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THE
SOUTHWESTERN REPORTER,
VOLUME 4,

CONTAINING

ALL THE CURRENT DECISIONS

OF THE

SUPREME COURTS OF MISSOURI, ARKANSAS, AND TENNESSEE,
COURT OF APPEALS OF KENTUCKY, AND SUPREME
COURT AND COURT OF APPEALS (CRIMINAL CASES) OF TEXAS.

MAY 16—AUGUST 1, 1887.

K.F.
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RULES FOR THE GOVERNMENT OF THE SUPREME COURT OF MISSOURI.

ADOPTED AT THE APRIL TERM, 1877.

Chief justice—His duty.

Rule 1. The chief justice shall superintend matters of order in the courtroom.

Motions to be written, signed, and filed.

Rule 2. All motions in a cause shall be in writing, signed by counsel, and filed of record.

Argument of motions.

Rule 3. No motion shall be argued unless by the direction of the court.

Taking record from clerk's office.

Rule 4. No member of the bar shall be permitted to take a record from the clerk's office without the written permission of some judge of the court.

Diminution of record—Suggestion after joinder in error.

Rule 5. No suggestion of diminution of record in civil cases will be entertained by the court after joinder in error, except by consent of parties.

Application for certiorari.

Rule 6. Whenever a *certiorari* may be applied for, there shall be an affidavit of the defect in the transcript which it is designed to supply, and at least twenty-four hours' notice shall be given to the adverse party or his attorney previous to the making of the application.

Notices of writs of error.

Rule 7. All notices of writs of error, with the acceptance, waiver, or return of service indorsed thereon, shall be filed with the clerk of this court, and be by him attached to the transcript in the cause, and shall be the only evidence that such notice has been given.

Reviewing instructions.

Rule 8. In actions at law it shall not be necessary for the purpose of reviewing in the supreme court the action of any circuit court or any other court having, by statute, jurisdiction of civil cases, in giving or refusing instructions, that the whole of the testimony given or excluded at the trial in the court of first instance be embodied in the bill of exceptions, but it shall be sufficient, for the purpose of such review, that the bill of exceptions state that "evidence tending to prove" a particular fact or issue was given, and that an exception was saved to the giving or refusal of the instructions founded on it.

Bill of exceptions — Whether there was evidence tending to prove an issue.

Rule 9. If the opposite party shall contend that there was no evidence tending to prove a fact or issue, and the court of first instance shall be of opinion that there was such evidence, it shall be the duty of the court to allow the bill of exceptions in the form stated in the last preceding rule, and then the

other party shall be at liberty to set out in a bill of exceptions, to be prepared by him, the whole of the testimony supposed to be applicable to such fact or issue, and to except to the opinion of the court that the same tends to prove such fact or issue.

Bill of exceptions — Whether there was evidence tending to prove an issue.

Rule 10. If the court of first instance shall be of opinion that there is no evidence tending to prove a particular issue of fact, the party alleging that there is such evidence shall tender a bill of exceptions, detailing all the evidence given and supposed to tend to the proof of such fact or issue, and except to the opinion of the court that it does not so tend, which bill of exceptions shall be allowed by the court by which the cause is tried.

Exceptions to admission or exclusion of evidence.

Rule 11. When an exception is saved to the admission or exclusion of any evidence, or the allowance or disallowance of any question, the question itself shall be stated in the bill of exceptions, or the substance of the evidence shall be fully stated.

Bill of exceptions in equity cases.

Rule 12. In cases of equitable jurisdiction, the whole of the evidence shall be embodied in the bill of exceptions, unless the parties shall agree upon an abbreviated statement thereof.

Rule as to making out transcripts.

Rule 13. The clerks of the several circuit courts, and other courts of first instance, before which a trial of any cause is had, in which an appeal is taken or writ of error is sued out, shall not, (unless an exception is saved to the regularity of the process, or its execution, or to the acquiring by the court of jurisdiction in the cause,) in making out transcripts of the record for the supreme court, set out in the original or any subsequent writ, or the return thereof; but in lieu thereof shall say, *e. g.*, "Summons issued October 2, 1871; executed October 5, 1871;" and, if any pleading be amended, the clerk making out transcripts will treat the last amended pleading as the only one of that order in the cause, and will refrain from setting out any abandoned pleading as part of the record, unless it be made such by a bill of exceptions; and no clerk shall insert in the transcript any matter touching the organization of the court, or any mention of any continuance, motion, or affidavit in the cause, unless the same be specially called for by the bill of exceptions.

Presumptions in support of bills of exceptions.

Rule 14. The only purpose of a statement, in a bill of exceptions, that it sets out all the evidence in a cause, being that the supreme court may have before it the same matter which was decided by the court of first instance, it shall be presumed as a matter of fact, in all bills of exceptions, for the future, that they contain all the evidence applicable to any particular ruling to which exception is saved.

Abstracts and briefs to be filed.

Rules 15 and 16, (as consolidated and amended at the April term, 1884.) In all cases the appellant or plaintiff in error shall file with the clerk of this court, on or before the day next preceding the day on which the cause is docketed for hearing, seven copies of an abstract or abridgment of the record in said cause, setting forth so much thereof as is necessary to a full understanding of all the questions presented to this court for decision, together with a brief containing, in numerical order, the points or legal propositions relied on, with citation of such authorities as counsel may desire to present in support thereof.

The appellant or plaintiff in error shall also deliver a copy of said abstract, briefs, points, and authorities to the attorney for the respondent or defendant in error, at least *thirty* days before the day on which the cause is docketed for hearing; and the counsel for the respondent or defendant in error shall, at least *ten* days before the day the cause is docketed for hearing, deliver to the counsel for appellant or plaintiff in error one copy of his brief, points, and authorities cited, and such further abstract of the record as he may deem necessary, and shall, on or before the day next preceding the day on which said cause is docketed for hearing, file with the clerk of this court seven copies of the same; and the evidence of the service of such abstracts, briefs, points, and authorities, as above required, shall be filed by each party at the time of filing said copies with the clerk.

Citing authorities in briefs.

Rule 17. In citing authorities in support of any proposition, it shall be the duty of the counsel to give the names of the parties to any case cited from any report of the adjudged cases, as well as the number of the volume and the page where the same will be found; and, when reference is made to a passage in any elementary work or treatise, the number of the edition, the volume, the chapter, section, paging, and side paging shall be set forth.

Appellant's brief to allege errors complained of.

Rule 18. The brief filed on behalf of the appellant or plaintiff in error shall distinctly and separately allege the errors committed by the inferior court, and no reference will be permitted at the argument to errors not thus specified, unless, for good cause shown, the court shall otherwise direct.

Failure to comply with rules 15 and 16.

Rule 19. If any appellant or plaintiff in error, in any civil cause, shall fail to comply with rules numbered 15 and 16, the court, when the cause is called for hearing, will dismiss the appeal or writ of error; or, at the option of respondent or defendant in error, continue the cause, at the costs of the party in default.

Agreed cases.

Rule 20. Parties may, in the courts of first instance, agree upon any statement of the cause of action, the defense, and the evidence, together with the rulings of the court thereupon, and the exceptions saved to any ruling, which may intelligibly present to the supreme court, or any appellate court, the matters intended to be reviewed; and this statement, with a certificate by the judge before whom the cause was tried that the same is a substantial history of what occurred at the trial of the cause, shall be treated as the record in all appellate courts, and the judgment rendered in the court of first instance shall be affirmed or reversed according to the opinion entertained by the supreme court respecting the same.

Motion for rehearing.

Rule 21. Motions for a rehearing must be accompanied by a brief statement of the reasons for a reconsideration of the cause, and must be founded on papers showing clearly that some question decisive of the case, and duly submitted by counsel, has been overlooked by the court, or that the decision is in conflict with an express statute, or with a controlling decision to which the attention of the court was not called, through the neglect or inadvertence of counsel; and the question so submitted by counsel, and overlooked by the court, or the statute with which the decision conflicts, or the controlling decision to which the attention of the court was not called, as the case may be, must be distinctly and particularly set forth in the motion, otherwise the motion will be disregarded. Such motion must be filed within ten days after the opinion of the court shall be delivered, and notice of the filing thereof

must be served on the opposite counsel, but no motion for a rehearing shall be filed after the final adjournment of the court.

Motion for affirmance.

Rule 22. On motion for affirmance under section 49, article 13, chapter 110, Wagner's Statutes, the mere fact that the appellant has on file, or presents, a copy of the transcript at the time such motion is made, shall not of *itself* be deemed "good cause," within the meaning of said section.

Former rules rescinded.

Rule 23. All rules not included in the foregoing enumeration are hereby rescinded.

ADDITIONAL RULES.

Rule 24. No writ of error from this court to the court of appeals can be issued by the clerk of this court in vacation. All applications in term-time for writs of error to the court of appeals shall be accompanied by an affidavit of the attorney of record that the cause in which such writ of error is sued out is one of which this court has appellate jurisdiction, under section 12 of article 6 of the constitution; and such affidavit shall state the facts conferring such jurisdiction, and thereupon the clerk shall issue such writ. (Adopted at the April term, 1878.)

Rule 25. That, hereafter, in no case will extension of time for filing statements, abstracts, and briefs be granted, except upon affidavit showing satisfactory cause. (Adopted at the October term, 1878.)

Rule 26. A party, in any cause, filing a motion either to dismiss an appeal or writ of error, or to affirm the judgment, shall first notify the adverse party, or his attorney of record, at least twenty-four hours before making the motion, by telegram, by letter, or by written notice, and shall, on filing such motion, satisfy the court that such notice has been given. (Adopted at the October term, 1879.)

Rule 27. All briefs of counsel shall hereafter contain, separate and apart from the argument or discussion of authorities, a statement, in numerical order, of the points relied on, together with a citation of authorities appropriate under each point. And any brief failing to comply with this rule may be disregarded by the court. (Adopted at the April term, 1886.)

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THE
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VOLUME IV.

MCINTIRE v. COMMONWEALTH.

(Court of Appeals of Kentucky. April 16, 1887.)

1. GRAND JURY—COURT—INDICTMENT.

When an indictment, with the indorsement "a true bill" thereon, signed by the foreman, as required by Crim. Code Ky. § 119, and the names of all the witnesses purporting to have been examined written thereon, as required by section 120, is presented by the foreman, in the presence of the grand jury, to the court, and filed with the clerk, as required by section 121, it must be taken as found and returned in due form of law. And the court has no authority to inquire whether the grand jury heard the evidence before finding it, or whether the evidence, as required by section 111, was such as, in their judgment, if unexplained, would warrant a conviction by the trial jury.

2. SAME—PROCEDURE—SECOND INDICTMENT.

An indictment having been dismissed upon motion of the prosecuting attorney, and the case re-referred to the grand jury, a second indictment was found against the defendant for the same offense. *Held*, that it was not necessary, before finding the second indictment, for the grand jury to have recalled and re-examined all the witnesses.

3. ROBBERY—INSTRUCTIONS.

Upon the trial of an indictment for robbery alleged to have been committed by putting the person robbed in fear of immediate injury to his person by tying him up with a rope, and threatening to hang him, the court instructed the jury that, before they could convict, they must believe "beyond a reasonable doubt that the robbery was committed by putting the man robbed in fear," without specifically describing how they must believe he was put in fear. *Held* sufficient.

Appeal from circuit court, Edmonson county.

This was an indictment for robbery.

W. E. Settle, for appellant.

LEWIS, J. 1. Appellant, before the trial, moved the court to set aside the indictment under which he was convicted in this case, upon the ground that the grand jury found and returned it without having heard the evidence of those whose names are written thereon as witnesses; and, to sustain his motion, offered to prove by said persons that they were not in fact examined as witnesses in support of the particular indictment.

When an indictment, with the indorsement "a true bill" thereon, signed by the foreman, as required by section 119, Crim. Code, and the names of all the witnesses purporting to have been examined written thereon, as required by section 120, is presented by the foreman, in the presence of the grand jury, to the court, and filed with the clerk, as required by section 121, it must be taken and considered as found and returned in due form of law. And the court has no authority to inquire whether 12 jurors concurred in finding it,

as required by section 119; nor whether the evidence before the grand jury was such as is required by section 111, to authorize the finding.

It appears in this case that an indictment against appellant for the same offense had on a previous day of the term been duly returned into court, but was on motion of the commonwealth's attorney dismissed, and the one under which appellant was convicted was found upon a reference of the case to the grand jury. So, even if it be conceded, which we think was never intended, that the court can inquire whether witnesses have been examined before the grand jury in support of an indictment returned by it, no such omission existed in this case; for, having previously examined the witnesses in reference to the offense charged against appellant, there was no necessity or propriety in recalling and re-examining the same witnesses when the case was re-referred and the second indictment was found.

2. The offense charged against appellant is robbery, committed, in the language of the indictment, "by then and there putting him, Carroll, the person robbed, in fear of immediate injury to his person, by then and there tying him with a rope, and threatening to hang him," etc. The instruction given at the instance of the commonwealth to which appellant objects, authorizes the jury to convict, if the property mentioned was feloniously taken from Carroll forcibly, against his will, "and by putting him in fear." It is contended that, as the particular mode in which Carroll was put in fear of immediate injury to his person is stated in the indictment, the instruction should have been equally as explicit and descriptive on that subject. The jury is by the instruction required, before finding appellant guilty, to believe beyond a reasonable doubt that the robbery was committed by putting Carroll in fear. That was the essential fact to be established, and it was not material to recite in the instruction all the circumstances attending the transaction; and there is nothing in either of the cases referred to by counsel to the contrary.

Judgment affirmed.

JOHNSON and others v. JOHNSON.

(Court of Appeals of Kentucky. April 14, 1887.)

DEED—ABANDONMENT—EXECUTORS AND ADMINISTRATORS.

A. sold and conveyed his interest in his mother's estate to G., his brother. G., being administrator of the estate, brought suit to sell the land to pay off debts, and, as A. had sold his interest, he was *not made a party* to the suit. B. became the purchaser of the lots sold by order of court. The lots being improperly described in the commissioner's deed to him, he brought this suit to correct the mistake, and clear up his title, and *made A. a party*. Held, that this was no abandonment of the deed from A., or of his rights thereunder, so as to authorize A. to claim a share in his mother's estate.

Appeal from chancery court, Kenton county.

Simmons & Schmidt and *J. F. & C. H. Fisk*, for appellants.

HOLT, J. Jane Johnson was, at the time of her death, the owner of a large number of lots in the city of Covington. In March, 1876, the undivided interest in them belonging to her son, the appellee, Jeremiah Johnson, and which he had inherited from her, was levied upon under an execution in favor of A. L. and T. Greer, and purchased by them at the execution sale. On July 7, 1876, the son conveyed his interest in them to his brother, the appellant, James T. Johnson. The wife of the grantor signed the deed, but was not a party to the granting clause of it, nor does her name appear in the body of it. He claims that he did not sell his interest to his brother, but that he understood the writing to be only a power of attorney, authorizing its sale. It is, however,

an absolute deed upon its face, and the evidence shows beyond question that it was in fact a sale. The appellant became the administrator of his mother. She had but little personal estate, and was in debt at the time of her death in a considerable sum, nearly all of which was owing to the appellant. The indebtedness to him appears to have been *bona fide*. On May 5, 1879, he, as her administrator, brought an action in the Kenton chancery court, against her heirs and creditors, the object of which was to procure a settlement of his accounts, and the sale of enough of the real estate to pay the indebtedness. The appellee was not made a party to this suit owing to his having conveyed his interest in the lots which constituted the estate of the decedent to the appellant. After proper proceedings a decree was obtained for the sale of enough of the realty to pay the indebtedness. The property was not desirable; and, at a second offering of it, the appellant became the purchaser of the lots sold, at what appears to have been a fair price, and which was sufficient to pay the indebtedness. The sale was confirmed, and a commissioner's deed made to him. Before it was recorded, however, he discovered that it embraced, among other lots, 12 which had not been sold, to-wit, Nos. 56 to 67, inclusive; and, by his request, the commissioner erased them from the deed. Thus matters stood for some time, when it was discovered that lots 70 and 71, which had actually been sold and conveyed by the commissioner to the appellant, had not been ordered sold by the judgment; but that, through mistake, it named lots 80 and 81, when, in fact, there were no such lots. It was also then ascertained that parts of lots 47, 48, 49, and 50, which had also been sold by the master, had not been ordered to be sold by the judgment; and that the commissioner had reported the sale of parts of lots 48, 49, and 50 only, and had not conveyed to the purchaser such parts, or the portion of lot 47, which had been sold. To correct these errors this action was brought. The conveyance of July 7, 1876, by Jeremiah Johnson, divested him of title; but, without a correction of the proceedings in the suit to settle Jane Johnson's estate, his wife had an apparent contingent dower right in lots 70 and 71, and parts of lots 47, 48, 49, and 50, and the sole object of this suit was to perfect the title of the appellant, James T. Johnson, to these lots, by making it appear, as was the fact, that they had been sold to pay the debts of Jane Johnson.

The prayer of the petition is: "The plaintiff asks that it be adjudged by this court that said lots Nos. 70 and 71, and said parts of lots Nos. 47, 48, 49, and 50, be adjudged to have been sold to said James T. Johnson in payment of the debts against the estate of said Jane Johnson, and that his title to the same be quieted and adjudged to be perfect, and the same be conveyed to said James T. Johnson by the master commissioner, and for all other and full and complete relief."

On November 25, 1881, the appellant purchased the right or title of the Greers, acquired under their execution sale, and obtained a sheriff's deed to himself therefor. This he had the right to do. Their claim was older than his own, which he had acquired by virtue of the deed from his brother, and he, of course, had the right to perfect his title. The lower court appears to have misconceived the object of this suit, and to have supposed that the appellant had abandoned his deed of July 7, 1876, from his brother, and was seeking a decree, declaring that he had acquired title to the entire interest of Jeremiah Johnson in the real estate of his mother by virtue of the proceedings in the suit to settle her estate. It therefore held that the appellant had, by accepting the sheriff's deed, and by having the interest of Jeremiah Johnson in some of the lots sold in the suit to settle his mother's estate, and by purchasing it, and then bringing this suit, to correct the errors in the proceedings, ignored his deed of July 7, 1876, from the appellee, and could no longer claim any right under it; and while it granted the relief sought, save it did not order a conveyance to be made to the appellant of lots 70 and 71, and the parts of lots 47, 48, 49, and 50, yet it went further; and, by holding

in effect as above stated, it decided issues not raised by the parties, and directed an account to be taken of what Jerry Johnson owed the appellant, of what Jane Johnson's estate owed him, and of the value of the real estate purchased by him in the suit to settle her estate.

It was not only the right, but the duty, of the appellant, as the administrator of his mother, to bring an action to sell enough of her realty to pay her indebtedness. He also had the right to perfect his title to Jerry Johnson's interest by the purchase of the Greer claim, and an undoubted right to have the errors corrected which were committed in the suit to settle Jane Johnson's estate; and we are at a loss to know by what rule or upon what theory the lower court, in effect, said to the appellant: "You may have the errors corrected, and your title quieted to the lots named in your petition; but by doing so, and by reason of the suit you brought to settle your mother's estate, and your purchase of the Greer claim, you shall be held to have abandoned your deed from Jeremiah Johnson, and to have forfeited all your rights under it." Even if such a forfeiture had resulted from these acts, it could only be so held in this suit as to lots 70 and 71, and parts of lots 47, 48, 49, and 50, as the action relates to them only.

It was intended that the proceedings for the sale of the lots should be regular; and, because the appellant now seeks to make them so, is he to be told that he must to that end give up another right? Twelve lots were not sold. The appellant is the owner of Jeremiah Johnson's interest therein, by virtue of the deed from him, and yet, by the judgment in this action, he is deprived of it upon a ground not suggested by the pleadings of either party. The lower court appears to have assumed that the appellant was seeking by this action to have it declared that he had derived title to all the lands that descended to Jerry Johnson from his mother through the suit to settle her estate. Certainly this could not be done as to the lots which were not sold by reason of their sale not being necessary to pay her debts. Nor was it necessary for the appellant to ask this as to the lots purchased by him at the commissioner's sale, and which were unaffected by the irregularities in the proceedings, because it already appeared that he had a right to them so derived. The position is utterly unsupported by the pleadings, and there is nothing in the record showing that the appellant so intended.

All of Jane Johnson's estate was subject to the payment of her debts, and, when the appellant purchased Jerry Johnson's interest in it, he did so subject to this burden. He merely took his grantor's place, and he cannot be deprived of any right so acquired because he subsequently did his duty as the administrator of Jane Johnson, and had a portion of the land sold to pay her indebtedness. It cannot be said that because he had it sold in his *fiduciary* capacity, that he, as an individual, ignored or abandoned his deed from the heir. It appears from the commissioner's report that Jerry Johnson, upon the theory that his deed to the appellant is no longer in force, is indebted to the appellant and to his mother's estate in a much greater sum than the value of his interest in the 12 unsold lots. At first glance, therefore, it might appear that the appellant might not be injuriously affected by the judgment below, but could hold the interest in these lots until the indebtedness is paid. The judgment, however, gives no lien upon it for this indebtedness. Moreover, we can easily suppose that some creditor of Jerry Johnson's may have acquired a lien upon his interest between the time of making the deed to the appellant and the judgment of which he now complains; and, by the destruction of his deed, he would fall behind the creditor. The correction of the proceedings by the lower court was proper; but it improperly went beyond this, and inflicted a greater injury upon the appellant than would likely have resulted from the irregularities in the proceedings to sell the lots.

The judgments complained of are reversed, save so far as they correct the proceedings in the sale of lots Nos. 70 and 71, and the parts of lots Nos. 47,

48, 49, and 50. To this extent it is affirmed, and the cause remanded, with directions to the lower court to cause said lots, and parts of lots, to be conveyed to the appellant.

CHESAPEAKE, O. & S. R. CO. v. WELLS.

(*Supreme Court of Tennessee. April Term, 1887.*)

RAILROAD COMPANIES—EJECTION OF PASSENGERS—MULATTO.

Plaintiff, a mulatto woman, purchased a ticket on defendant's railroad for a 10-mile journey. She passed through the front car, and attempted to enter the rear car, which, by a regulation of the company, was set apart for white ladies and gentlemen. She was stopped on the platform, and told to ride in the front car, which she refused to do, and refused to give up her ticket unless allowed to ride in the rear car. She was ejected from the train. It appeared on the trial that persons of both sexes were allowed to ride on the front car without regard to color or race, and the two cars were alike in every respect as to comfort, convenience, safety, and equipment. There was conflicting evidence as to smoking going on at the time in the front car. Held that, as plaintiff's purpose evidently was to harass the defendant with a view to bringing this action, and her persistence was not in good faith, with a view to obtain a comfortable seat for the short ride, the judgment in her favor in the court below should be reversed.

Error to circuit court, Shelby county.

Holmes Cummins, for plaintiff in error. *Green & Adams* and *T. F. Casells*, for defendant in error.

TURNER, C. J. On May 4, 1884, defendant in error, a mulatto, purchased of plaintiff in error a ticket over its road from Woodstock to Memphis, a distance of 10 miles. She passed through the front car to the platform, where she was stopped by the conductor, and told to take a seat in the front car. She refused to give up her ticket unless allowed a seat in the rear car. The conductor told her he would have to put her off. The train was stopped at about 400 yards, when she was politely assisted from the car by a colored porter. She left the train of her own accord because not allowed to pass within the rear car. Persons of either sex were allowed in the front car, without regard to color or race. She says she saw one person smoking in that car, and that it was filled with tobacco smoke; while another passenger says there was no one smoking, nor was there any tobacco smoke. There were only six passengers in the front car, one of them a woman. The rear car was set apart for white ladies and gentlemen. The two coaches were alike in every respect, as to comfort, convenience, and safety,—were furnished and equipped alike, with like accommodations.

We know of no rule that requires railroad companies to yield to the disposition of passengers to arbitrarily determine as to the coach in which they shall take passage. The conduct of the plaintiff below was upon an idea without the slightest reason. Having offered, as the statute provides, "accommodations equal in all respects in comfort and convenience to the first-class cars on the train, and subject to the rules governing other first-class cars," the company had done all that could rightfully be demanded. We think it is evident the purpose of the defendant in error was to harass with a view to this suit, and that her persistence was not in good faith to obtain a comfortable seat for the short ride.

Judgment reversed, and judgment here for plaintiff in error.

MEMPHIS & C. R. CO. v. BENSON.

(*Supreme Court of Tennessee. 1887.*)

1. CARRIERS—EJECTION OF PASSENGER—REFUSAL TO DELIVER TICKET.

A. got on a passenger train at a city station, and went into the ladies' car, where he was unable to find a seat. He remained in this car standing, and refused to sur-

render his ticket until he was given a seat. The conductor told him that there would soon be seats vacant, or that he could find a seat in the gentlemen's car, but he refused to go into that car, on the ground that the smoking there would make him sick. When his ticket was again demanded of him, he refused to give it up, and was ejected from the train, for which he sued the railroad company for damages. *Held*, that he was not entitled to recover.¹

2. SAME—PAROL EVIDENCE—ADMISSIBILITY.

In action by a passenger to recover damages for being ejected from a railroad train for refusal to give up his ticket when demanded, the best evidence of his right to be on the train is the ticket itself, and until the non-production of the ticket is explained parol evidence of what such ticket entitled him to cannot be admitted.

Appeal from circuit court, Shelby county.

Poston & Poston and *L. W. Humes*, for plaintiff in error. *Wright & Folkes*, for defendant in error.

LURTON, J. This was a suit for damages for an alleged unlawful ejection of the defendant in error from the train of the plaintiff in error. There was a judgment of \$500 in favor of the defendant in error rendered by the circuit judge, who tried the case without a jury. The railway company have appealed, and a number of reasons are assigned for reversal. The defendant in error went upon the passenger train at Memphis, Tennessee, and went into the car set apart for ladies, and gentlemen traveling with ladies. This car at the time was overcrowded, and he was unable to obtain a seat, and this condition of things he saw before the train left Memphis; yet he made no demand at Memphis, the terminal station, but, preferring to take his chances to get a seat, he remained on the car, standing until after the train had started upon its trip. After the train had gotten well out of Memphis, the usual demand was made upon him for his ticket. This he declined to surrender, taking the position that he would not surrender his ticket until he had been furnished with a seat. The conductor called his attention to the fact that there was not a vacant seat in the car in which he was, and offered to get him a seat in the next forward car, and further saying that it would be but a short time before seats would be vacated by passengers for local stations, and that he would then give him a seat in the ladies' car. This he declined, and demanded a seat in the ladies' car before surrendering his ticket. The demand of the conductor for his ticket was renewed in a short time, with the statement that he must either get off the train or surrender his ticket. This demand was again refused, and he further declared that he would not leave the train. Upon the train stopping at the next regular station, he still refusing to leave the train, he was ejected. He neither surrendered his ticket to the conductor, or showed that he had such ticket; nor did he state the point to which he was destined. He bases his refusal to go into the forward car upon the ground that it was a smoking car, and that the foul air of such a car was likely to make him ill.

There can be no doubt that the contract of a carrier of passengers by railway is one not only to furnish the passenger with transportation, but with the comfort of a seat. The contract is no more performed by furnishing him with a seat, without transportation, than it is when he is offered transportation without a seat. It is equally well settled that the passenger need not surrender his ticket until he is furnished with a seat, for the ticket is the evidence of the contract which entitles him to one. But it cannot be that one may ride free because not furnished with a seat. If the passenger chooses to accept transportation without a seat, he must on demand pay his fare. If unwilling to ride without transportation is furnished him in a seat, he must get off at first opportunity, and by so doing may bring his action for breach of contract, and recover as damages such sum as will compensate him for

¹ As to the rights of a common carrier to eject a passenger who refuses to pay his fare, and as to the manner of such ejection, see *Arnold v. Pennsylvania R. Co.*, (Pa.) 8 Atl. Rep. 213, and note.

such breach, including such damages as are the natural and immediate results of such breach. *Rorer*, R. R. 968, 969; *Davis v. Railroad Co.*, 53 Mo. 317; *Railroad Co. v. Leigh*, 45 Ark. 368. It results that for the indignity and vexation consequent upon the ejection in this case there can be no recovery. This result is made the more certain by the facts of this case; it appearing that, at the time this passenger entered the car at the terminal station, he saw that this car, assigned to ladies, and gentlemen with ladies, was overcrowded, and he knew that he must either ride standing, or take a seat in the car called the smoking car. He gave the railway company no opportunity to furnish additional seats while at its station.

We have, at this term, in the case of *Chesapeake, O. & S. R. Co. v. Wells*, 1 Pickel, —, *ante*, 5, held that a railway company may make reasonable regulations concerning the car in which a passenger might be required to ride, provided that equal accommodations were furnished to all holding first-class tickets, and that a regulation assigning a particular car to persons of color, that car being in all respects equal in comfort to any other in the train, was reasonable. This rule has been sustained in the courts of many states. *West Chester R. Co. v. Miles*, 55 Pa. St. 209; *Chicago & N. W. R. R. v. Williams*, 55 Ill. 185. So we think a regulation setting apart a car for ladies, or gentlemen accompanied by ladies, a reasonable regulation. A passenger may not dictate where he will sit, or in which car he will ride. If he is furnished accommodations equal in all respects to those furnished other passengers on the same train, he cannot complain; and this was the substance of our decision in the *Wells Case*. The doctrine is equally applicable here. This passenger, when he took passage at Memphis, did it with knowledge that the ladies' car was crowded, and that he would either have to ride standing in that car, or go into the car assigned exclusively to gentlemen, and in which smoking was permitted. The requirement that he should go temporarily into the smoking car, under the circumstances, was not unreasonable. He ought not to have started when he did, unless willing to submit to what he realized was an inevitable necessity, without giving the carrier notice of his demand.

But upon another ground this judgment cannot be sustained, even for damages for breach of contract. The defendant in error in his deposition states that he had a ticket purchased at Austin, Texas, which entitled him to passage to Atlanta, Georgia, and that one of the coupons upon this ticket entitled him to passage over the road of plaintiff in error from Memphis to Chattanooga. This ticket he does not produce, nor does he account for his failure to produce it by proof of its loss, or that he had subsequently used it. Objection was taken to this evidence, and the objection overruled, upon promise of counsel, at a subsequent stage of the trial, to account for its non-production so as to let in secondary evidence of the fact of the contract therein contained. This was not done. It is elementary law that the contents of a written or printed contract cannot be proven, without the failure to produce the paper itself is accounted for. This objection is fatal to the whole case of defendant in error, for there is no legal evidence that he had a ticket. This being so, he was rightfully ejected.

The conductor who ejected this passenger, while using no unnecessary force, did use unnecessarily abusive language, such as was calculated to unnecessarily insult and degrade the person ejected. In exercising a legal right of ejection, railway companies must not do so in an abusive way. They are the servants of the public; and, while their right to enforce reasonable regulations will be enforced, yet the regulations must not only be reasonable in themselves, but the manner and method of enforcing such regulations must be reasonable, and free from unnecessary force, as well as free from unnecessary indignity. The reasonable demands of the defendant in error afford some excuse for the temper shown by the conductor. In view, however, of the absence of any proof of a legal character that the ejected passenger had any ticket, and

his refusal to pay fare, and that, therefore, the relation of passenger and carrier did not exist, we are constrained to reverse the judgment of the circuit judge, and enter judgment here for plaintiff in error, the carrier in such case not being held responsible for the ejection.

FOLKES, J., incompetent, and did not sit.

DAVIS and others v. WILLIAMS and others.

(*Supreme Court of Tennessee.* April 22, 1887.)

WILL—CONSTRUCTION—ESTATE—FOR LIFE OR IN FEE.

W. devised certain realty to G. in trust, to rent, collect rents, keep up repairs, pay taxes, retain \$50 a month for services, and to pay the remainder of said rents to devisor's four children, naming them, equal portions to each. The will provided that "at the death of either of my said children, the child or children of such one dying shall receive the part or portion of said rents and profits that their father or mother was entitled to under this will." If any child died without child or children, his share was to be paid to the survivors in equal portions, and the children of such as might have died leaving issue. *Held*, that devisor's grandchildren received the remainder in fee, since a devise of the rents and profits or the income of land is equivalent to a devise of the land itself, and since no limitation was attached to the devise to the grandchildren, and the word "heirs" was not necessary to a fee. Furthermore, if the will created life-estates in the grandchildren, it would be void as limiting a remainder on the termination of a life not in being; or, since the remainder in such case would be to devisor's children, their life-estate would merge in the fee they obtained in remainder, thus extinguishing the children's life-estate, and defeating the will of the devisor.

Appeal from chancery court, Shelby county.

Craft & Cooper, Clapp & Beard, and *L. W. Humes*, for appellants. *T. B. Turley* and *F. J. Slack*, for respondents.

LURTON, J. This case involves the construction of the will of Robert Williams, Sr. It is as follows: "I do will and devise to my friend H. E. Garth, of the city of Memphis, Tennessee, in trust for the uses and purposes herein-after expressed, the following named real estate, situated in the city of Memphis, Tennessee, to-wit, [here follow descriptions of the realty,] with all the improvements on all the aforesaid lots. It is my will and desire that the said H. E. Garth, trustee, and his successors, shall at my death take charge and possession of the said described property and real estate, and rent the same, and collect the rents and all profits accruing in any manner from said property, and, after paying for all necessary repairs and improvements that may be required to keep said property in good tenantable condition, and all taxes that may be lawfully imposed upon said property, the said trustee shall pay over the remainder of rents accruing from said property to my son Edward P. Williams, my daughter Mary Lee, my daughter Rebecca Valines, my daughter Winnie Davis, and my daughter Margaret Williams, equal portions to each. At the death of either of my said children, it is my will that the child or children of such one dying shall receive the part or portion of said rents and profits that their father or mother was entitled to under this will; and, should any of my said children die without child or children, then, and in that event, his or her share or portion shall be paid over to the survivors in equal portions, and the children of such as may have died leaving issue. It is my will and desire that the said H. E. Garth, trustee as aforesaid, shall retain and receive from the rents and profits of said property the sum of \$50 per month as full compensation for his services in attending to the execution of this will, he having agreed to accept the trust upon these terms. This done eighth day of April, 1878."

For the complainants, who are the children of the testator, it is insisted that under this will there is carved out of this property—*First*, an equi-

table life-estate for the children of the testator; *secondly*, an equitable life-estate for the grandchildren of the testator; and that he has died intestate as to the remainder. For the grandchildren it is contended that the property devised vests absolutely in the grandchildren after the life-estate of the children. If the first contention be the true construction of the will, to-wit, that an equitable life-estate for the grandchildren follows upon an equitable life-estate for the children, then the will would clearly violate the rule against perpetuities. A devise by which property is tied up, and made inalienable beyond the period within a life or lives in being and 21 years, with a fraction of a year added for the term of gestation in case of posthumous birth, is void as creating a perpetuity. *Booker v. Booker*, 5 Humph. 508; *Franklin v. Armfield*, 2 Sneed, 305; *White v. Hale*, 2 Cold. 77. "There may be such an interval of time possible between the gift and the consummation of the use as will be fatal to the power. The rule of perpetuity applies as well to trust as to legal estates. The objection is as effectual in one case as in the other. If the period may elapse before what is to be done can be done, the consequence is the same as if such must inevitably be the result. Possibility and certainty have the same effect." *Ould v. Washington Hospital*, 95 U. S. 303.

If, then, it be assumed that this will gives to the grandchildren the rents and profits of the property devised, limited to their lives, and following after the estate given to the children, it is not only possible but very probable that the two life-estates thus created, and following one upon the other, might, by the birth of grandchildren after the death of the testator, continue for a period beyond a life or lives in being and 21 years and a fraction; and thus, under the rule against perpetuities, the devise to the grandchildren would be void. Another result would follow: The remainder after the termination of the estate for life given the children not being disposed of, it would necessarily be inherited by the children. The estate for life and the remainder estate uniting in the same persons would result in a merger of the lesser estate with the greater, and the estate of the children would become an absolute one. 1 Washb. Real Prop. § 113. This assumption, then, that the will gives to the grandchildren nothing but an estate for life, works the utter destruction of the will of this testator. Undoubtedly, if it be clear that the testator intended and by apt words did limit his devise to the grandchildren to the rents and profits *for life only*, then all the consequences of an abortive testament must be declared. But does the will bear the construction contended for? Has the testator failed to devise the fee? It is a cardinal principle of the law of real estate that a devise of the rents and profits, or the income of the land, is equivalent to a devise of the land itself. 3 Washb. Real Prop. p. 529, § 30; *Polk v. Faris*, 9 Yerg. 241; *Morgan v. Pope*, 7 Cold. 542. Such a devise is equivalent to a devise of the land for life or in fee according to the limitations expressed in the will. 3 Washb. Real Prop. 387, 388, 456.

The devise of the rents and profits to the children is expressly and unequivocally limited to an estate for life. This limitation is clearly expressed, and by no sort of intendment can the estate they take be enlarged. But how is it as to the devise to the grandchildren? The very able counsel for the children argue that "the very same words which define that life-estate [the one given the children] are used to define the estate of the grandchildren, *except that the estate of the grandchildren is made to follow the estate of the children, and beyond the grandchildren there is no limitation.*" This very difference which he points out is what gives to the grandchildren the fee. There is no limitation as to the time the grandchildren shall enjoy the rents and profits, and there is no express disposition made of rents and profits beyond the grandchildren. Under the Code, the use of the word "heirs" is unnecessary to carry the fee. Hence a devise of the rents, profits, and income of land, without any limitations, carries the fee. But it is insisted that, while there may be no express limitation upon the devise to the grandchildren, yet that

the purpose of the testator is shown by the absence of any power of alienation in the devise to them. Power of alienation is not expressly withheld, and it is only implied from the fact that the devise is of the rents. This will not answer; for, if sound, then a devise of rents and profits would not be equivalent to a devise of the land,—a result which would be hostile to all the authorities. The presumptions are always in favor of, rather than against, the power of alienation. That the estate is devised to a trustee is not of any great significance. This was for the purpose of preserving the remainder for the grandchildren. The broadness of the devise to the trustee is unimportant; for it is familiar law that the estate of the trustee will be limited to the purposes of the trust, and will altogether cease when the trust is accomplished. In this case the trust will cease upon the termination of the life-estate given the children, and the absolute title will vest in the grandchildren.

Other criticisms are made upon the devise to the grandchildren as indicating a purpose to limit the gift to the grandchildren to a gift for life only. We do not deem it necessary to answer them further than to say that the broad distinction between the devise to the children and that to the grandchildren is that in the first case there is a clear and unmistakable limitation. "The grant of the rents is to be construed just as if it was a grant of the land itself; if no limitation is expressed or restriction attached, it is in fee."

We are therefore of opinion that the devise to the grandchildren is of the fee, unlimited and absolute.

ROSENBAUM and others v. MOLLER and others.

(Supreme Court of Tennessee. April 22, 1887.)

ASSIGNMENT FOR BENEFIT OF CREDITORS—INVENTORY—STOCK IN TRADE—SUFFICIENCY.

An inventory attached to a general assignment for the benefit of creditors in these terms: "The entire stock of goods, wares, and merchandise in the store-houses, * * * consisting of dry goods, boots, shoes, hats, caps, gentlemen's furnishing goods, clothing, notions, trunks, valises, counters, shelving, chairs, stoves, desks, one iron safe, and one mirror, in all to the value of \$7,600, and choses in action,"—is full and complete, within the meaning of New Code Tenn. § 2733, requiring the inventory to be full and complete; since a fuller and itemized inventory would take several days to frame, during which the property could be levied on, and the object of the statute be defeated. TURNER, C. J., dissenting.

Appeal from chancery court, Shelby county.

Poston & Poston and *Müller & Gillham*, for appellants. *T. B. Edgington* and *W. G. Weatherford*, for respondents.

FOLKES, J. On the tenth day of January, 1887, E. C. Moller, a merchant doing business at Memphis, undertook to make a general assignment of all of his property for the benefit of all of his creditors. After a recital of his purpose, he conveys to the assignee named, "and his successors, all of his (grantor's) property of every description, whereof a full and complete inventory or schedule is hereto annexed as a part hereof, marked 'Schedule A;' and said property hereby conveyed to said party of the second part, and specified in said Schedule A, contains all the property of every description of the said party of the first part."

Schedule A referred to in the foregoing deed of assignment, and attached thereto, is as follows: "The entire stock of goods, wares, and merchandise, in the store-houses Nos. 79 and 79½ Beale street, in the city of Memphis, county of Shelby, state of Tennessee, consisting of dry-goods, boots, shoes, hats, caps, gentlemen's furnishing goods, clothing, notions, trunks, valises, counters, shelving, chairs, stoves, desks, one iron safe, and one mirror, in all to the value of about \$7,600, (seventy-six hundred dollars,) and choses in action of the party of the first part, directed in the within assignment to be collected

by the trustee, being all due and owing by account." Then follows a list of the persons indebted to him, with a statement of the amount due by each; to all of which this jurat is appended:

"This day personally appeared before me, M. T. Garvin, deputy-clerk of the county court of Shelby county, E. C. Moller, assignor in the foregoing deed of assignment, who, after being first duly sworn, says that the inventory or schedule hereto attached contains a complete list of all his property.

"E. C. MOLLER.

"Subscribed and sworn to before me this tenth day of January, 1887.

"M. T. GARVIN, D. C."

On the twelfth January, 1887, the attachment bill in this cause was sued out, wherein it is charged that "this conveyance or pretended assignment is and was void upon its face; for while it purports to be made under the act of 1881, c. 121, and makes a schedule of the property so conveyed, it utterly and entirely fails to comply with the statute, to make and annex to the said assignment a full and complete inventory or schedule, under oath, of all of his property of every description; said schedule being incomplete, not showing what specific property in detail was included therein, but described the property in a general lumping way, without any inventory, full and complete, as required by the statute; for which reason said assignment is, and was when made, void, and operates to hinder, delay, and defraud creditors, and postpone them in the collection of their debt, and as such is fraudulent and void."

The bill was fully answered by the debtor and the assignee, setting up the facts, and claiming a compliance with the statute.

Several similar bills were filed by sundry creditors, when an agreed case was made up, upon the determination of which all the cases were to depend. From the agreed case, as made, it is manifest that the assignment, together with the schedule, as already set out, was acknowledged, sworn to, and filed in the proper office for registration, on the tenth day of January; that the assignee qualified, and took possession of the assigned property, on the same day, and at once begun the taking of a minute inventory, occupying the tenth, eleventh, and twelfth of January, and which inventory was on the fifteenth February sworn to by the assignee, and filed by him with the clerk of the county court, but which inventory has never been recorded in the register's office.

The chancellor, on the agreed case, sustained the attachment, upon the ground that the assignment was null and void, and had the effect to hinder, delay, and defraud the creditors of Moller. From this decree the defendants have appealed.

The contention here to sustain the ruling of the chancellor is that the act of 1881, now carried into the New Code, § 2783, wherein it is provided that "the debtor making a general assignment shall annex thereto a full and complete inventory or schedule, under oath, of all of his property of every description," has not been complied with in this case. It is insisted that the statute requires, and is imperative in such requirements, that a minute and detailed inventory of every article should have been annexed, such as was thereafter made out by the assignee; that nothing short of this will satisfy this mandatory statute; and lexicographers are quoted to furnish the meaning of the words "full" and "complete." With this insistence we cannot concur. Giving to this statute all that can reasonably be claimed for it as mandatory, we are of opinion that, in the case now before us, there has been a substantial compliance with the terms and its spirit. The fundamental rule of interpretation applied to statutes, mandatory as well as directory, is that words in a statute, if of common use, are to be taken in their natural and ordinary sense, without any forced or subtle construction to limit or extend their import; but the real intention, when accurately ascertained, will always prevail over the literal sense of the terms.

As was said by the present chief justice, in delivering the opinion of the court in *Hill v. Alexander*, 16 Lea, 496: "The policy of the statute is to prevent fraud on the part of the conveying debtor, by concealment of any of his estate. * * * It addresses itself to the sworn conscience of the debtor, and makes room for punishment for perjury. The debtor will not be allowed to escape such serious consequences of the enforcement of the law by a mere recital of his property without the commanded oath;" to which we add that the mere recital of his property would not suffice, even with the oath.

In the case at bar we have, as has already been seen, a schedule or inventory, full and complete, within the meaning of the statute. The stock of goods, wares, and merchandise conveyed are enumerated and scheduled as consisting of "dry goods, boots, shoes, hats, caps, gentlemen's furnishing goods, clothing, notions, trunks, valises;" and the schedule, continuing, embraces "counters, shelving, chairs, stoves, desks, one iron safe, and one mirror, in all to the value of \$7,600," being the entire stock, etc., in Nos. 79 and 79½ Beale street. Surely it would be a forced and unnatural construction that would hold this an insufficient schedule, within the meaning of the legislature. If we are to give the literal meaning of the terms "full" and "complete," it is difficult to see where we could stop in requiring a compliance with the statute. Certainly, in a large mercantile establishment, it would seem unreasonable to expect every collar, cuff, sock, lady's belt, corset, or yard of ribbon to be specified in the emergency attending usually the making of such an assignment. As is shown in this case, it required three days for the assignee to make such an inventory. It is manifest that, if this failing debtor had closed his doors for three days in order to prepare an inventory, his creditors would have been upon him, doubtless, with attachments, and thus have defeated the very object of this statute, which was to prevent preference, and to secure, as far as possible, an equal distribution of the assets of an insolvent debtor. Nor in a conveyance embracing all of the grantor's horses, hogs, cows, now located in a certain barn, situated on black acre, and duly sworn to as embracing all his property, it would not do to say the conveyance was void, under this statute, because forsooth he failed to designate the size, age, sex, color, or previous condition of servitude of each animal.

The case of *Hill v. Alexander*, above referred to, is invoked as sustaining the contention of counsel for the attaching creditors here. In that case the only question presented, and the only point adjudged, was the matter of the oath to the schedule; and it was held that the oath was absolutely necessary to the validity of the deed of assignment. With this holding we most heartily concur, and there is nothing in this opinion at variance therewith. There must be a full and complete schedule of the property conveyed, verified by oath. The schedule in this case is in substantial compliance with this requirement.

The result is that the decree will be reversed, and bill dismissed, at the cost of complainants.

TURNER, C. J., (dissenting.) I think the decree of the chancellor is correct. The schedule set out does not conform to the requirements of the statutes. Such terms as "dry goods," "notions," "boots," etc., are entirely too comprehensive to fall within the demand for "a full and complete schedule or inventory." There is almost no limit to the number, quality, and diversity of articles that may be embraced under each of the general heads. If a better inventory could have been made, then this one is not "full and complete." A better was made immediately after the trust deed was executed.

TEXAS CENT. RY. CO. v. ASCUE.

(Supreme Court of Texas. April 15, 1887.)

1. NEW TRIAL—EXCESSIVE VERDICT.

In an action to recover damage resulting from a collision of plaintiff's horses and wagon with defendant's train, a verdict, on evidence only showing the death of one horse, and injury to the other, without specifying its extent, for such sum as would cover the highest value placed on both horses and the damages for the injury to the wagon and harness, is erroneous, since it is not sustained by the evidence.

2. SAME—MISLEADING INSTRUCTIONS.

The charge of the court was such as to induce the jury to believe that, in the opinion of the court, there was evidence from which they could find that both horses were killed. *Held* erroneous, and that a new trial should be granted.

Appeal from district court, Bosque county.

Alexander & Winter, for appellant. No counsel for appellee.

STAYTON, J. The appellee sought to recover for an injury claimed to have resulted from a collision of his wagon and team with a train on the appellant's railway at a public crossing. He averred that through the negligence of the appellant two of his horses were killed, and that his wagon and harness were broken. There is no evidence that more than one horse was killed; and, while there is evidence that the other horse may have been injured, there is no evidence of the extent of the injury done to it, unless it be assumed that the injury was such as to render the animal valueless so as to entitle the appellee to recover its entire value. The verdict is for such a sum as to cover the highest value placed on both horses and the damages found for the injury to the wagon and harness, and is therefore not sustained by the evidence. In the absence of proof that both horses were killed, or that one was killed and the other so injured as to be valueless, a new trial should have been granted.

The charge of the court was such as to induce the jury to believe that, in the opinion of the court, there was evidence from which they might find that both horses were killed. This charge, in the absence of evidence to which it was applicable, should not have been given. The evidence was such as to authorize the court to submit to the jury whether the accident occurred from the negligence of the appellant, and whether the negligence of the appellee contributed to the injury.

The other questions raised by the assignments of error are not likely to occur upon another trial, and need not be considered.

For the error of the court in refusing to grant a new trial, the judgment will be reversed, and the cause remanded.

GALVESTON, H. & S. A. RY. CO. v. WARE.

(Supreme Court of Texas. April 15, 1887.)

DAMAGES—PROXIMATE AND REMOTE—FLOWAGE—RAILROAD.

In an action for damages caused by the improper building of defendant's railway, whereby plaintiff's house was, September 15, 1883, greatly damaged and weakened by a flow of water, so that on April 30, 1884, the house, with furniture and stores therein, was destroyed by storm, the destruction of the house, furniture, and stores is not a proximate result of the injury, and there can be no recovery therefor, and the true measure of damage is the cost of the repairs rendered necessary by the overflow, and the inconvenience the necessity for them caused.

Appeal from district court, Kinney county.

Solon Stewart, for appellant. *J. A. Ware*, for appellee.

STAYTON, J. There is nothing in the facts of this case on which to base a claim for exemplary damages; and, as none other than actual damages were awarded by the jury, no injury resulted from overruling the demurrer to so

much of the petition as attempted to state facts on which to found a claim for exemplary damages. The language used, however, in that part of the petition, was improper, and should be stricken out.

The application, which was for a first continuance, was in strict compliance with the statute, showed legal diligence, and should have been granted on account of the absence of the witness.

It was claimed by the appellee, among other matters, that a house on his lot was greatly injured on September 15, 1888, by a flow of water upon the lot, caused by the improper construction of appellant's railway; that he caused it to be repaired, and had in it on April 30, 1884, furniture and stores, which, with the house, were on that day destroyed by a storm. This destruction of the house he attributed to its weakened condition resulting from the overflow which occurred more than seven months before. Evidence to prove the destruction of the house, furniture, and goods was objected to, but admitted. If the house was injured through the negligence of the appellant, then the appellee was entitled to recover damages which directly or necessarily resulted from such injury, but he was not entitled to recover for an injury resulting from another cause, which the appellant in no way participated in bringing about. If the house was rendered insecure by the overflow, and this resulted from the negligence of the appellant, it was negligence in the appellee to place furniture and stores in it, and the injury resulting from his own act cannot entitle him to compensation. The right to recover for any injury to the house caused by the negligence of the appellant, and the measure of damages, were fixed by facts existing long before the storm came which destroyed it; and the appellee would have been entitled to recover such sum as would have been necessary to put the house in as good condition as it was before the overflow, with reasonable compensation for any interruption in its use while in the course of repair, or to the difference between the value of the house before and after it was injured, with compensation for any deprivation of its use necessarily suffered while it was being repaired. This was the extent of the right of the appellee to recover for any injury to the house which may have been caused by the negligence of the appellant. The injury from the storm was neither the ordinary nor necessary result of the negligence of the appellant complained of. The evidence objected to should have been excluded. 1 *Suth. Dam.* 56.

The other assignments of error relate to matters which will not probably occur on another trial, and need not be considered.

For the errors noticed the judgment will be reversed, and the cause remanded.

STATE v. PARTLOW.

(*Supreme Court of Missouri.* January 31, 1887.)

1. CRIMINAL PRACTICE—APPEAL—REFUSAL OF INSTRUCTION.

There is no error in refusing to give an instruction, the principle embraced in which has already been fully stated.

2. SAME—INSTRUCTIONS—DISPUTED EVIDENCE.

Defendant in a criminal case has the right to have an instruction given based on his own testimony, and that of his witnesses, although contradicted by the testimony of the prosecution.

3. HOMICIDE—INSTRUCTIONS—DEGREE.

Upon trial for murder it is error to instruct the jury that they must find the defendant guilty of murder, or acquit him altogether, if there is evidence upon which they would be justified in finding him guilty of a lower degree of crime.

4. SAME—DEGREE—PROVOKING COMBAT—INTENT.

If one provokes a combat, and in the affray has to kill his adversary in order to save his own life, the killing is not murder, but manslaughter only, if the intent with which the combat was provoked was not a felonious one.

5. **SAME—SELF-DEFENSE—WITHDRAWING FROM AFFRAY.**

If one, after commencing an affray, attempts in good faith to withdraw from it, but is prevented from doing so by his adversary, he will then be justified in taking the life of the latter, if necessary in order to save his own.

6. **SAME—EJECTING FROM DWELLING-HOUSE—USE OF FORCE.**

One entering another's dwelling-house on an implied license to do so, cannot be ejected forcibly until first requested to leave, although he misbehaves himself.

7. **SAME—EVIDENCE—THREATS AGAINST THIRD PERSON.**

On a trial for murder there was evidence that defendant commenced or provoked the affray, and it was claimed by the prosecution that he went to the house where the homicide was committed in order to make trouble at a wedding which was about to occur there. *Held*, that evidence of threats previously made by him against the groom were admissible, as well as declarations of his intention to go to the house on the day of the wedding.

8. **EVIDENCE—DYING DECLARATIONS.**

On a trial for murder the declaration of deceased is not admissible merely because made after being told that his wound was necessarily fatal. It must be shown that the declaration was made under a sense of impending death, or with the expectation of immediate dissolution.¹

NORTON, C. J., dissents.

Appeal from circuit court, Buchanan county.

Indictment for murder.

The following, among other instructions, was given: "If the jury believe from the evidence in the case that, on the twenty-fifth day of December last, the defendant went to the house of William J. Taylor, deceased, and while there, by any act or words of his, made himself disagreeable to said Taylor, then the said Taylor not only had the right to tell the defendant to leave his premises, but he had the right to use to defendant sufficient force to eject defendant from his premises; and if the jury believe from the evidence that said Taylor did approach the defendant, and use to him such force as was necessary to eject him from his premises, and no more, and that while said Taylor was only using such force the defendant shot him, then the plea of self-defense cannot avail the defendant in this case." The other instructions, and the evidence necessary to an understanding of the case, are given in the opinion.

The Attorney General, for respondent. *M. G. Moran, T. W. Harl, and D. E. Burnes*, for appellant.

SHERWOOD, J. The defendant was indicted for the murder of William J. Taylor by shooting him with a pistol, and, being brought to trial, was convicted of the second degree of that offense, and sentenced to imprisonment in the penitentiary for 10 years. As is usual in such cases, there was a great deal of conflict in the testimony, the state making out a case which indicated that a felonious purpose actuated the defendant in visiting the house of Taylor on the day of the homicide, while the testimony on behalf of the defendant, and it would seem the weight of the testimony in the case, favored the theory that he went to Taylor's house with no other end in view but that of escorting his wife home, who was then at Taylor's, attending the wedding ceremony between Willis Bunch and Mary Reno. Against the life of Bunch it appears that threats had been made by defendant some two years before, and at frequent intervals since, almost down to the time of the homicide, which occurred the twenty-fifth day of December, 1884, and within about 10 days prior to that time.

1. The instructions of the court in regard to murder in its first and second degrees were in usual form; and the jury were in effect instructed under the evidence and law of the case, unless they could find the defendant guilty of murder in the first or in the second degree, to acquit him altogether. The eleventh instruction given at the instance of the state was as follows: "Be-

¹See *State v. Johnson*, (S. C.) 1 S. E. Rep. 510; *Jordan v. State*, (Ala.) 1 South. Rep. 577, and note; *State v. Mathes*, (Mo.) 2 S. W. Rep. 800, and note.

fore the right of self-defense can avail the defendant in this case, the jury must believe from the evidence not only that the defendant had, at the time he shot the deceased, reasonable cause to apprehend a design on the part of the deceased, or others aiding in concert with him, if they find others were so aiding, to do him some great bodily injury, and that he had reasonable cause to apprehend immediate danger of such design being accomplished, and that he shot deceased to avert such apprehended danger, but they must also believe from the evidence that the defendant neither sought, invited, provoked, nor commenced, by any willful act of his own, said difficulty. And if the jury believe from the evidence that there was an affray or difficulty between defendant and deceased, and that defendant voluntarily sought or invited the difficulty, or provoked or commenced it, or brought it on by any willful act of his own, or that he voluntarily and of his own free will engaged in it, then and in that case the jury is not authorized to acquit him upon the ground of self-defense; and this is true, no matter how violent his passion became, or how hard he was pressed, or how imminent his peril may have become during said difficulty." The phraseology of this instruction, as to the defendant seeking or bringing on the difficulty, is also used in instruction No. 2 given by the court of its own motion, and also in instruction No. 7 given at the instance of the state.

The defendant saved exceptions to the refusal of three instructions asked by him, as follows:

"No. 1. The court declares the law to be that homicide is justifiable whenever there is reasonable cause to apprehend immediate danger of any felonious maiming, wounding, or disfiguring being committed upon the person committing such homicide, when the same is done to prevent the execution of such felonious maiming, wounding, or disfiguring, provided at the time the deceased, or those aiding, abetting, and assisting him, made, or were about to make, such demonstrations as would induce a reasonable man to believe such danger was imminent.

"No. 2. The court instructs the jury that, even if defendant did voluntarily enter into a difficulty with deceased, still, if the jury believe from the evidence that, after said difficulty had commenced, the defendant attempted in good faith to withdraw from the difficulty, but was prevented from so doing by the deceased, then, in that event, defendant would be excused in taking the life of said Taylor, if it became necessary to do so in order to save his own.

"No. 3. Before the jury can refuse to allow the defendant the benefit of the plea of self-defense on the ground that he sought or voluntarily entered into a fight with deceased, they must believe from the evidence that defendant, at the time he so sought or voluntarily entered into a fight with deceased, he was actuated by a felonious intent to maim, wound, hurt, or kill said deceased."

As to the first of the instructions just mentioned, no error occurred in its refusal, because, aside from any other consideration, the principle embraced in it had already been fully and more properly stated in instructions 1, 6, and 7 given by the court of its own motion.

I cannot speak so favorably of the refusal of defendant's third instruction, and there are many reasons for this assertion. Although evidence on behalf of the state disclosed the existence of certain matters which, if believed by the jury to be true, would perhaps have warranted the jury in finding the defendant guilty of the highest grade of homicide, yet that on behalf of the defendant disclosed such matters as would well have warranted the jury in acquitting the defendant altogether, or in finding him only guilty of manslaughter.

In *State v. Hays*, 23 Mo. 287, the evidence disclosed a state of facts well covered by the third and sixth instructions there given at the instance of the state: "If the defendant, with a spade in his hand, took a position near

Brown, and gradually approached him, for the purpose of inducing an altercation and getting a chance to kill him, and commenced raising his spade at the same time Brown commenced drawing his pistol, and then struck him and killed him, he is guilty of murder in the first degree; and in such case it would be no defense, even if the evidence showed that Brown drew his pistol before the defendant commenced raising his spade; for the law will not permit a man thus to induce a provocation, and so take advantage of it." "Although the jury may believe from the evidence that Brown was attempting to draw his pistol, or had it drawn at the time Hays struck, and that Hays' life or person was in imminent danger, yet, if they further believe that Hays intentionally brought on the difficulty for the purpose of killing Brown, he is still guilty of murder in the first degree." That case is a clear enunciation of the law as applicable to the state of facts disclosed by that record,—a record abounding in all the incidents of murder in the first degree, prior expressions of ill will, and murderous threats, followed, upon the fatal occasion, by Hays "*inching up towards*" his victim with a spade in his hands, with which he carried out his deadly purpose.

The principle thus announced in that case was followed in that of *State v. Starr*, 38 Mo. 270; for there a qualifying instruction given by the court of its own motion was expressly approved, which told the jury that "the foregoing instructions are given with this qualification; that the right of self-defense, which justifies homicide, does not imply the right of attack; and the plea of justification in self-defense cannot avail in any case where it appears that the difficulty was sought for and induced by the act of the party in order to afford him a pretense for wreaking his malice." WAGNER, J., remarked: "The qualification was necessary in view of the evidence in the case. The testimony tended to show that the accused sought the altercation, and was instrumental in bringing it on; and, if the jury found such to be the fact, the law would not permit him to shield himself behind the doctrine of self-defense. Besides, the qualification is couched in the very language of Wharton, and commends itself for its justice, and is well supported by authority. Whart. *Hom.* 197."

The author just cited with approval, when speaking of a case "where the attack is sought by the party killing," uses this language: "The plea of provocation will not avail in any case where it appears that the provocation was sought for and induced by the act of the party in order to afford him a pretense for wreaking his malice; and it will presently be seen that, even where there may have been previous struggling or blows, such plea cannot be admitted where there is evidence of express malice, and it must appear, therefore, that, when he did the act, he acted upon such provocation, and not upon any old grudge." And the same learned author uses similar language in another work. 1 Whart. *Crim. Law*, (8th Ed.) §§ 474, 476.

Treating of this subject of seeking quarrel, an eminent text writer says: "If a man determines to kill another, or to do him great bodily harm, and seeks a quarrel, he cannot avail himself of the passion it excites, because he acts from an impulse which his mind receives in its cool moments." 2 Bish. *Crim. Law*, § 715. Elsewhere the same writer says: "If, without provocation, a man draws his sword upon another, who draws in defense, whereupon they fight, and the first slays his adversary, his crime is murder; for he who seeks and brings on a quarrel, cannot, in general, avail himself of his own wrong in defense. But where an assault which is neither intended nor calculated to kill, is returned by violence beyond what is proportionate to the aggression, the character of the combat is changed; and if, without time for his passion to cool, the assailant kills the other, he commits only manslaughter." *Id.* § 702.

It would seem needless to say that this view of the law is supported by the most abundant authority. *State v. Lane*, 4 Ired. 113; *Reg. v. Smith*, 8 Car.

& P. 160; *Slaughter's Case*, 11 Leigh, 681; *Murphy v. State*, 37 Ala. 142; *Adams v. People*, 47 Ill. 376; *State v. Hildreth*, 9 Ired. 440; *State v. Hogue*, 6 Jones, (N. C.) 381; *State v. Martin*, 2 Ired. 101; *Atkins v. State*, 16 Ark. 568; *Cotton v. State*, 31 Miss. 504; *Stewart v. State*, 1 Ohio St. 66; *State v. Hill*, 4 Dev. & B. 491. In all of these cases I have cited, and I might have cited "a great cloud of witnesses" to bear testimony to this well-established legal principle, the idea is made prominent that the main feature in such cases is the *intent with which the accused brought on the quarrel or difficulty*; if with no felonious intent, no harboring of malice, no premeditated purpose of doing great bodily harm, or killing the person assaulted, or with whom the quarrel is begun, then the accused is not a *murderer*, let the result of the difficulty turn out as it will. This view I will further illustrate by quotations from some of the cases cited *supra*.

Thus, in *Stewart v. State*, THURMAN, J., said: "And, again, the combat must not have been of his own seeking, and he must not have put himself in the way of being assaulted, in order that, when assaulted and hard pressed, he might take the life of his assailant. * * * Now, it does seem to us clear that Stewart sought to bring on the affray; that he desired and intended, if assaulted, to make good his previous threats of using his knife. True, he had a right to dun Doty for his money, but he had no right to do so for the purpose of bringing on an affray in order to afford him a pretext to stab his enemy."

In *Adams v. People*, BREESE, J., said: "The twelfth instruction for the people was right. It was as follows: 'If the defendant sought a difficulty with the deceased for the purpose of killing him, and in the fight did kill him, in pursuance of his malicious intention of taking the life of Bostic, they will find the defendant guilty of manslaughter, although the cutting and killing were done in order to prevent an assault upon him by Bostic, or to prevent Bostic from getting an advantage in the fight.'"

In *Cotton v. State*, FISHER, J., said: "The qualification by the court made to the third instruction is clearly erroneous. The instruction is, in substance, that if Cotton killed Smith, not in pursuance of a premeditated design, but on a sudden quarrel, the crime of murder is not made out. The modification made is, 'unless Cotton sought the quarrel, and used a deadly weapon.' The question was whether malice prompted the accused to kill. He interposed, as his defense, by the instruction, '*no design to kill*, and that the killing was on a sudden quarrel.' The court say to him that 'this is no defense, not even to mitigate the crime, if you sought the quarrel and used a deadly weapon.' Now, he may have done both without being guilty of murder; for he may not, by seeking the quarrel, have intended the slightest personal injury to the deceased, and he may, from sudden provocation, have used his weapon, or he may have been forced to do so in self-defense although he was the aggressor in the quarrel. The modification amounts to this: that, although there must be a formed design to take life to constitute murder, yet such design is not necessary where the party killing seeks the quarrel, and uses a deadly weapon. There must be proof of malice in some form. The seeking of the quarrel and using the deadly weapon, may be evidence for this purpose. But this is what the defendant below was endeavoring to meet, by showing no design to take life, because the killing occurred on a sudden quarrel. The modification virtually declares this to be no defense, if the party sought the quarrel."

In *State v. Lane*, RUFFIN, C. J., said: "If the prisoner sought the deceased, and entered into that fight, with the purpose, under the pretense of fighting, to stab him, it was clearly murder, no matter what provocation was then given or how high the prisoner's passion rose during the combat; for the malice is express, and was promptly wreaked, and puts the idea of provocation out of the case."

In *State v. Hill* the defendant was convicted of murder in the first degree. He had "brought on the difficulty" by striking the deceased a blow with his fist, when the deceased stabbed him, and he thereupon stabbed and killed the deceased, but in circumstances which rendered it doubtful whether the act of the prisoner was the result of passion in consequence of being stabbed, or was necessary in self-defense; and GASTON, J., in delivering the opinion of the court awarding a new trial, said: "It was necessary that the jury should, in the first place, ascertain whether the prisoner commenced the affray with a preconceived purpose to kill the deceased, or to do him great bodily harm; for, if he did, then there was nothing in the subsequent occurrences of the transaction which could free him from the guilt of murder. If the first assault was made with this purpose, the malice of that assault, notwithstanding the violence with which it was returned by the deceased, communicates its character to the last act of the prisoner. * * * If, upon consideration of all the evidence, the jury came to the conclusion that the first assault of the prisoner was not of malice prepense, then the subsequent occurrences demanded their careful consideration, because upon these the prisoner's guilt might be extenuated into manslaughter, or excused as a homicide in self-defense." Wharton has given the ruling in this case his approval. Whart. Hom. (2d Ed.) §§ 461, 462.

In a case which arose in Tennessee, DEADERICK, C. J., observed: "The charge in this case holds, in effect, that a person who may, by improper conduct, provoke an assault, cannot be allowed to rely on the plea of self-defense, nor can he rely upon such defense if he willingly engage in a fight, even if first assaulted and stricken. * * * Provoking words and gestures might be used from heat of blood, in a sudden quarrel, and a fight might, under such circumstances, be engaged in, during which a party might have the right to defend himself from impending danger of death or great bodily harm." *Daniel v. State*, 10 Lea, 261.

Horrigan & Thompson, in their *Cases on Self-defense*, page 227, in a note to *Stoffer v. State*, 15 Ohio St. 47, have given an admirable summary of the authorities on this subject as follows: "(1) If he [the slayer] provoked the combat or produced the occasion in order to have a pretext for killing his adversary, or doing him great bodily harm, the killing will be murder, no matter to what extremity he may have been reduced in the combat. (2) But if he provoked the combat or produced the occasion without any felonious intent, intending, for instance, an ordinary battery merely, the final killing in self-defense will be manslaughter only."

This distinction between the right of perfect and the right of imperfect self-defense is fully recognized in the formula above set forth, and that formula is fully indorsed by the Texas court of appeals in *Reed v. State*, 11 Tex. App. 509. That court, when treating of this subject of self-defense, said: "It may be divided into two general classes, to-wit, *perfect* and *imperfect* right of self-defense. A perfect right of self-defense can only obtain and avail where the party pleading it acted from necessity, and was wholly free from wrong or blame in occasioning or producing the necessity which required his action. If, however, he was in the wrong, if he was himself violating or in the act of violating the law, and on account of his own wrong was placed in a situation wherein it became necessary for him to defend himself against an attack made upon himself which was superinduced or created by his own wrong, then the law justly limits his right of self-defense, and regulates it according to the magnitude of his own wrong. Such a state of case may be said to illustrate and determine what in law would be denominated the imperfect right of self-defense. Whenever a party, by his own wrongful act, produces a condition of things wherein it becomes necessary for his own safety that he should take life or do serious bodily harm, then, indeed, the law wisely imputes to him his own wrong, and its consequences, to the extent that they may and

should be considered in determining the grade of offense which but for such acts would never have been occasioned. * * * How far and to what extent he will be excused or excusable in law must depend on the nature and character of the act he was committing, and which produced the necessity that he should defend himself. When his own original act was in violation of law, then the law takes that fact into consideration in limiting his right of defense and resistance while in the perpetration of such unlawful act. If he was engaged in the commission of a felony, and, to prevent its commission, the party seeing it, or about to be injured thereby, makes a violent assault upon him, calculated to produce death or serious bodily harm, and in resisting such attack he slay his assailant, the law would impute the original wrong to the homicide, and make it murder; but, if the original wrong was or would have been a misdemeanor, then the homicide growing out of or occasioned by it, though in self-defense from any assault made upon him, would be manslaughter under the law."

The foregoing remarks are quoted with approval in *King v. State*, 13 Tex. App. 277, where the court remarks: "We think this view of the law is in harmony with our Code, and with the decisions construing it. It is not in conflict with the well-settled doctrine that he who seeks and brings on a difficulty cannot avail himself of the right of self-defense in order to shield himself from the consequences of killing his adversary. In fact, it is the same doctrine, and is recognized by the best authority."

This doctrine of perfect and imperfect self-defense is fully recognized by Bishop, (section 702, *supra*, and elsewhere in his work;) also in *Cotton v. State* and *Adams v. People*, *supra*. Indeed, the assertion of the doctrine that one who begins a quarrel, or brings on a difficulty, with the felonious purpose to kill the person assaulted, and accomplishing such purpose, is guilty of murder, and cannot avail himself of the doctrine of self-defense, carries with it in its very bosom the inevitable corollary that if the quarrel be begun *without a felonious purpose*, that the homicidal act will not be *murder*. To deny this obvious deduction is equivalent to the anomalous assertion that there can be a *felony* without a *felonious* intent; that the *act* done characterizes the *intent*, and not the *intent* the *act*. The bare statement of such a doctrine accomplishes its own ample refutation,—a doctrine inconsistent in its premises, and illogical in its conclusion. The absurdity of such a doctrine may readily be shown by this syllogism: Without a felonious intent there can be no murder. A. brought on a difficulty with B., and in the sudden struggle which ensued, but without felonious intent, killed him. Therefore A. is guilty of murder. Or the form of the syllogism may be varied thus: He who with malice aforethought brings on a quarrel with and kills another, is guilty of murder, and cannot, however imminent his peril, avail himself of the doctrine of self-defense. A., without malice aforethought, begins a quarrel with and kills B. in the endeavor to save his own life from a murderous assault by the latter. Therefore A. is a murderer, and cannot invoke the doctrine of self-defense. Such a doctrine as this is at war, too, with the analogies of the law in similar cases; for if two, with deadly weapons, engage in a sudden encounter, and one should kill the other, the slayer will only be guilty of manslaughter.

Bishop says: "A common case is where two persons, upon a sudden quarrel, engage in mutual combat. Then if either one, in the heat of it, kills the other, though without a deadly weapon, the offense is, in most circumstances, only manslaughter. * * * When the combat has become mutual, it ordinarily ceases to be of importance by which party the first blow was given. And, as we have seen, it makes no difference, though the blow which proved fatal was, while prompted by the heat of the fight, inflicted with the intent to take life." 2 Bish. Crim. Law, § 701.

REDFIELD, C. J., takes the same view of the matter; for he says: "If the jury

should regard this as a *bona fide* case of mutual combat, without previous malice on the part of the accused, and that mutual blows were given before the accused drew his knife, and that he drew it in the heat and fury of the fight, and dealt a mortal wound, although with the purpose of doing just what he did do, that is, of taking life, or what would be that intent if he had been in such a state as properly to comprehend the nature of his act, still it is but manslaughter." *State v. McDonnell*, 32 Vt. 491.

Speaking of *Morley's Case*, Lord HALE said: "And many who were of opinion that bare words of alighting, disdain, or contumely would not of themselves make such a provocation as to lessen the crime into manslaughter, yet were of this opinion: that if A. gives indecent language to B., and B. thereupon strikes A., but not mortally, and then A. strikes B. again, and then B. kills A., that this is but manslaughter; for the second stroke made a new provocation, and so it was but a sudden falling out; and, though B. gave the first stroke, and, after a blow received from A., B. gives him a mortal stroke, this is but manslaughter according to the proverb, 'the second blow makes the fray;' and this was the opinion of myself and some others." 1 Hale, P. C. 456. In *Morley's Case* it was agreed that "if, upon ill words, both of the parties suddenly fight, and one kill the other, this is but manslaughter; for it is a combat betwixt two upon a sudden heat, which is the legal description of manslaughter." 6 How. St. Tr. 769.

With these authorities and legal definitions before us, let us examine the testimony of the defendant, supported, as it is, by that of other witnesses in all essential particulars. He testified: "About 3 o'clock in the afternoon of Christmas day, 1884, James Lane and myself started from his house to go to the coal-yard, where we were working, to feed our teams. When we started I said to Lane that we would go around by my house, and see whether my wife had returned home or not. [She had not returned.] We then went over to McCoy's, [who lived with Taylor.] I went in the gate, and around to the kitchen door. The front room and basement of the house was occupied by Taylor; the middle room and kitchen by McCoy. There is a door opening from the yard into the middle room. I was familiar with the entrance, having been there before. The west or front end of the house runs up to the sidewalk. The yard fence commences at the south-west corner of the house, and runs south along the west end of the yard. The gate is a few feet south of the house. There is a porch four or five feet wide, and two feet high, in front of the kitchen door. The door is on the south side of the room. I rapped, and was waited on by Mary Reno, now Mrs. Bunch, who invited me in. I declined the invitation, and told her that I had called for my wife. At this time my wife had also come to the door, and I asked her if she was ready to return home. She replied that the wedding had not come off yet. I then said to her: 'It is getting late; perhaps you had better go home now.' She asked me to wait, then, while she prepared the children and got her wraps, and she started into the front room. Just as my wife was returning, William J. Taylor, A. J. Sollers, Clifton McCoy, and young John Sollers came out through the middle room into the kitchen. They were walking rapidly. Taylor and Sollers were in their shirt sleeves. Sollers had his sleeves rolled up, his collar and shirt bosom unbuttoned. I was standing on the porch, with my back to the south. Taylor stepped out on the porch, facing me. Sollers stood somewhat west of us, with his face towards Taylor and myself. Lane was west of Sollers. Lillie McCoy, Mary Reno, and Mary Stephenson were part inside the kitchen door. Taylor first called me by my name, and wanted me to come in. When he invited me, I replied I did not have time; that I had just called for my wife. He then said that he understood that I had come over to the wedding to raise a row. I replied I had not come for any such purpose; that I had called for my wife to accompany her home. Mary Stephenson then spoke up and said to me: 'Yes you did come to raise a difficulty. I heard you say so this morn-

ing.' I said: 'That's a lie.' A. J. Sollers then said to Taylor: 'Give him one, anyway, Bill;' and Taylor immediately struck at me with his right hand clinched. I tried to avoid the blow, but only partially succeeded. The blow struck me on the left side of my head, near the eye, and staggered me backward off the porch. Taylor sprang after me, striking. He was right over me, and I was retreating towards the gate to get away. The gate was south and west of the porch. A. J. Sollers jumped off the porch, right after Taylor, and was following us, shouting: 'Give it to him, Bill; don't let him get away.' Taylor continued to press me, and Sollers was cursing and swearing in a loud voice. Taylor was over me, like, and striking. Young John Sollers was also in the yard at this time. When I had retreated in a half circle about midway from the porch to the gate, I saw young Jack Sollers coming towards me with a neck-yoke or large club, as if to strike me. I caught Taylor somewhere on his right arm, to protect myself and keep from falling. I was greatly excited. I was afraid I would go down, and that A. J. Sollers and John Sollers, with the neck-yoke, would reach me. I thought my life was in danger, and I drew my revolver with my right hand, and, to save myself, I shot Taylor. Up to the time the shot was fired, Lane took no part whatever in the difficulty."

From this testimony it will readily be seen that, taking that testimony as true, no malicious purpose prompted the defendant, even if it be held that he "brought on the difficulty." And the defendant had the right to have an instruction based on his own testimony, and to testify as to his intent. *State v. Banks*, 73 Mo. 592. But, as already seen, he was denied any instruction which would allow the jury to consider his offense as anything less than murder in the second degree, no matter what his intent may have been, provided he "brought on the difficulty;" and if he did this, under the instructions given, his intent was immaterial, and his right of self-defense altogether destroyed. I am of opinion that he was clearly entitled to have his third instruction, modified, as hereinafter indicated, given to the jury, and the intent with which he did the homicidal act considered by them in making up their verdict. Taking as a basis the testimony of the defendant, and of others who corroborated his statements, as true, there was ample ground for holding that he had not lost his right of imperfect self-defense by reason of anything occurring at the place of the homicide,—a right which, according to the authorities, would, if there were no felonious intent actuating the defendant, reduce his offense from what would otherwise have been murder to manslaughter. This doctrine receives my cordial concurrence. Any other doctrine is abhorrent to all my conceptions of what constitutes reason, humanity, justice, and law. Any other doctrine places on the same plane him who, with murderous malice in his heart, provokes a difficulty, and slays the victim of his deadly hate, and him who, in the *furor brevis* of a casual combat, and of sudden anger, and without malice, takes the life of his assailing adversary. See *State v. Culler*, 82 Mo. 623.

2. But granting that defendant was in the wrong, granting that by mere words he "brought on the difficulty,"—and no witness contends that he brought it on in any other way,—still he had a right, after the combat began, to withdraw from the conflict; and this is what there is testimony tending to show he did in good faith try to do, and was trying to do, when pressed so hard as to be compelled to use his pistol. Taylor had struck him, and knocked him off the porch,—was still striking him. A. J. Sollers, who had urged on the fight in the first instance, was still doing so, following close on Taylor's heels, shouting: "Give it to him, Bill; don't let him get away,"—while John Sollers, who had followed Taylor into the yard, had picked up the neck-yoke, and only some six or eight feet away was coming towards defendant with the neck-yoke in both hands as if to strike him, while he was retreating towards the gate, and it was at this juncture that he fired the shot. Taking this tes-

timony as true, the second instruction asked by defendant should have been given; for it announces but the well-settled doctrine that, though a man should be in the wrong in the first instance, yet a "space for repentance is always open; and where a combatant in good faith withdraws as far as he can, really intending to abandon the conflict," and his adversary still pursues him, then, if taking life becomes necessary to save his own, he will be justified. 1 Bish. Crim. Law, § 871; Hor. & T. Cas. 227; Fost. 276. Sir William Blackstone says: "When both parties are actually combating at the time the mortal stroke is given, the slayer is guilty of manslaughter; but if the slayer has not begun to fight, or (having begun) endeavors to decline any further struggle, and afterwards, being closely pressed by his antagonist, kills him to avoid his own destruction, this is homicide excusable by self-defense." 4 Bl. Comm. 184. Treating of this subject of "retreating to the wall," Mr. Wharton aptly says: "The true view is that a 'wall' is to be presumed whenever retreat cannot be further continued without probable death, and when the only apparent means of escape is to turn and attack the pursuer. And retreat need not be attempted when the attack is so fierce that the assailed, by retreating, will apparently expose himself to death." Whart. Hom. § 485.

And, in this connection, it may not be amiss to remark that Taylor had no right to offer violence to defendant in order to eject him from his house until he had first requested him to leave his premises, and not until more gentle means had proved unavailing. On this point, Bishop observes: "If a man enters another's dwelling-house peaceably, on an implied license, he cannot be ejected except on request to leave, followed by no more than the necessary and proper force, even though misbehaving himself therein." 1 Crim. Law, 859; Whart. Hom. § 552. I make this remark, because I find no evidence in the record that Taylor requested defendant to leave his premises before resorting to violence, and because of the language of the sixth instruction given on behalf of the state. In the circumstances of this case, as already related, the language of that instruction is misleading, and not being based on any testimony of a request to the defendant to leave, and because apparently sanctioning violence at the outset, and treating that violence in the light of necessary force.

8. Relative to the evidence of threats said to have been made towards Willis Bunch by defendant, there was no error in admitting it. If the defendant made such threats, and also similar threats and expressions of his intention to go down to Taylor's house on the day of the wedding, evidence of threats made against Bunch would tend very materially to disclose the *animus* of the defendant.

4. In regard to the rejection of testimony as to the conversation had with Taylor, by the witness Sweeney, after Taylor had been informed by De France that his wound was necessarily fatal, I discover no error, and this of itself is a sufficient reason for such rejection. It does not appear, nor was it offered to be shown, as preliminary to the introduction of such testimony, that the declarations were "made under a sense of impending death," or with the impression on the mind of the declarant of "almost immediate dissolution." 1 Greenl. Ev. § 158. The existence of such being the condition of the deceased's mind was not proven, nor offered to be proven.

For the errors heretofore noticed, the judgment should be reversed, and the cause remanded.

BLACK and BRACE, JJ., concur. NORTON, C. J., dissents. RAY, J., will express his views in a separate opinion.

STATE v. BERKLEY.

(Supreme Court of Missouri. April 27, 1887.)

1. CONSTITUTIONAL LAW—RIGHT OF ACCUSED TO PROCESS—CONTINUANCE.

Gen. St. Mo. § 1886, providing that when, in a criminal case, the adverse party will consent that on the trial the facts set out in the application or affidavit for continuance, as the facts which the party asking the continuance expects to prove by the absent witness, shall be taken as and for the testimony of such witness, the trial shall not be postponed, is void, as against an accused showing due diligence, since it violates the constitutional right of the accused to have process to compel the attendance of witnesses in his behalf. Norton, C. J., and RAY, J., dissent.

2. HOMICIDE—INTENT—INSTRUCTIONS.

In a trial for murder, an instruction making no distinction between bringing on a difficulty with felonious intent, and bringing it on without felonious intent, is erroneous; following *State v. Partlow*, ante, 14. Norton, C. J., and RAY, J., dissent.

3. SAME—SUDDEN QUARREL—INSTRUCTIONS—DEGREE.

Where the evidence tends to show that the killing was the result of a sudden quarrel, it is error to refuse to give an instruction in relation to a lower grade of homicide than murder in the second degree.

Appeal from circuit court, Boone county.

Atty. Gen. Boone, for respondent. *Squire Turner* and *S. C. Major*, for appellant.

SHERWOOD, J. The defendant was indicted for the murder of Martin Carlos, by striking him with a club. The jury before whom the cause was first tried failed to agree; the second trial resulted in a conviction of murder in the second degree. The errors assigned relate to the refusal of a continuance; permitting the prosecuting attorney to admit that the absent witness, Hopkinson, would testify to the facts as set forth in the affidavit for a continuance, were he personally present; the giving and the refusing of certain instructions, and the failure to give an instruction in relation to a lower grade of offense than murder in the second degree.

1. The first point for discussion is whether the continuance should have been granted. It showed, in the circumstances detailed in the affidavit, due diligence; and the trial court, in effect, so held, by calling on the prosecuting attorney to say whether he would admit, etc.; and, under the strict terms of section 1886, it is requisite that the application for a continuance should be sufficient in form, should show ample grounds why the continuance should go, before that section becomes operative, and the prosecuting attorney is called upon to say whether it shall go or not. This, case, therefore, presents the question of the constitutionality of that section, and will decide how far the legislature may go counter to the organic law, and their acts still be held valid. Section 22 of article 3 of our state constitution, known as the "Bill of Rights," so far as necessary to quote the same, is as follows: "In criminal prosecutions, the accused shall have the right * * * to have process to compel the attendance of witnesses in his behalf."

Mr. Justice Cooley, when discussing that portion of a written constitution termed a "Bill of Rights," says: "It is also sometimes expressly declared, what, indeed, is implied without the declaration, that everything in the declaration of rights contained is excepted out of the general powers of government, and all laws contrary thereto shall be void. * * * While they continue in force, they are to remain absolute and unchangeable rules of action and decision." Cooley, Const. Lim. 46.

The words of the constitution now under discussion would seem too plain for interpretation. They interpret themselves. They are to be understood according to their usual and most known signification. 1 Story, Const. § 400. Nearly every school-boy knows what process is, what attendance of witnesses is, and that the witnesses are to attend and testify at the place from whence

the process or writ issues, and to which it is made returnable. This is the sense of the words used by the constitution, and they will admit of no other.

Does section 1886 interfere with the constitutional provision above quoted? It does. How does it do this? Just in this way: It is only where the application for a continuance shows all possible diligence that section 1886 comes into play. The witness may be most important and material; his testimony may have been discovered almost on the calling of the case for trial; he may be temporarily absent from the state; and yet the continuance cannot go without the consent of the prosecuting attorney, and, when it does *not* go, the applicant is deprived of his constitutional right,—of the testimony of his witness; deprived even of his deposition, and forced to go to trial upon the simple consent of the prosecuting attorney that the facts set out in the application “shall be taken as and for the testimony of such witness.”

Is it necessary to argue, at this late day, that this method of procedure is wholly unwarranted by, and in contravention of, the plain words of the organic law? Is it necessary to say that the rights which those plain words confer are, in the language of Judge Cooley, “excepted out of the general powers of government, and all laws contrary thereto shall be void?” Is it necessary to speak of the inestimable value to the accused to have the testimony of his witnesses delivered, *ore tenus*, before the tribunal where that accused is on trial for his life? If it is necessary, it argues a great want of attention to, or familiarity with, that historic struggle which finally led to the right in question being embalmed in our American constitutions, both state and federal. The right is an *absolute one*; *it is not the subject of diminution, barter, or exchange*. The importance of its being maintained cannot be overestimated. Speaking on this subject, the eminent jurist, Chief Justice MARSHALL, said: “The right of an accused person to the process of the court, to compel the attendance of witnesses, seems to follow, necessarily, from the right to examine those witnesses; and, whenever the right exists, it would be reasonable that it should be accompanied by means of rendering it effectual. * * * The genius and character of our laws and usages are friendly, not to condemnation, at all events, but to a fair and impartial trial; and they consequently allow to the accused the right of preparing the means to secure such a trial. * * *”

The constitution and laws of the United States will now be considered, for the purpose of ascertaining how they bear upon the question. The sixth amendment to the constitution gives to the accused, “in all criminal prosecutions, a right to a speedy and public trial, and the compulsory process for obtaining witnesses in his favor.” The right given by this article must be *deemed sacred by the courts*, and the article should be so construed as to be *something more than a dead letter*. 1 Burr, Trial, 178, 179. But this right, sacred as it is, by the operation of the statute in question is made “*a dead letter*,” at the option of every prosecuting attorney in the state. From whence does the legislature derive its power to divest the trial court of that judicial judgment and discretion lodged there by the constitution, and confide them to the breast of the prosecuting officer? In my humble opinion, the legislature has no more authority to do this than to authorize him to pass on the defendant's application for a change of venue, or his motion for a new trial. From whence does the legislature derive the power to deny the simple right conferred by the organic law, and, in lieu thereof, compel the accused to accept such a beggarly substitute as section 1886 offers? If such legislation is valid, then there is no boundary and no limit imposed by the constitution which may not be overridden and destroyed in the same way, whenever the legislature so wills it.

I have already suggested the inestimable value to the accused of having the testimony of his witnesses delivered, *ore tenus*, at the time and place of his trial. All the sages of the law have so regarded it. Speaking on this subject,

Blackstone observes: "This open examination of witnesses, *viva voce*, in the presence of all mankind, is much more conducive to the clearing up of truth than the private and secret examination, taken down in writing before an officer or his clerk, * * * where a witness may frequently depose that in private which he will be ashamed to testify in a public and solemn tribunal. * * * Besides, the occasional questions of the judge, the jury, and the counsel, propounded to the witness on a sudden, will sift out the truth much better than a formal set of interrogatories previously penned and settled; and the confronting of adverse witnesses is also another opportunity of obtaining a clear discovery, which can never be had upon any other method of trial. * * * In short, by this method of examination, and this only, the persons who are to decide upon the evidence have an opportunity of observing the quality, age, education, understanding, behavior, and inclinations of the witness; in which points all persons must appear alike, when their depositions are reduced to writing, and read to the judge, in the absence of those who made them; and yet as much may be frequently collected from the manner in which the evidence is delivered as from the matter of it." 3 Cooley, Bl. Comm. 373.

Touching the same matter, Starkie says: "In these, as in so many other cases, it is for the jury to estimate the degree of influence by which the testimony of a witness is likely to be corrupted, and to determine whether, under all the circumstances, he may be the witness of truth. In arriving at this conclusion, a consideration of the demeanor of the witness upon the trial, and of the manner of giving his evidence, both in chief and upon cross-examination, is oftentimes not less material than the testimony itself. And over-forward and hasty zeal on the part of the witness in giving testimony which will benefit the party whose witness he is; his exaggeration of circumstances; his reluctance in giving adverse evidence; his slowness in answering; his evasive replies; his affectation of not hearing or not understanding the question, for the purpose of gaining time to consider the effect of his answer; precipitancy in answering without waiting to hear or to understand the nature of the question; his inability to detail any circumstances wherein, if his testimony were untrue, he would be open to contradiction, or his forwardness in minutely detailing those where he knows contradiction to be impossible; an affectation of indifference,—are all, to a greater or less extent, obvious marks of insincerity. On the other hand, his promptness and frankness in answering questions without regard to consequences, and especially his unhesitating readiness in stating all the circumstances attending the transaction, by which he opens a wide field for contradiction, if his testimony be false, are, as well as numerous others of a similar nature, strong internal indications of his sincerity. The means thus afforded by a *viva voce* examination, of judging of the credit due to witnesses, especially where their statements conflict, are of incalculable advantage in the investigation of truth. They not unfrequently supply the only true test by which the real character of the witnesses can be appreciated." Starkie, Ev. (9th Ed.) 727, 728.

Elsewhere the same learned author observes: "As the deposition of dead or absent witnesses are, in point of law, of a secondary nature to the *viva voce* testimony of witnesses subjected to the ordeal of cross-examination, so are they inferior and weaker in point of force and effect; so true is it that a witness will frequently depose that in private which he would be ashamed to certify before a public tribunal. It is by the test of a public examination, and by that alone, that the credit of a witness, both as to honesty and ability, can be thoroughly tried and appreciated. *Nam minus obtestisse videtur pudor inter paucos signatores*, is an ancient and a powerful observation in favor of oral testimony." Id. 766.

If the depositions of absent witnesses are, in point of law, of a secondary nature to the *viva voce* testimony of witnesses subjected to the ordeal of cross-

examination, how low in the scale of evidence, both in point of law and in point of fact, must we place the affidavit of the accused, *swearing what some one else will swear?*

But it may be urged that the legislature has provided that the facts set forth in the affidavit "shall be taken and received by the jury as the testimony of the absent witness." So it has, but *all* that a legislature enacts does not necessarily pass for law. So, too, it might enact that a piece of *palpable pot-metal* should be "taken and received" by a jury as *genuine guinea gold*; but I imagine that all the legislature in the land would not have sufficient power to make a common-sense jury so take and receive it. There is a limit to the power of the legislature; there is a boundary over which it may not pass. It cannot make the impossible, *possible*; nor, in defiance of the bill of rights, compel the accused to accept *a piece of paper instead of a man*.

The question presents itself whether anything may be made the law of the land, or may become due process of law, which the legislature, under the proper forms, has seen fit to enact. To solve this question, we have only to consider for a moment the purpose of the clause under examination. That purpose, as is apparent, was individual protection, and limitation upon power; and any construction which would leave with the legislature this unbridled authority, as has been well said by an eminent jurist, "would render the restriction absolutely nugatory, and turn this part of the constitution into mere nonsense. The people would be made to say to the two houses: 'You shall be vested with the legislative power of the state, but no one shall be disfranchised or deprived of any of the rights or privileges of a citizen unless you pass a statute for that purpose. In other words, you shall not do the wrong unless you chose to do it.'" 2 Story, Const. (4th Ed.) § 1948.

Speaking of the sixth amendment to the constitution of the United States, already quoted, Mr. Justice DAVIS says: "These securities for personal liberty, thus embodied, were such as wisdom and experience had demonstrated to be necessary for the protection of those accused of crime. And so strong was the sense of the country of their importance, and so jealous were the people that these rights, highly prized, might be denied them by implication, that, when the original constitution was proposed for adoption, it encountered severe opposition; and, but for the belief that it would be so amended as to embrace them, it would never have been ratified. Time has proven the discernment of our ancestors; for even these provisions, expressed in such plain English words that it would seem the ingenuity of man could not evade them, are now, after the lapse of more than seventy years, sought to be avoided. * * * The history of the world had taught them that what was done in the past might be attempted in the future." *Ex parte Milligan*, 4 Wall. 120.

Moreover, I regard section 1886 as in plain violation of section 1 of the fourteenth amendment of the constitution of the United States, which forbids that any state "deny to any person the equal protection of the laws." I illustrate this view in this way: Here are two defendants in the same court, both on trial for their lives. Both make equally meritorious applications for a continuance. In one case the prosecuting attorney graciously waives the interposition of his *veto*, and the trial court is consequently *allowed* to exercise its ordinary judicial discretion, and, the grounds therefor being ample, the continuance goes, and *that* defendant secures, as a matter of *favor*, what belongs to him as a *home-born constitutional right*,—the attendance of his witnesses. In the *other* case the prosecuting attorney does *veto* the application; does overrule the judicial discretion of the court; does override the constitutional right of the defendant; and so the latter is forced into trial, on whose result his life depends, with nothing better *than a piece of paper*, on which is written something which *on its face* does not bear even so much probative force as *hearsay testimony*. Thus *these* constitutional rights are stricken down by one and the same blow,—the constitutional right of the trial judge

to the exercise of his judicial discretion in all cases coming before him; the constitutional right of the defendant to compulsory process for his witnesses; and his constitutional right to the "equal protection of the laws," (*State v. Hayes*, 81 Mo. 574;) thus affording an apt illustration of what Judge Cooley so strongly says: "The securities of individual rights * * * cannot be too frequently declared, nor in too many forms of words; nor is it possible to guard too vigilantly against the encroachments of power, nor to watch with too lively a suspicion the propensity of persons in authority to break through the cobweb chains of paper constitutions." 2 Story, Const. § 1938.

I will not pursue the subject further. I have already done so on a former occasion, where will be found collected abundant authorities in support of the positions here taken. *State v. Jennings*, 81 Mo. loc. cit. 193.

2. It is unnecessary to notice the numerous instructions in detail. There were 7 given on behalf of the defendant, 14 on behalf of the state, and 3 as modified by the court, making 24 instructions in all; enough, in all conscience, to confuse and mislead any jury in the land.

I will take one as the type of the rest. The seventh instruction, given at the instance of the state, is faulty in the same particular as were instructions in *Partlow's Case*, ante, 14, (decided at the present term,) because it makes no distinction in regard to bringing on a difficulty with a felonious intent and in bringing it on without such felonious intent. There is an obvious difference, as in that case was ruled.

3. An instruction should have been given in relation to a lower grade of homicide than murder in the second degree. The evidence tends to show that the killing was the result of a sudden quarrel. This would furnish basis for such an instruction. Indeed, the fourth instruction, given on behalf of the state, recognizes that defendant's guilt could fall below murder in the second degree. *State v. Wilson*, 85 Mo. 134; *State v. Barham*, 82 Mo. 67.

We reverse the judgment, and remand the cause.

BLACK and BRACE, JJ., concur,—the former as to paragraph 1, in a separate opinion; Judge BRACE, *in toto*. NORTON, C. J., dissents as to all the paragraphs except No. 3; and RAY, J., does the like.

BLACK, J. According to the rule asserted in *State v. Hickman*, 75 Mo. 418, and *State v. Jennings*, 81 Mo. 185, section 1886, Rev. St., can only be invoked by the state after the accused, by the exercise of reasonable diligence, shall have unsuccessfully employed the power of the court to secure the personal attendance of his witnesses. The legislature has the right to enact reasonable laws regulating the use of the process employed by the courts to bring witnesses before them; and if the statute means that, and only that, indicated by the two cases before noted, then I am prepared to affirm its constitutionality. But that section must be considered with the preceding sections, which determine what the application for a continuance shall state and disclose. By those sections the defendant must, in all cases, state what facts he believes the witnesses will prove. Section 1886 then declares that "if in any such case the adverse party will consent that, on the trial, the facts set out in the application or affidavit, as the facts which the party asking the continuance expects to prove by the absent witnesses, shall be taken as and for the testimony of such witness, the trial shall not be postponed for that cause," etc. In every case where the accused makes a good showing for a continuance, he is bound to go to trial without his witnesses, and without process for them, if the prosecuting officer sees fit to say he will let the accused take the affidavit, in so far as it states what the defendant expects to prove, as the evidence of the absent witness. The defendant may show that he has used all reasonable efforts to have his witnesses summoned, that they are within the jurisdiction of the court, and can be served; or he may show that they have been served, but do

not appear, and can and ought to be attached; yet in all these cases he must go to trial without them. The statute makes no exception. Its evident purpose is to substitute the affidavit for the witnesses, and thus avoid the necessity of bringing the witnesses before the court. The plain sense of the law is to deprive the accused of the right "to have process to compel the attendance of witnesses in his own behalf," as is secured to him by the state constitution; but I do not agree that the statute violates any other provision of the state or federal constitution.

NORTON, C. J., (*dissenting*.) It needs no argument to establish the proposition that a statute which denies to a person criminally charged the right to process to compel the attendance of his witnesses is unconstitutional and void. The proposition is self-evident, and the bare statement of it establishes its truth. But I do not understand, as is assumed by the court in its opinion, that the statute in question, either expressly or impliedly, or by proper construction, denies this right. It is clear that on its face it contains no such denial, but, on the contrary, as construed by this court in *State v. Hickman*, it was held to be operative only in a case where the accused had had the benefit of the process of the court, and where such process proved to be ineffectual in bringing the witness into court. The true purpose and intent of the legislature, as thus construed, so far from denying to the accused process for his witnesses, was to give him the benefit of the evidence of the witnesses which the process of the court had failed to secure to him by bringing the witness into court, thus declaring that the trial should not proceed without such evidence being admitted.

I am not prepared to say, and will not say, that the general assembly, the members of which were as capable as we are to appreciate the importance of the right conferred by the constitution on persons criminally accused to have process to compel the attendance of their witnesses, and who doubtless were animated by as ardent a desire as we are to preserve in its integrity and full force such right, have transcended the limit of its power in the enactment of the statute in question, which in no way impairs such right by a denial of such process, unless the constitutional provision be so construed as not only to give the accused a right to process to compel the attendance of his witnesses, but that the accused cannot legally be tried till such process proves to be effectual in bringing the witness into court to deliver in person his evidence. While the reasoning of the opinion results in such a construction, I cannot believe that it is intended so to construe the constitution as would render the trial of a person criminally charged impossible so long as the party accused might will it to be so. If, as is argued, the chief object of the constitutional provision is to secure the attendance of the witness, and his evidence only as an incident, then it logically follows that the accused might stand on such right, and refuse to be tried till the attendance of the witness was secured. If, on the other hand, the object of such provision is to secure the evidence of the witness, and his attendance as a means of securing it, how can it be said that a statute which provides that the accused, before he can be put on his trial, shall, when the process of the court has failed to bring the witness, have the benefit of the evidence of such witness, is obnoxious to the constitution? The law deals in substance, and not in shadows. And if it is, as intimated in the opinion, within the discretion of the trial judge to refuse to grant a continuance in a case where the person accused has had the process of the court to compel the attendance of his witnesses, which has proved to be ineffectual, and compel him to go to trial without either the attendance of his witnesses, or their evidence, how can the statute in question be condemned as unconstitutional, which, as heretofore construed, provides that where the process had not brought the witness, the accused shall not be put on his trial, unless the state admits, through its prosecuting attorney, what the ac-

cused avers, in his affidavit for a continuance, the absent witness would prove or swear to if present? It is, however, assumed in the opinion that the statute in question interferes with the judicial discretion of the court, in that it provides that, if the prosecution admit, as the evidence of the witness on account of whose absence a continuance is asked, what the applicant for the continuance states he expects to prove by him, the cause shall not be continued, but the trial shall be proceeded with, and that the statute is unconstitutional and void on that account, and for that reason. How this can be said to be an interference with judicial discretion I am not able to perceive. If it is, then, for the same reason, section 1884, Rev. St., which provides what an affidavit shall contain before the court can grant a continuance, must also be condemned. Besides this, from an early period in the history of jurisprudence in this state, there have been on the statute books laws providing that in civil cases, where one party applied for a continuance on account of the absence of a witness, and stated what he expected to prove by such witness, that the cause should not be continued if the opposite party would admit either the truth of such statements, or that they might be received as the evidence of such witness, and although the state, during all that time, has not been lacking in astute lawyers and judges, none of them till now have been astute enough to discover that such statutes were unconstitutional and void because they interfered with the discretion of the trial judge.

Section 3596 of the Revision of 1879 on that subject is as follows: "If the affidavit does not contain a sufficient statement of facts as herein required, the court shall overrule the same; but if, upon the contrary, the court shall find the affidavit sufficient, the cause shall be continued, unless the opposite party will admit that the witness, if present, would swear to the facts set out in such affidavit, in which event the cause shall not be continued, but the party moving therefor shall read, as the evidence of such witness, the facts so stated in such affidavit, and the opposite party may disprove the facts disclosed, or prove any contradictory statements made by such absent witness in relation to the matter in issue and on trial."

For the reasons herein given, I dissent from the conclusion reached by the majority of the court, that the statute in question is void, and in the views expressed Judge RAY concurs.

STATE *ex rel.* DOUGLAS CO. v. ALSUP, Adm'r, etc.*(Supreme Court of Missouri. February 28, 1887.)*

1. BONDS—OFFICIAL—SUCCESSIVE TERMS—LIABILITY OF SURETIES.

Where a collector of taxes was elected for a second term, and gave a new bond, with sureties other than those on his bond during his first term, *held*, in a suit on the second bond, that the sureties thereon were not liable for the delinquencies of the collector during his first term.

2. COLLECTORS—OF TAXES—COMMISSIONS.

Under the provisions of the Missouri law, (Acts Mo. 1877, pp. 253, 382, 389,) a collector of county taxes, who is not a defaulter, is entitled to commissions upon his collections, and such commissions may be retained by him, and need not be paid into the county treasury.

3. SAME—WORK ON ROADS.

The Missouri law, as it existed in 1876, provided for the levy and collection of road taxes as the state and county taxes, with the proviso that such tax could be paid in labor on public roads, receipts being given by the road overseer to those who worked out their tax, and these receipts were turned over to the collector. Any money collected by the collector was receipted for by the overseer in the proper district. *Held*, that these receipts so obtained by the collector exonerated him from all charge against him on account of the road tax.

Appeal from circuit court, Webster county.

Rice & Heffernan, for respondent. *Mr. Calhoun et al.*, for appellant.

SHERWOOD, J. Action on bond of J. S. Alsup, formerly collector of Douglas county. He being dead, this suit was brought in the circuit court of Douglas county against his administrator, and against his sureties on his second bond, and the cause was removed by change of venue to the Webster circuit court, where judgment went on the bond, and execution was ordered to issue for the sum of \$490.08. On settlement with the county court, on the nineteenth day of January, 1877, by the collector for his first term, *i. e.*, for the years 1875 and 1876, a balance was found against him of \$889.71; and action being brought therefor against his administrator and the sureties on the first bond, judgment was recovered for that sum, and that judgment satisfied. The sureties on the second bond, the one now in suit, are not the same as those on the bond for the first term. The record in this cause is wonderfully confused, and the finding of the trial court is based on the action of the two referees, who differ as to the amount which should be allowed for the collector's commissions, to the extent of \$1,388.63.

The defendants asked the following declarations of law: (1) That unless Collector Alsup was a defaulter, he was entitled to commissions on his collections; and if his payments, together with his commissions thereon, equal or exceed his liability on the bond of 1877-1878, he is not a defaulter, and is entitled to have his commissions allowed. (2) That the settlement of Collector Alsup with the county court, on nineteenth January, 1877, for the term of 1875-1876, in which a balance was found of \$889.71 against him, and the judgment of this court on said bond for said term in said sum of \$889.71, and the payment thereof, are conclusive of the liabilities and payments on said term and bond; and all liabilities of said collector accruing after said nineteenth of January, 1877, from tax-books, back tax-books, and delinquent lists, and all collections thereafter made are chargeable wholly and only to the second term and on the second bond; and all payments made after January 19, 1877, are properly credited to the term and bond of 1877-1878. Which the court refused to give. Under the law, the collector was allowed to retain his commissions. Section 1, Acts 1877, p. 253; section 1, *Id.* p. 389; section 16, *Id.* p. 382. If, as appears to be the case, Alsup was not a defaulter on his bond for his last term, he was entitled to his commissions.

With one exception, I see no objection to the second declaration of law. A party suing is not allowed to split his cause of action; and even if he were,

the sureties on the second bond would be liable only for the collector's delinquency on such bond, and *prima facie* the suit on the first bond would settle all matters then existing between the parties then litigant. Under the ruling made in *Hickerson v. City of Mexico*, 58 Mo. 61, it is competent to show by parol that certain matters, apparently included in a judgment, were not then adjudicated; but certainly the burden of showing this lies on the party asserting it, so that, under the case just cited, the judgment rendered in the first instance was not conclusive, unless it should appear that the matter claimed to be *res judicata* was properly in issue in the former trial, and necessarily involved in its determination. But in no event can I see how the sureties in the second bond are in any way liable for former delinquencies; and certainly, if collections were made and paid over during their term, they should have the benefit while they have to bear the burden. Manifestly, their responsibility cannot be extended to a period anterior to the time when they signed the bond in suit, nor can they be precluded from availing themselves of all payments made by their principal, which, in strictness, should have gone to lessen their liability.

An exception was made by defendants to the referees' charging Alsup with the road tax to the amount of \$252.30. In this it is claimed the referees erred. Under the law as it then existed, the road tax was levied and collected as the state and county taxes, with the proviso, however, that such tax could be paid in labor on public roads, receipts being given by the road overseer to those who worked out their tax, who in turn handed them to the collector as their and his voucher, and any money collected by the collector was also receipted for by the road overseers of the proper road-districts, and all these receipts, of both kinds, were evidently designed to exonerate the collector, and to wipe out the charge against him on account of the road tax. The fact that he did not have to pay any money into court on this score does not signify.

The judgment will be reversed, and the cause remanded.
(All concur.)

TRABUE v. REYNOLDS.

(Court of Appeals of Kentucky. April 23, 1887.)

CONTRACT—TRUST FUND—ASSIGNMENT—ACTION.

A., being entitled to an interest in a trust fund, transferred that interest to B. in exchange for a tract of land. A. agreed to make up whatever the interest might lack of being \$3,000. B. sued the trustee of the fund to recover A.'s interest, but the court determined that the fund was subject to a life-estate in the trustee, and B. could not recover any part of it until the termination of that estate. It was also adjudged that A.'s interest was worth \$1,700 less than \$3,000. *Held*, that B. was entitled to recover this deficit of A. at once, without waiting for the termination of the trustee's life-estate.

Appeal from circuit court, Barren county.

J. B. Leslie and H. B. Trabue, for appellant. *W. P. D. Bush and T. M. Dickey*, for appellee.

PRYOR, C. J. H. B. Trabue being entitled to an interest in a trust fund held by his father, B. F. Trabue, transferred that interest, to the extent of \$3,000, to the appellee, Reynolds, for a tract of 155 acres of land in the county of Barren, the crop on the farm, farming utensils, mules, horses, etc., Reynolds delivering to Trabue the possession. It was further agreed that, if the interest of H. B. Trabue in the trust fund did not amount to \$3,000, then and in that event H. B. Trabue bound himself to make up the deficit, *or whatever it may lack of being three thousand dollars*. The parties subsequently agreed that if the appellee, Reynolds, failed to get the money from the trustee, he was to charge the appellant no interest, but reserved the right to make the trustee liable for the interest as well as the principal. After the appellant obtained the possession of the land, and the contract had been fully performed by the appellee, the latter instituted an action in equity against the trustee for the recovery of the trust fund assigned him, and the interest. The trustee, who was the father of the appellant, claimed in that action that he was entitled to a life-estate in the fund, and that neither his son nor his assignee could recover any part of it until the termination of his life-estate.

The trust was created by the will of G. W. Trabue, the grandfather of the appellant, and in the litigation between Reynolds and the trustee for the recovery of the fund it was adjudged by this court that appellant's father (the trustee) had a life-estate in the fund, and was entitled to the interest so long as he lived. In that action it was clearly shown that the interest of H. B. Trabue in the fund was much less than \$3,000, and that there was a deficit of about \$1,700. The appellee, having retained a lien on the land to secure the deficit, brought the present action to enforce that lien, and obtained a judgment directing a sale of the land to pay it. From that judgment H. B. Trabue appeals, insisting that the deficit is not payable until the death of his father, the life-tenant, and that the deficit cannot be ascertained until that event happens. The fact of the deficit, or the extent of appellant's interest in the trust fund, had been clearly established in the first action by Reynolds against the trustee, and that fact is not controverted in the present proceeding.

The amount of the trust fund payable to the appellant, and assigned by him to Reynolds, he was compelled to accept by the terms of his contract, and can obtain no interest thereon from the trustee, as the latter has a life-estate in it, and is entitled to the income; nor can he recover interest from the appellant, because by his contract he has agreed not to look to the appellant for interest; but, as to the deficit, we see no reason why the appellee is not entitled to recover the amount, with interest, from the date of the judgment. The deficit has been ascertained, and, by an express provision of the agreement, that deficit was to be made good by the appellant. It is agreed that the deficit can only appear when the life-estate of the trustee ends. The trust

fund itself, to the extent of \$3,000, was transferred; and, when the appellee seeks to recover it, he finds a deficit of \$1,700. If the trust fund had amounted to \$3,000, the appellee could have been required to take it, although it was incumbered with a life-estate, and could have charged no interest, because such was the agreement; but, on the other hand, if there was not that much of the fund belonging to appellant, he (the appellant) agreed to pay whatever was lacking. There was no agreement that appellee was to wait until the termination of the life-estate before he could enforce his lien for the deficit, if any. In fact, it plainly appears that both of the contracting parties supposed the appellant was entitled at once to the fund, and the trustee had already paid to the appellant, before the transfer to Reynolds, \$500 of the trust money.

The construction of the will of the grandfather, however, showed that the payment of the money was postponed until the death of the trustee, and that left the land, crops, mules, horses, etc., that the appellant had obtained from the appellee, in the appellant's possession, for which the transfer of the fund was only a fair equivalent, and the appellee compelled, as is insisted, to wait for the deficit until the death of the trustee, who was then only 54 years of age. Such we think is not a just or proper construction of the agreement. If the trust fund had been ample to pay for the land, the appellee could have looked to that alone, because he had bound himself to do so; but as it was not sufficient, when the deficit was ascertained, the right to enforce the lien existed.

The judgment of the court below is therefore affirmed. The question of fraud was litigated and determined in the first action.

LEWIS, J., not sitting.

PRICE v. SWAGER'S TRUSTEE.

(Court of Appeals of Kentucky. April 23, 1887.)

TRUSTS—TRUSTEES—APPOINTMENT BY CHANCELLOR—POWERS.

A testator by his will empowered his executor and trustee to lay off certain lots and streets in a tract of land owned by the testator, and to sell and convey a part or the whole thereof on such terms as might be beneficial to the estate, and use the proceeds in improving other property. The executor named in the will refused to qualify, and the chancellor appointed the appellee as trustee to execute the will. Held, the chancellor might confer on him all the powers given to the executor. Those powers were not of such a personal nature as could be exercised only by the person named in the will.

Appeal from Louisville chancery court.

E. F. Trabue, for appellant. *Chas. H. Gibson*, for appellee.

PRYOR, C. J. By the last will of Joseph Swager, he appointed O'Leary his executor and trustee, with certain powers and directions as to the disposition of his estate, and among them he directed the trustee to lay off certain lots and streets in a tract of 13 acres of land lying on the Dunkirk road, in the county of Jefferson, and to sell and convey such portions or parts or the whole of said lots on such terms as might be considered beneficial to his estate, and invest the proceeds in improving the lots unsold, or upon any other unimproved ground the testator owned in the city of Louisville. The will then proceeds to direct the trustee or executor as to the disposition to be made of the estate between his children and grandchildren. O'Leary refused to accept the trust, or to qualify as the executor, and the appellee, Sidney Hobbs, was, by an order of the Jefferson county court, appointed administrator with the will annexed of the estate, and qualified as such. After his qualification, he instituted an action in the Louisville chancery court against the children and devisees of the testator for a settlement of his accounts, and, at the instance of the chil-

dren, the appellee, Sidney Hobbs, by an order of court in that case, was appointed trustee in place of O'Leary, who declined to accept the trusts. The appellee qualified as trustee, and by an order of the chancellor was invested with all the powers and duties that had been conferred by the testator on the trustees who were designated as such by his last will and testament. Under this power conferred by the chancellor, the appellee, as trustee, proceeded to lay off the 13 acres into streets, alleys, and lots, and afterwards sold all the lots to the appellant, Vernon D. Price, for \$12,500, a part of which was paid in cash, and the balance in deferred payments.

The appellant refuses to pay the purchase money, or accept a deed from the trustee, in accordance with the terms of sale, on the ground that the chancellor had no power to confer on the trustee appointed by him the right to sell this realty in the manner directed by the testator when appointing the trustee by his last will, and who refused to qualify. The object of this proceeding is to enforce the contract by compelling the appellant, Price, to comply with the terms of sale, and accept the title offered by the trustee. The power to sell is expressly conferred by the will of the testator, and the refusal of the executor and trustee to qualify leaves no one to execute the trust, unless the right to appoint a trustee is with the chancellor. The mere appointment of the appellee as trustee would vest him with no other right than to hold and possess the property for the beneficiaries of the trust, but in this case the chancellor has gone further, and invested the trustee appointed by him with all the powers that had been given the trustees designated by the will; and the mere fact that the lots and streets were to be laid off, and a portion or all sold, as might be deemed by the trustees named in the will beneficial to his estate, was not such a discretion or confidence placed in O'Leary by the testator as finally terminated with the refusal of O'Leary to qualify. A mere power, to be exercised in the management of the estate, or for its benefit, is not of such a personal character as applies alone to the person named as the trustee and directed to execute it.

The direction to lay off the land into lots, and sell them, or any portion of them, without adding the words "as might be considered beneficial to the estate," would impose on the trustee the duty of so executing the trust as would in his judgment prove beneficial. The law imposed the duty on the part of the trustee of looking to the interest of the beneficiaries; and the desire of the testator that the lots should be sold is manifest from the provision of the will creating the trust. Without the aid of the chancellor, the trust could not be executed, and it is a familiar rule of equity that a trust shall not fail for the want of a trustee.

The cases of *Warfield v. Brand*, 13 Bush, 77, and *Harris v. Rucker*, 13 B. Mon. 456, settle the question presented. Besides, the trustee, clothed with all the powers conferred on the original trustees, is in the same court of equity from which he derived his powers, alleging the manner of its execution, and asking the chancellor to enforce the contract of sale made by him as trustee to the appellant. The chancellor approves his action; and, while he may control the investment of the fund by requiring the trustee to report his investments, still, as the appellant is in no manner responsible for the acts of the trustee after he, the appellant, performs his part of the contract, we see no reason why the judgment of the chancellor compelling him to accept the title should not be affirmed. Judgment affirmed.

ROBERTS v. HOSKINS' ADM'R.

(Court of Appeals of Kentucky. April 23, 1887.)

ABATEMENT AND REVIVAL—ACTION BY VENDEE—DEATH.

In an action against the vendee to enforce notes given for the purchase money of land, the vendee set up a defect in the title, and by cross-petition claimed a rescis-

sion of the purchase, and a cancellation of the notes; but he died before the trial. Held, that the action should have been revived, not only in the name of his administrator, but also of his children; the vendee's title, such as it was, having descended to his heirs upon his death.

Appeal from circuit court, Henry county.

Carroll & Barbour, for appellant. *John D. Carroll and Wm. M. Cravens*, for appellee.

PRYOR, C. J. The appellant, Roberts, executed to Hoskins a bond for title to a certain tract of land, and for which the appellee's intestate gave his notes, and paid part of the purchase money. The wife of Roberts owned the land in her own right, and died leaving children, who took the land by descent from their mother. The death of the wife left Roberts tenant by the curtesy; and, he having assigned the notes for the purchase money to Harford, the latter brought suit against Hoskins to enforce the contract. Hoskins died leaving children, but, before his death, had answered the suit of Harford, setting up the defect in the title, and asking for a cancellation of the contract, and a sale of Roberts' life-estate in the land to repay the purchase money and its interest. At Hoskins' death, after answer, his answer being made a cross-petition, the cross-petition was revived in the name of his administrator, and a judgment rendered canceling the contract, and subjecting the curtesy of Roberts to the payment of the money paid by Hoskins in his life-time. Roberts' complaint is that the cross-petition of Hoskins should have been revived in the name of his children, as well as his administrator. The title, if any acquired, passed from Hoskins to his heirs at law; and in order to divest them of title, and sell this realty, they were necessary parties.

It is urged that Hoskins had no title, and acquired none by his bond. It is true that Roberts had no title at the time he sold, but the death of his wife made him a tenant for life, and Hoskins sought to subject this on the idea that, to the extent Roberts had acquired title, the land was subject to sale to repay him what he had advanced on the purchase. It was an equitable lien created by reason of the inability of Roberts to make his title perfect. That title the children might have accepted, if beneficial to them, in preference to a personal judgment. While the reasons for a rescission are palpable, the vendee or his heirs are necessary parties. The intestate, Hoskins, held Roberts' bond for title, and the rescission could not be made without the heirs of Hoskins were before the court.

The judgment is in every respect a rescission of the contract for the sale of land between these parties. The judgment is therefore reversed, with directions to make the children of Hoskins parties plaintiff or defendant to the cross-petition, and for proceedings consistent with this opinion.

CARTER and others v. ADAMS and others.

(Court of Appeals of Kentucky. April 23, 1887.)

1. EXECUTION—EXEMPTION—HOUSEKEEPER—"FAMILY."

Under Gen. St. Ky. c. 38, art. 13, § 6, which exempts certain personal property of a debtor who is a *bona fide* housekeeper with a family from sale under execution or attachment, the word "family" means one or more persons dependent upon the debtor, and whom he is under a natural or legal obligation to support.

2. SAME.

A debtor who is a widower having two daughters, both of whom are married, and, with their husbands, board with him, cannot be considered as having a family within the meaning of the statute.

Appeal from circuit court, Warren county.

B. F. Proctor and E. W. Hines, for appellant. *Rodes, Settle & Rodes*, for appellee.

LEWIS, J. The evidence does not show that the land which appellant seeks to subject to the satisfaction of his judgment against J. G. Adams is now held in secret trust or otherwise for his benefit by either J. C. Adams or Taylor, or that he has any interest in or claim upon it whatever. On the contrary, under judgment in favor of other creditors rendered before the commencement of this action, the validity of which it does not seem can be questioned, the whole of the land appears to have been regularly sold and conveyed to J. C. Adams, who paid the purchase price thereof. The effect of those sales was not only to divest J. G. Adams of whatever interest in the land he may have had, but to annul the deed he made to Taylor in 1878, which appellant alleges in his petition, and J. G. Adams admits, was fraudulent and void as to his creditors, for whose benefit it was afterwards subjected and sold.

But the personal property belonging to J. G. Adams, a list of which he gives in his answer, we think is subject to appellant's debt, and the lower court erred in dismissing the petition as to him. To exempt personal property from sale under execution attachment, or for the satisfaction of a judgment, the defendant must be a *bona fide* housekeeper, with family. It is not sufficient that he be a housekeeper, but he must be one with a family consisting of one or more persons dependent upon him, and whom he is under a natural or legal obligation to maintain. The proof is that he is a widower, having two children, both of whom are married; that he resides in the same house with one of his daughters, her husband, and child. Admitting that he is the housekeeper, and that his son-in-law, wife, and child are boarders, which the evidence tends to show, still none of them, nor the old lady who resides with him, but is of no kin to him, can be considered members of his family in the meaning of the statute, for he is not under any natural or legal obligation to support either of them; his daughter and child being dependent upon her husband, who is bound to support them; and the old lady having no natural or legal claim on him for a support.

Wherefore the judgment is affirmed as to appellees J. C. Adams, Taylor, and McFadden, but reversed as to appellee J. G. Adams, and the case is remanded for further proceedings consistent with this opinion.

HARDIN and others v. WATSON and others.

(Supreme Court of Tennessee. March 11, 1887.)

1. APPEAL.—JURISDICTION.—APPEALABLE ORDER.

C. purchased lands at a sale on a decree in equity, in 1863, paying therefor in Confederate money. In 1869 a decree was rendered against him for the price, on the ground that the payment was invalid. In February, 1870, the court allowed him till the August term, 1870, to perfect title to part interest in the lands and decree which he had purchased from one of the persons interested; the decree concluding: "In the mean time the clerk and master will suspend the collection from C. of such sum as he may be entitled to as purchaser" of the part interest. Nothing more was done till April, 1879, when a final decree was pronounced, disposing of the cause, and settling all questions. The court refused C.'s prayer for an appeal from the action of the court in the whole case, on the ground that he asked "an appeal from a decree pronounced in 1869." From this refusal C. obtained an appeal. *Held* error, since no appeal lies from such action.

2. SAME.—FINAL DECREE.

The motion for judgment in 1869 was a suit in the interest of parties to the proceedings for sale of lands, and the judgment was final, as its finality was necessary to the progress of the cause. Hence it was appealable, but not after the expiration of the term at which it was rendered.

Appeal from chancery court, Lincoln county.

W. N. Cowden, for petitioner.

TURNER, C. J. In this cause land was sold, by decree of the chancery court at Fayetteville, some time prior to the war between the states. D. M. Cald-

well bought one of the lots, and paid for it. The cost payment of \$574.50 was made in January, 1862 or 1863. After the war, and in 1869, Farquharson, clerk and master, reported this payment was in Confederate money, and moved for judgment for the amount. The chancellor decreed: "The court being of opinion that said payment is invalid, and not binding upon the parties in interest, as well because of the illegal currency in which said payment was made, as because said McCord had no authority to receive or collect the same, doth decree accordingly; and it appearing that there remains due and unpaid on said note, including interest, the sum of \$808.22, it is therefore ordered, adjudged, and decreed," etc.; rendering judgment. This was on fourth October, 1869. An appeal was prayed and granted, but not perfected. On fourth February, 1870, Caldwell filed a petition, claiming an error of \$20 in the judgment, which was allowed, and also asking to be credited by the interest of Margaret A. Watson, which he claimed to have purchased. The chancellor gave time to perfect his title to that interest to the August term, 1870; the decree concluding: "In the mean time the clerk and master will suspend the collection from petitioner, Caldwell, of such sum as he may be entitled to as purchaser of the interest of said Margaret A. Watson." There this matter rested. The stay of execution *pro tanto* ceased with the August term, 1870, and the judgment was in all things restored, with no reason, from that time to the present, why execution should not issue. A final decree, disposing of the cause, and settling all questions, was pronounced at April term, 1879. "Caldwell prayed an appeal from the action of the court heretofore had in this cause, upon the whole case of *Nancy Hardin et als. v. Turner B. Watson and others*," "which the court declined to grant, because the said Caldwell now prays for an appeal from a decree pronounced in 1869." From the refusal Caldwell prayed and obtained an appeal.

The chancellor erred in his last order. No appeal lies from such action. If the party had a remedy, it was not by appeal. The decree pronouncing judgment in 1869 is not before us, and we are not at liberty to express an opinion as to its correctness. The petition to rehear is dismissed. The decree on the whole case is that the appeal, having never been properly here, is dismissed, with costs. If any other decree has been entered, it will be rescinded, and the one indicated entered. The motion for judgment in 1869 was a suit in the interest of the parties to the proceedings for sale of lands, etc. The judgment could be appealed from only at the term at which it was rendered. It settled the rights of the parties to it, and was final. The debtor, as such, was no further concerned in the matter. Its finality was necessary to further progress in the cause. Not appealing then, the parties were bound, the judgment remaining as of that date, with credits for any proper payments.

McGREW v. CITY PRODUCE EXCHANGE and others.

(Supreme Court of Tennessee. March 14, 1887.)

1. CORPORATIONS—LIABILITY OF STOCKHOLDERS—GAMING CONTRACTS.

In an action against the incorporators of a so-called "Produce Exchange," to recover moneys deposited as wagers upon the rise and fall of prices of grain, etc., it is no defense to claim that the corporation having been legally chartered for an apparently lawful purpose, the incorporators cannot be held individually liable for the illegal acts of its managers or officers, where the evidence shows that the incorporation was but a cloak used to cover illegal acts, such as those giving rise to the suit, (gambling in futures,) and which were contemplated in the organization, and afterwards done as a business.

2. CONTRACTS—GAMING—DEPOSIT WITH AGENT.

It is no defense to an action to recover deposits for dealing in futures that the money was not paid to the defendants, if the evidence shows that it was paid to their agent in another city.

3. SAME—STATUTORY LIMITATION.

Where money is deposited as a wager on the future rise or fall in the value of a certain commodity or thing, the statutory period of 90 days, during which suit must be brought to recover the same, (New Code Tenn. § 2440,) does not begin to run at the time of the deposit of the money, but from the time of the close of the "deal" to await the result of which the deposit was made.

4. SAME—RIGHT OF RECOVERY.

The provision of New Code Tenn. § 2440, that "any person who has paid any money or delivered anything of value, lost upon any game or wager, may recover," etc., is not to be limited to wagers made upon games, but covers all forms of wagers, including wagers upon the rise and fall of grain, etc.

5. SAME—DEALING IN FUTURES—INTENTION OF PARTIES.

The effect of the Tennessee act of 1883, c. 251, was to declare the dealing in futures, where either party intended a mere speculation on the rise and fall of prices, gambling; but a contract for the dealing in futures, entered into by parties *neither* of whom intended actual sale or delivery, was gambling at common law.¹

Appeal from chancery court, Davidson county.

J. D. Goodpasture and W. B. Bats, for McGrew. *East & Fogg, W. S. Bearden, and Hill & Granberry*, for City Produce Exchange.

SNODGRASS, J. This suit was brought on the fourth April, 1882, to recover various amounts lost by complainant on certain wagers made with defendants. The several amounts, with dates of their deposit, are set forth in the bill, together with dates of the closing of the "deals" whereby the loss occurred. All the deposits, except one for \$600, were made within 90 days of the commencement of the suit, and the "deals" referred to by which all the loss was occasioned were within 90 days. The individuals sued were Joseph W. Horton, Charles Sulzbacher, W. C. Graves, Thaddeus H. Mason, and Thomas Parkes, incorporators of the City Produce Exchange. The bill alleged, and the proof showed, that these defendants combined and confederated together, styling themselves and chartered as the "City Produce Exchange," for the purpose of engaging in the business of buying and selling "futures" in corn, cotton, wheat, etc., ostensibly, while in reality this was a pretense; the real business intended to be done, and in fact done, being the pretended purchase or sale, for future delivery, of these products under contracts in legal and valid form, when in fact illegal and invalid because of the non-existence of any real intention to buy and sell for such delivery; and so executed and framed to cover and conceal the real purpose of the parties, which was to gamble and wager on the rise and fall of prices of the articles pretended to be bought or sold.

There were several defenses interposed—*First*, that the corporation was alone liable; that, being chartered for an apparently legal purpose, the incorporators could not be held individually liable for illegal acts of its managers or officers. There is nothing in this defense. The facts justify the finding that the incorporation was but a cloak used to cover the illegal acts contemplated in the organization, and done as a business; and in such case the form of the transaction is disregarded, and the interest and substance ascertained, and liability fixed for the thing done, without respect to the pretense under which it was attempted to be concealed. Nor, in this connection, it may be properly stated, is it material that defendants did not themselves originally in person receive of complainant the sums lost by him, but did it through an agent at Shelbyville, who received and forwarded the money to their office at Nashville. When it appears that several have unlawfully combined and confederated to gamble with and defraud another through a selected party, each confederate participating is liable for the entire amount received, as the money is received for all, and by all, according to the devised illegal method under which they were all jointly operating.

¹See *Dunn v. Bell*, *post*, 41.

The *second* defense interposed was (as to one of the transactions,—a deposit of \$800, in December, 1881,) the statute of limitation of 90 days. New Code, § 2440. The language of that section is as follows: "Moreover, any person who has paid any money, or delivered anything of value, *lost* upon any game or *wager*, may recover such money, thing, or its value, by action commenced within ninety days from the time of such payment or delivery." If the money was lost when deposited, the item referred to could not be recovered, for more than ninety days had elapsed from the date of deposit until the commencement of the action; but this amount was not lost until the close of the "deal," as to it, on the eighth of February, 1882; and we hold that the statute did not operate until date of the loss, as before that time it was merely deposited to abide the result. The payment, for this purpose, must date from such appropriation of the money of complainant, or his loss at that time in the transaction.

It is also insisted that there can be no recovery in this case, because there was no "wager upon the game;" and that this is essential to constitute the "wager" referred to in the statute. The terms of the statute answer this position. It is not a "wager upon a game" for which recovery is authorized. The plain language is that money "lost upon any game" or "wager" may be recovered. Mr. Bonner defines a "wager" to be "a contract by which two parties or more agree that a certain sum of money, or other thing, shall be paid or delivered to one of them on the happening or not happening of an uncertain event." If for the word used in the statute this definition was substituted, there could be no doubt of the right of recovery. It would be a strange construction by which the statute should be deprived of its effect by refusing assent to the definition of its terms. Contracts of this character are clearly provided for, in letter and spirit, by the words used, and are obviously within the mischief intended to be suppressed. This is a sufficient answer, without pursuing the argument made in this connection by defendants' counsel, that a wager is not an indictable offense, within the meaning of the gaming law, under which merely betting on horse-races and elections was not, and therefore money lost on a wager is not recoverable under the statute. But, if it were necessary, we would have no hesitation in holding that such wagering contracts as those disclosed in this case were gaming, in the sense of the statute. It is now settled in this state that gaming is not confined to "playing at any game of hazard or address for money," etc., in the ordinary sense of these words, as used in Code, § 5688; but that it is "any agreement between two or more persons to risk money or property on a contest or *chance* of any kind, where one must be gainer and the other loser." *Bell v. State*, 5 Sneed, 507; *Eubanks v. State*, 3 Heisk. 488-490.

The first of these cases is an indictment sustained for gaming, against Bell for receiving money in "a scheme denominated 'a gift enterprise;'" and the last is another held good against Eubanks for taking money as consideration for sale of a prize candy package. It matters not what the unlawful device is upon which the money is received as a hazard; it is gaming. The argument established in this record was not gaming before the act of 1883, c. 251; and that this act was a legislative declaration to that effect is not sound for two reasons: *First*. Because that act did not declare that the dealing in futures, when *neither* party intended a real purchase or sale, was gaming, for it always had been so. *Second*. It declared that thereafter such dealing should be gaming "if *either* of the contracting parties, dealing simply for the margin, or on the prospective rise or fall of prices, had no intention or purpose of making actual delivery, or receiving the property or thing in specie." Acts 1883, p. 331. Before the passage of this law, such a transaction as dealing in futures, of itself, was not unlawful, nor was it unlawful unless it was the intent of both parties that there should be no real purchase or delivery. This act was intended to make it unlawful if *either* had no intention of effectuating a real

purchase or sale. It was designed to suppress the evil of dealing in futures, and limit such operations to *bona fide* sales and purchases by those who wished to sell to those who wished to buy. In making the seller responsible for the intent of the buyer, and the buyer responsible for the intent of the seller, it intended to suppress gambling by confining the business of buying and selling for future delivery in such limits as would practically preclude the possibility of it. The *bona fide* dealer can still operate, but he cannot do so upon any terms which do not protect the community against the pernicious and ruinous speculation in the rise and fall of prices. He is obliged, for his own safety, as this act provides extreme penalties, to avoid the speculator, and buy only for the legitimate demands of necessity and trade.

The unreported case of *Wallace v. State* is cited as an authority to show that this court, in discharging the defendant under commitment for contempt for refusing to answer before the grand jury in relation to certain dealings in futures at Shelbyville, thereby declared that these contracts under consideration were not gaming. The statement of the proposition by counsel in his brief is as follows: "The judge charged the grand jury that dealing in futures was gaming, within our statutes, and thereupon summoned Wallace before them. He refused to disclose the names of the dealers. The court imprisoned him for contempt. He applied for a writ of *habeas corpus*, and the case finally reached the supreme court," and the prisoner was discharged. Upon this statement the judgment of this court was manifestly correct, no matter what unreported reasons were assigned for it; he holding that "dealing in futures" was not gaming *per se*, as charged by the circuit judge. The court there held no more than we have here held. The defendant, it seems, was being examined generally, upon assumption of a right to have such examination generally made, with no charge of any unlawful dealing (which would have been gambling) pending before the grand jury, upon which they were expected to find an indictment or presentment. His commitment for contempt was therefore unauthorized, and his discharge clearly proper. This is the extent to which the judgment in that case can be looked to, and to no other purpose. It is authority for this, and no more.

The final defense in this case was one of settlement. The defendants insisted that they had made a settlement with their agent, Shoffner, at his and complainant's instance, and that complainant agreed that if such settlement was made as it was afterwards done, that such settlement should operate to discharge defendants of liability to complainant. Several of the defendants so testify, but complainant and Shoffner deny it, and gave some reasons for support of their version of it which are of much weight. We are entirely content to hold that, as against their evidence, the defendants have not made out the defense of settlement. The chancellor decreed against defendants. Three of them, Sulzbacher, Graves, and Mason, appealed.

The judgment must be affirmed with costs.

DUNN, by Next Friend, v. BELL and others.

(Supreme Court of Tennessee.)

1. CONTRACT—GAMBLING—DEALING IN "FUTURES."

Contracts purporting on their face to be contracts of purchase or sale of grain, stock, or other property, to be delivered at a future day, but under which neither of the parties intends to buy or sell real products, but both intend at the time of making the contracts to close them by a settlement of differences merely, are gambling or wagering contracts, and are illegal and void.¹

¹As to the validity of contracts for dealing in futures, see *Bangs v. Hornick*, 30 Fed. Rep. 97; *Beadles v. McElrath*, (Ky.) 3 S. W. Rep. 152, and note.

See, also, *McGrew v. City Produce Exchange*, ante, 38.

2. SAME—FOREIGN MARKETS.

The fact that wagering contracts, such as dealings in "futures," are made with reference to markets in foreign cities, and beyond the control of the parties to such wagers, does not affect the validity or invalidity of such contracts.

3. SAME—AGENT—LIABILITY OF CONFEDERATES.

Where several confederate together for an unlawful purpose, *e. g.*, stock gambling or dealing in "futures," the acts of one selected to transact the unlawful business are the acts of all, and each confederate is severally and jointly liable therefor.

4. SAME—SUIT BY WIFE—LIMITATION.

A suit by the wife of one who deposits money or property in pursuance of a gambling or wagering contract, to recover the same of the other party to such illegal contract, is not barred by the 90-days statute of limitation, (Code Tenn. 2440,) but may be brought within 12 months after the expiration of the 90 days. *Id.* 2441.

5. LIMITATION OF ACTIONS—SET-OFF.

The right of set-off accrues when an action is commenced, and is not barred by the statute of limitations, even though not pleaded within the statutory time, where the right of action is not barred, and the claim sued on and the set-off both arise out of the same transaction.

Appeal from chancery court, Davidson county.

J. D. Goodpasture and *W. B. Bates*, for complainant, Dunn. *East & Fogg*, for defendants.

CALDWELL, J. The origin, nature, and result, thus far, of this litigation, appears from the report of the commission of referees, which is as follows:

"TINNON, B. This is a case in which the complainant's husband bet and wagered his money with the defendants in margins upon the rise or fall in the price of certain commodities in the market at a future day. The complainant's husband lost his money, \$693.70, in these gambling and wagering contracts, and she filed this bill against the defendants, who got the money, within 12 months from the date of the transactions to recover it from them. The chancellor was of opinion and decreed as follows: 'It further appears to the court that the defendants made various wagering contracts in "futures" with M. C. Dunn, the husband of the complainant, and that said contracts were purely wagering or betting contracts on the rise or fall of the grain, cotton, or stock markets, without any intention on the part of either party to the contracts to handle or deliver any real article.' The chancellor granted a decree in favor of the complainant against the defendants for the money lost, and interest, \$749.20. The decree is clearly correct, upon the law and the facts of the case, except the set-off of \$178.65 claimed by the defendants, which we think should have been allowed. The proof shows that the complainant's husband, while he was losing his 'margins,' won that amount from the defendants. The defendants' right to plead the set-off *attached* when the bill was filed against them, and they were not barred by the 90-days limitation, although their answer, claiming the set-off, was not filed within that time. 'The bringing of a suit by one party saves from the operation of the statute all such claims of the defendant as are properly the subject of set-off, and which are in fact pleaded as a set-off in the action.' *Wood, Lim.* 601; *Williams v. Lenoir*, 8 Baxt. 396; *Ord v. Ruspint*, 2 Esp. 569.

"It is earnestly insisted, however, that the contracts to buy 'futures' in this case are not within the statute authorizing the losing party to recover back the money put up and lost 'in margins.' We think the contracts are, under the proof in the case, within the *letter* as well as within the *evil* intended to be remedied by the statute. The facts are that when the dealer, M. C. Dunn, concluded upon which side he would put up his margin,—whether he would risk it upon the rise or fall of the article named,—he signed and delivered to the defendants a written order to buy or sell the article named upon his account, at the price named, to be delivered at a future day specified; and the

defendants, at the same time, delivered to him a written contract that they *had bought*, or *had sold*, the article upon his account, to be *delivered* at a future day named in the contract. The contract then states the amount of the margin put up, and recites conditions upon which it would be lost, and the contract closed. The proof is conclusive that the defendants did not buy or sell the articles named in the contract, and that neither party *intended* at any time to buy, sell, deliver, or receive the articles specified; but *intended* simply to settle by the 'difference' in the price of the article in the market when the contract was made and the price on the day named for delivery. This leaves nothing in the transaction but a 'naked wager' upon the rise or fall of the article in the market. We think the margins put up under these contracts are as clearly wagers as can be conceived, pernicious in the extreme, and void, both by statute and public policy.

"We have heretofore considered the questions involved in these bucket-shop cases, giving the reasons and citing the authorities for our opinion, but, in deference to the earnest and able argument of the defendants' counsel in this case, we will again briefly state the ground of our conclusion.

"The Code, under the general head 'Void Contracts,' and under the special head 'Gambling and Wagering Contracts,' provides as follows:

"2438. All contracts, founded in whole or in part on a gambling or wagering consideration, shall be void to the extent of such consideration.

"2439. No money or property of any kind, won by any species or mode of gaming, shall be recovered by action.

"2440. Moreover, any person who has paid any money, or delivered anything of value, lost upon any game or wager, may recover such money, thing, or its value, by action commenced within ninety days from the time of such payment or delivery."

"5705. All laws made for the prevention, discouraging, or suppression of gaming shall be construed as remedial, and not as penal, statutes, and no presentment or indictment in such case shall be quashed for want of form."

"Bouvier defines a 'wager' as follows: 'Wager. A bet; a contract by which two parties or more agree that a certain sum of money, or other thing, shall be paid or delivered to one of them on the happening or not happening of an uncertain event.' The whole current of authority now is that contracts just such as these in this record, under the same state of facts, are gambling and wagering contracts, and void, both by statute and public policy. We have no doubt whatever that the legislature, in enacting the chapter in the Code entitled 'Void Contracts,' intended to declare all contracts and transactions of the character of those in this record 'gambling and wagering contracts,' and intended to empower the losing party, his wife or creditor, to recover the money thus lost from the other party. The construction of the penal statute against gambling, (Code, § 5688,) using the words 'play at any game of hazard or address,' and the cases defining gaming under that statute, have no application to the questions in this case. The chapter of the Code above recited, over the head of 'Gambling and Wagering Contracts,' was simply intended to provide a remedy for the losing party in all contracts void as gaming or wagering contracts, to recover back the money thus lost. We will cite some of the cases and authorities which we have considered, and which sustain our conclusions upon the questions in this case: *Marshall v. Thurston*, 8 Lea, 740; *Irwin v. Williar*, 110 U. S. 499, 508, 4 Sup. Ct. Rep. 160; *Dickson v. Thomas*, 97 Pa. 278; *Lyon v. Culbertson*, 83 Ill. 88; *Barnard v. Backhaus*, 52 Wis. 593, 6 N. W. Rep. 252, and 9 N. W. Rep. 595; *Story v. Salomon*, 71 N. Y. 420; *Love v. Harvey*, 114 Mass. 80; *Dos Passos*, *Stockbrokers*, 410, 477; 2 Benj. Sales, 714.

"Mr. Justice MATTHEWS, delivering the opinion of the court in *Irwin v. Williar*, above cited, says: 'The generally accepted doctrine in this country is, as stated by Mr. Benjamin, that a contract for the sale of goods to be delivered

at a future day is valid, even though the seller has not the goods, nor any other means of getting them than to go into market and buy them; but such a contract is only valid when the parties really intend and agree that the goods are to be delivered by the seller, and the price to be paid by the buyer; and if, under the guise of such a contract, the real intent be merely to speculate in the rise or fall of prices, and the goods are not to be delivered, but one party is to pay to the other the difference between the contract price and the market price of the goods at the date fixed for executing the contract, then the whole transaction constitutes nothing more than a wager, and is null and void.'

"The English statute (8 & 9 Vict. c. 109, § 18) is similar to ours, using the words, 'contracts,' by way of gaming or wagering, shall 'be null and void;' and the courts there uniformly hold that contracts like these in this record are within the statute.

"*Grissetwood v. Blane*, 11 C. B. 526, was an action on a contract for the future delivery of railway shares; and JERVIS, C. J., left it to the jury to say what was the plaintiff's intention, and what was the defendant's intention, at the time of making the contracts; 'whether either party really meant to purchase or sell the shares in question, — telling them, if they did not, the contract was, in his opinion, a gambling transaction and void.' The ruling was held to be correct. But certainly we need not multiply authorities upon the question. The statute is plain, and the evil to be suppressed is rank, and is corrupting the morals of the land. The charter of incorporation does not cover these transactions, and the defendants must be held liable individually, as confederates in unlawful transactions.

"We recommend that the chancellor's decree, modified as above indicated, be affirmed, but the complainant should pay the cost of the appeal.

"CALDWELL and EAKIN, RR., concur."

The defendants filed five exceptions to the report:

1. "Because the court failed to report that the alleged contracts were made upon the rise and fall of the New York and Chicago markets, and that the defendants or complainant had no control over the said markets." The report does fail as assumed in this exception; but that is wholly immaterial. That the contracts of the parties were made with reference to markets in other cities, and beyond their control, cannot affect the validity or invalidity of those contracts, and the liabilities flowing therefrom.

2. "Because the court failed to report that the defendant is an incorporated company," etc. The bill is not filed against "an incorporated company," and no such creature is before the court as a defendant. Certain individuals are sued as persons "trading under the name of the 'Tennessee Brokerage Association,'" but no effort is made to sue a corporation. The persons sued answer jointly, as individuals, making no reference to "an incorporated company." The bill of exceptions recites that it was agreed by counsel "that the charter of the 'Tennessee Brokerage Association' be read as evidence;" but no such charter appears in the transcript. The bill of exceptions parenthetically states: "This charter referred to was never filed."

3. "Because they do not report that said transactions * * * were legitimate, and not gambling or wagering transactions." The report states the facts of the case correctly with reference to the transactions mentioned therein, and properly applies the law to them. That neither party *intended* to buy or sell *real products*, and that both parties *intended*, at the time of making the several contracts, to close them by a *settlement of differences merely*, is well established by the proof; and the authorities cited sustain the proposition that such contracts are gambling or wagering, and therefore illegal and void. In accord is the late case of *Beadles v. Ownby*, 16 Lea, 424; also *Fortenbury v. State*, 1 S. W. Rep. 60.

The fourth and fifth exceptions are that such contracts are reported to be "within the meaning of section 2440 of New Code," when the contrary

should have been reported. Upon this point the report sustains itself, and we need add nothing to it. The same construction is given in an opinion delivered to-day by Judge SNODGRASS in *McGrew v. Produce Exchange*, ante, 38. The commission cited no authority for its holding, at the conclusion of the report, that "the defendants must be held liable individually, as confederates in unlawful transactions." Nevertheless that proposition of law is sustained by authority, both in cases of criminal and in cases of civil liability. Judge CARTON said, in *State v. Smith*: "It is insisted that those who encourage and promote gaming are not subject to indictment by the act of 1803. This is clearly a mistake, for two reasons. Let us put a case: Say four persons sit down to play loo. One of the parties bets nothing himself, but plays for another. Here he who plays encourages the match, without betting. So, adopt the construction contended for, neither is indictable; still, in point of fact, they are both guilty of gaming. In offenses inferior to felony, there are no accessories. All concerned in their commission are principals." 2 Yerg. 273. This language is quoted and approved in *Houlett v. State*, 5 Yerg. 153, for the purpose of holding one who did not bet himself, but played cards with others, whom he knew to be betting, guilty of encouraging and promoting gaming.

In *Lear v. McMillen*, 17 Ohio St. 469, the court said: "If the plaintiffs in error were in fact engaged in maintaining and carrying on an illegal business of gaming, it is not for *them* to set up the illegality of the business, or of the contract between them, to defeat their joint liability. It is a well-known rule of law that, when an illegal *conspiracy* is proven, the acts of each conspirator are held as the acts of all. It is true their illegal contract is not binding *between* them, but it is binding *upon* them. It gives no legal *rights*, but it imposes upon them legal *liabilities*. Having established their *joint* proprietorship, the defendant in error, by *proving the receipt of money by one, proved its receipt by all, and entitled himself to a joint recovery against all*. The real 'winners' of the money are the proprietors of the business, who, by the terms of the contract between them, no matter if it be an illegal contract, are to furnish the funds, pay the losses, and receive the winnings. The dealer is their agent, and they are estopped from denying his power to bind them. His winnings are their winnings, and his receipt of money won is their receipt. Any other construction of the law would render it utterly ineffective. It would only be necessary to put forward an irresponsible dealer in order that the real gamblers, who grow rich by his winnings, might evade the law. This would be to hold the nominal party, and let the real party escape,—to convict the 'dealer,' and acquit the *double dealer*. It would be of little avail to set aside the 'game' by which the plaintiff has been defrauded of his money, and allow him to recover it back, and yet allow the *deeper game*, by which the law itself is to be defrauded of its purpose, to have its intended effect."

It cannot be seriously controverted, in the face of this record, that the defendants were having the business, detailed in the report, conducted for their benefit. That such was the fact is not denied by any exception to the report; nor could it have been successfully denied by exception or otherwise. That they did not make the contracts themselves in person with Dunn is of no importance. The acts of one Herndon, whom they put forth for that purpose, were their acts, for which they are individually and jointly liable. The bill is in time as to all of the items allowed by the chancellor, though such items were not lost within "ninety days" next before the filing of the bill. This is the suit of the wife, by next friend, to recover money lost by her husband. It is only the *party losing the money* who must sue within "ninety days;" but suit by or on behalf of the wife is not barred if brought "after the expiration of the ninety days, and within twelve months thereafter." New Code, § 2441.

The chancellor improperly refused, and the commission properly allowed, the defendants the set-off claimed by them. The reason and authority for its holding are stated in the report. All exceptions are overruled, the report is confirmed, and decree of the chancellor is modified accordingly.

BAGWELL v. MCTIGHE.

(*Supreme Court of Tennessee.* April Term, 1887.)

1. APPEAL—FOREIGN STATUTE—JUDICIAL NOTICE.

Where evidence is offered on the trial as to the statute law of another state, and the bill of exceptions shows that fact, the statute itself need not (unless by direction of the circuit judge) be transcribed into the record, but the supreme court may take judicial notice of it. Code Tenn. § 4554. But, if such evidence is not offered below, the appellate court will not take such notice, where the result will be to put the court below in error.

2. STATUTES—FOREIGN STATE—JUDICIAL NOTICE.

In Tennessee the trial court cannot take judicial notice of the statute law of another state. What it is must be proved, or the court must decide upon the presumption that the foreign law is the same as the law of Tennessee.¹

3. LIMITATION OF ACTIONS—FOREIGN STATUTE—BURDEN OF PROOF.

A plaintiff seeking to avoid the bar of the statute of limitations of a sister state must show what that statute is, or the court will presume that it is the same as that of Tennessee; and, if the claim would be barred by the home statute, the defense will prevail.¹

Error to circuit court, Shelby county.

T. B. Edgington, for plaintiff in error. *Morgan & McFarland*, for defendant in error.

SNODGRASS, J. Bagwell and McTighe both resided in St. Louis, Missouri, on the sixteenth December, 1874, on which date the latter executed to the former the following note:

"ST. LOUIS, MO., December 16, 1874.

"Sixty days after date I promise to pay to the order of Robt. Bagwell fifty dollars, (\$50,) at American Financial Corporation, for value received, with interest from date at the rate of 10 per ct. per annum.

"J. S. MCTIGHE."

This note is sued on in this action, suit having been brought in Shelby county on the eleventh February, 1885. The place of payment designated in the note was in St. Louis, Missouri. Plaintiff still resides in that state, but defendant became a resident of Tennessee in July, 1884. The defense is the statute of limitations of six years, and this plea was sustained by the circuit judge. Plaintiff appealed in error. He insists that the action was not barred in Missouri, where the contract was executed, and where defendant resided, with temporary absence or residence in Arkansas; that, under the Missouri statute, 10 years' time is required to form a bar, and this period had not elapsed from the date of the maturity of the note, February 16, 1875, to date of commencement of this suit, February 11, 1885.

There was no evidence offered below as to what the Missouri statute was, and the court must have presumed it to be the same as our own. *Lewis v. Woodfolk*, 2 Baxt. 26. Had such evidence been offered, and the bill of exceptions made to show it, the law need not (unless by direction of the circuit judge) have been transcribed into the record, but this court might take judicial cognizance of it. Code, § 4554. But it is only when so offered in evi-

¹ See *Chicago & A. R. Co. v. Wiggins Ferry Co.*, 7 Sup. Ct. Rep. 398; *Renaud v. Abbott*, 6 Sup. Ct. Rep. 1194; *Hanley v. Donoghue*, Id. 242; *McLeod v. Connecticut & P. R. Co.*, (Vt.) 6 Atl. Rep. 648; *Harris v. Grand Trunk Ry.*, (R. I.) 5 Atl. Rep. 305; *Leatherwood v. Sullivan*, (Ala.) 1 South. Rep. 718.

dence below that this court is required to take such notice of the law of another state, and it will never do so for the purpose of putting the inferior court in error. Such action by this court would practically repeal the statute.

The inferior court is required to have evidence of what such law is before it, in order to act upon it, and is not allowed to take judicial notice of foreign law. The parties chose to bring no such evidence. The result is, the court below must decide upon the presumption that the foreign law is the same as our own, and determine the case accordingly. It has done right,—done precisely what the law requires; and yet, upon an appeal, using the same record, this court, if it must in all cases take judicial notice of such law, would be required to reverse the case, deciding in so doing that the inferior court had done right in determining the case as it had, and yet that such determination was erroneous. A construction leading to this result, doing such injustice to the inferior court as well as litigants therein,—applying one law to facts below, and another here, and changing results according to the court in which the litigation ended,—is manifestly improper.

In several of our cases the question has been noticed, and reserved; and in one (*Sherron v. Hall*, 4 Lea, 500) it was intimated that the court might take judicial notice of the laws of other states in all cases, whether the laws were proven or not; but this point was not decided in that or any other case, and we have no hesitation in holding the contrary. In the absence of evidence offered below, this court will presume, as the inferior court must, that the law of another state is the same as that of our own. *Lewis v. Woodfolk*, 2 Baxt. 26. This does away with the necessity of discussing section 3458 of the Code, and attempting to harmonize the several cases arising thereunder. Section 3480 provides that, "where the statute of limitations of another state or government has created a bar to an action upon a cause accruing therein, while the party to be charged was a resident in such state or under such government, the bar is equally effectual in this state." As the cause of action in this controversy accrued in Missouri, and as more than six years had elapsed before defendant removed to this state before the bringing of this suit, presuming their statute to be the same as our own, the action was there barred, and is here also.

The judgment must be affirmed, with costs.

CHESAPEAKE, O. & S. W. R. Co. v. HIGGINS.

(*Supreme Court of Tennessee.* April 8, 1887.)

1. CONFLICT OF LAWS—JURISDICTION—ACTION FOR DEATH.

In an action in Tennessee, by the widow of a locomotive engineer against the railroad company employing him, for damages for the loss of his life in a wreck of its engine and train, the company pleaded to the jurisdiction on the grounds that the plaintiff's husband was a resident of Kentucky at and before his death; that plaintiff lived there; that the greater part of defendant's road lay in Kentucky; and that the contract by which the deceased was employed was made there, and the engine placed in his charge there; that the breach of duty on the part of defendant, if any, had occurred in Kentucky, and therefore plaintiff could not sue in Tennessee. The accident occurred on the part of the road lying in Tennessee. *Held*, that the plea was bad, as the road was necessarily operated at the place of the accident under the Tennessee charter and the laws of that state.

2. NEW TRIAL—EXCESSIVE DAMAGES—APPEAL.

Deceased, a locomotive engineer, was killed by reason of the derailment of his engine caused by a collision with a bull on the track. Deceased was a capable and skillful engineer, the engine was in good order, and the accident was unavoidable, and not the fault of the company. A verdict of \$500 having been found by the jury in favor of deceased's widow, she procured it to be set aside on the ground of inadequacy of damages. On a new trial, the verdict was \$5,000, from the judgment entered upon which the company appealed. *Held*, that the judgment appealed from should be reversed, and judgment rendered for the amount of the first verdict, with interest from the date of its rendition, the company to pay costs accruing up to that date, and the plaintiff all subsequent costs.

8. APPEAL—JUDGMENT—REVERSAL.

The supreme court of Tennessee has the same power to reverse for error in granting new trials, and enforce verdicts improperly set aside, that it has to reverse judgments rendered upon improper verdicts. Act 1875, c. 124.

Appeal from circuit court, Shelby county.

Holmes Cummins, for Railroad Co. *Wright & Folkes*, for Higgins.

TURNER, C. J. The widow of Martin Higgins sues the railroad company for damages resulting from the loss of his life in a wreck of its engine and train. The declaration is demurred to on two grounds: (1) Higgins, as engineer, knew the condition of his machine, and continued in its use willingly, and without objection, assuming the risk incident to such defects; (2) no cause of action is stated. Sufficient averments appear in the declaration to overrule the demurrers.

The defendant pleaded not guilty, and that Martin Higgins resided in Kentucky at and prior to his death; that plaintiff resided there, and the greater part of defendant's road lay in that state; that the contract of employment of Higgins was made in that state; the engine placed in his control there; the breach of duty, if any, had occurred there; and therefore plaintiff could not sue in Tennessee. The accident occurred on that part of the road lying in Tennessee, where the road must be operated under its Tennessee charter, and the laws of this state. The residence of the deceased, or of the plaintiff, will not change the rule. She is as well comprehended in our statute as a citizen of the state.

There were several trials of the cause in the circuit court. In one there was a verdict for plaintiff for \$500, which, on her motion, was set aside; her ground and the reason of the court being, "the verdict of the jury assessing plaintiff's damages as \$500 was and is insufficient and inadequate for the loss of her husband." The motion to set aside was resisted, and a bill of exceptions was presented under the statute providing: "Where a motion for a new trial shall be granted or refused, either party may except to the decision of the court, and may reduce to writing the reason offered for said new trial, together with the substance of the evidence in the case; also the decision of the court on said motion; and it shall be the duty of the judge, before whom such motion is made, to allow and sign the same; and such bill of exceptions shall be a part of the record in the case. It shall be lawful for the appellant in such case to assign for error that the judges in the court below improperly granted or refused a new trial therein, and the supreme court shall have power to grant new trials, or to correct any errors of the circuit court in granting or refusing the same." Acts 1875, c. 124.

The effect of this statute is simply to give to this court the same power to reverse for error in granting new trials, and enforce verdicts improperly set aside, that it has always had to reverse judgments rendered upon improper verdicts. The consideration of the question in the record arising under this statute is just the same as it would have been had the court refused to set aside the verdict at the instance of the plaintiff, the defendant resisting, and the plaintiff had appealed. To be more explicit, we try the case upon the first record just as if the case had come to us on appeal of plaintiff. Ignoring the fact that the verdict and judgment on a new trial was \$5,000, and looking alone to the fact that the verdict for \$500 is before us, we look to the facts to ascertain whether the verdict was authorized.

The facts are substantially the same on both trials, and show that deceased was a capable, skillful, and experienced locomotive engineer, and accustomed to running the engine by the wreck of which he lost his life; that he ran it from Louisville to Memphis, drawing a pay-car, and on its return from Memphis, as far as Brighton, a distance of 30 or 32 miles, near which latter point he was derailed by collision with a bull which was seen on the

track only a very few seconds before collision, and not in time to check the train, and (as he said to several persons) when it was impossible to prevent an accident. *En route* from Louisville he complained of a want of air to his brakes, and at several points dismounted, and examined the engine, and never alluded to any other defect in his engine. At Memphis he thought so little of this defect that he made no mention of it, until asked by a master mechanic if all was right with his engine, when he called attention to the trouble, which was remedied. He then tested it, and said it was "all right." On the same evening, as he left Memphis, and was passing the mechanic who had repaired the engine, he "shouted" to him it was "all right." During the several days he lived after receiving injuries he is not shown to have complained of any defect whatever in the engine, but in several conversations he attributed the accident, as we have already seen, to the impossibility to so check his speed as to prevent the accident in the short time after discovering the animal on the track. These facts are in nowise controverted.

It is argued the pilot or cow-catcher was loose and insufficient, and there is some proof to that effect; but the large preponderance of the evidence is to the reverse. Several engineers and mechanics, who profess to speak from personal observation and knowledge, show there was no defect; and it is clear that the defect complained of—looseness and closeness to the track of the pilot—was not the cause of the derailment. It did not hang upon an obstruction. It threw the animal into the air, the animal fell, and was passed under the engine, and rolled into a ditch; the engine passing on the road some distance before leaving the track, when it fell or turned over on its side, the pilot remaining fast to the engine, with part of it driven in the ground.

Experts acquainted with the engine, and who had run it and repaired it, prove that it was a safe one, and in good condition, and that the defects complained of did not increase the danger, but only decreased the capacity of the engine to draw. This latter is proven by a number of experienced mechanics and locomotive engineers, disconnected with defendant company; as also that the pilot was properly attached. The truth of these is put beyond doubt by the conduct and statements of Higgins, the competent, intelligent, and faithful engineer who lost his life. The facts do not make a case for the plaintiff; the accident being such as would in all probability have happened to any engineer. The verdict of the jury for \$500 does not evince passion, prejudice, or corruption authorizing the court to set it aside. If it shows feeling at all, it is sympathy for the widow who sues.

The judgment for \$5,000 is set aside, and a judgment rendered here for \$500, with interest from the date of that verdict. The railroad will pay all costs accruing before and including the first verdict. Defendant in error will pay all other costs.

FOLKES, J., incompetent, and did not preside.

MORROW v. MCGREGOR and others.

(*Supreme Court of Arkansas.* April 16, 1887.)

EXECUTION—SALE—VALIDITY—FIXTURES.

In Arkansas a sale by a sheriff, by order of a court of equity, of a cotton-gin and condenser, together with the gin-house, made at the court-house door, will not be held void because the property was not present, as, being a fixture, it is in the nature of real estate, and may be sold as such.

Appeal from circuit court, Boone county.

O. W. Watkins, for appellant. J. F. Wilson, for appellees.

COCKRILL, C. J. This is an action of replevin for a cotton-gin and condenser, together with the gin-house in which they are located. It is conceded
v. 4s.w.no.2—4

that they are all personal property. The evidence is not set out, but only the court's special finding of facts, which is as follows: "That the plaintiffs in the suit below were the owners of said property, and that they became the owners by virtue of a sale made by the order and judgment of the Boone circuit court; that the sale was made at the court-house door, in the town of Harrison, in Boone county, as the court directed, and that the property, at the time of the sale thereof, was not present, but was at the town of Lead Hill, in said county, more than twenty miles away from the place of sale; that the sale was afterwards reported to said Boone circuit court, and was by said court confirmed; that, soon after the sale aforesaid, the sheriff selling the same placed the appellees in possession of the property; and that the defendant was in the wrongful possession thereof at the time this suit was brought against him." Judgment was entered for the plaintiffs. The defendant has appealed, and argues that the sale of the property through which the plaintiffs derive title is shown to be void because the property was not present for the inspection of bidders at the time of the sale.

That an ordinary execution sale, by a sheriff or constable, of personal property, not present at the time of the sale, is void, was determined in *Kennedy v. Clayton*, 29 Ark. 276, and *Rowan v. Refeld*, 31 Ark. 648. But a sheriff who has been appointed to execute a decree or order of sale acts by virtue of the order, and not by virtue of the office of sheriff, and the sale is the sale of the court when confirmed. Such is our understanding of the sale in this case, and there is but slight analogy between it and a sheriff's ministerial sale under execution. In the former class of sales, the time, place, terms, and manner of sale, when not prescribed by statute, are regulated by the court. The court is the vendor. The order of sale, like the order of confirmation, is a judicial act, (*Halleck v. Guy*, 9 Cal. 181; *Mason v. Osgood*, 64 N. C. 467,) and either or both will be made or refused as the law or justice of the case may require, (*Thomason v. Craighead*, 32 Ark. 391;) and, like other judicial determinations, the orders are not open to collateral attack except for lack of jurisdiction to make the order. Excellent reasons may be given why personal property should be within the view of the bidders at a public sale, and it is therefore the policy of the law to require it; but we do not think it would be wise to carry this policy to the extent of declaring that it is so far beyond the power of the chancellor to dispense with the presence of the property as to render the action of the court a nullity. The property involved in this case would ordinarily be fixtures, (*White v. Chaffin*, 32 Ark. 59, 70; see *Foster v. Mabe*, 37 Amer. Dec. 749, note;) and it partook of the nature of real estate. The court, in directing the sale, probably concluded that the usual order for the sale of real estate would best subserve the ends of justice.

The finding of facts does not show that the order directed the sheriff to sell in the absence of the property; but it shows that he was directed to sell at the court-house door, and the nature of the property is such that it is improbable that the court intended that it should be moved for the purpose of sale, and this view is sustained by the subsequent confirmation of the report of sale. Affirmed.

ST. LOUIS, I. M. & S. RY. v. FAIRBAIRN.

(Supreme Court of Arkansas. March 19, 1887.)

1. RAILROADS—CONDITION OF PREMISES—NEGLIGENCE.

A railroad is bound to use ordinary care to keep the platforms at its various station-houses in good repair and safe condition for the use of those who have the legal right to go upon them; and, it appearing in this case that the railroad was required by statute to post at the nearest station-house a notice of the killing of stock by their trains, and that one who was missing a cow went upon the platform of the station to read a notice posted there, taking plaintiff with him to do the reading,

as he himself was unable to read, and that plaintiff, in climbing up to get at the notice, fell through a defective plank in the platform, and was injured, *held*, that the railroad was liable to plaintiff.¹

2. NEGLIGENCE—CONTRIBUTORY—LAW AND FACT.

The act of plaintiff in going upon the platform to read the notice about dark, cannot, as a conclusion of law, be declared *per se* negligent.

Appeal from circuit court, Clark county.

Dodge & Johnson, for appellant. *Crawford & Crawford*, for appellee.

COCKRILL, C. J. The appellee was injured by stepping into a cavity caused by a rotten plank in the appellant's platform at Biene station. The jury found the issues in his favor, and the question whether the appellee was lawfully upon the platform at the time he was injured is the only one properly left for our consideration. If he was there merely from curiosity, or for his own convenience, or for the transaction of business in no way connected with the railroad company, no relation existed between him and the company which imposed upon the latter the duty of exercising even ordinary care in maintaining a safe platform for his use, and it is not liable for his injury. *Thomp. Carr.* p. 105, § 2; *Pittsburgh, Ft. W. & C. Ry. v. Bingham*, 29 Ohio St. 364; *Gillis v. Pennsylvania Ry.*, 59 Pa. St. 129; *Kansas City Ry. v. Kirksey*, 8 S. W. Rep. 190. But the company is bound to use ordinary care to keep its platform in a safe condition for the benefit of those who have the legal right to go upon them. The public duties and obligations of a railroad confer upon the public the right to enter upon its premises for the purpose of making such obligations available. There is an implied promise on the part of the company that these obligations will be discharged, and this promise is an inducement—an invitation—to those who may wish to derive a benefit therefrom to enter upon the premises for the purpose; and, when they do so, the company owes them the duty of having its premises in such condition that a person, in the exercise of ordinary care, can transact his business without injury.

In fixing the railways' obligations, the statute requires that they shall post upon the nearest station-house a notice of the killing of stock by their trains, and imposes a penalty to be recovered by the owner for its non-observance. This is for the benefit of the stock-owner. If his cow is missing, and he is informed that an animal has been killed upon the railroad track, he can get a description of it, with the time and place of the killing, from the notice the company is required to post, and is thus facilitated in making his claim for compensation. It is necessary that he should go upon the platform at the station for this purpose, and he has therefore the legal right to do so. Without this right, the notice would be useless, and would not have been required.

In the case before us, a cow had been killed on the appellant's track. The owner was apprised of the fact, and desired to examine the notice, which he knew was posted at the station, in order to get more accurate information. He was illiterate, and unable to read. He procured the plaintiff to go with him and read the notice for him. The notice was posted on the wall of the station-house, and the plaintiff was compelled to mount a box to read it. When he stepped off the box, his foot went through a hole in a decayed plank in the platform, and he was injured. If the stock-owner had been injured,

¹ A railroad company is bound to keep in safe condition for its passengers all that part of its stations and platforms where passengers are expressly or impliedly invited to go, and is bound, by its servants and agents, to exercise due care towards passengers using its stations and platforms by its invitation. *Keefe v. Boston & A. R. Co.*, (Mass.) 7 N. E. Rep. 874. With respect to its platforms and approaches the company is to be held to that reasonable degree of care for the safety and protection of its patrons, having regard to the nature of its business, as is demanded of individuals upon whose premises others come, by invitation or inducement, for the transaction of business. *Pennsylvania Co., etc., v. Marion*, (Ind.) 3 N. E. Rep. 874.

while properly exercising his right to examine the notice, through the want of ordinary care on the company's part, we think it clear that he could recover. He was there through the inducement or upon the invitation of the company, implied from posting the notice for his information, and was entitled to safe access to his place of business. 2 Wood, Ry. Law, § 310; *Carleton v. Franconia I. & S. Co.*, 99 Mass. 216. This right of protection extends to all persons "who have rightful occasion to use" the platforms, as was said by APPLETON, C. J., in *Tobin v. Railroad Co.*, 59 Me. 183. This was the case of a hackman engaged in carrying passengers to the railroad depot. See, too, *Wendell v. Baxter*, 12 Gray, 494. No distinction can be drawn between the plaintiff and the stock-owner in the right to go upon the platform to examine the notice. What the latter had the right to do himself, he had the power to authorize another to do for him. An employee who goes upon a company's premises to receive his master's freight enjoys the same right of protection that the master does, (*Toledo, W. & W. Ry. Co. v. Grush*, 67 Ill. 262,) and for the same reason that the plaintiff here should be protected, viz., because he is clothed with his principal's right to enter the premises to transact his business; and the rule applies to one who goes upon the company's premises to aid a friend who is to depart or arrive by its trains, (*Gillis v. Pennsylvania Ry.*, *supra*; *McKone v. Michigan Cent. Ry.*, 51 Mich. 601, 17 N. W. Rep. 74.)

But it is said the plaintiff was guilty of contributory negligence in entering upon the platform at the hour selected. It was dusk,—neither daylight nor dark. We cannot declare, as a conclusion of law, that this *per se* was negligence. The question was fairly submitted to the jury, under proper instructions, to determine whether the plaintiff's conduct contributed to his injury, and they have resolved the question in his favor. The charge was as favorable to the company as it could demand, and the facts proved were sufficient to warrant the jury in finding that the plaintiff was free from negligence, and that the defendant was not. Affirmed.

ST. LOUIS, I. M. & S. RY. CO. v. WHITE, by Next Friend.

(*Supreme Court of Arkansas. March 19, 1887.*)

RAILROADS—PASSENGER—NEGLECT—VERDICT.

In an action to recover from a railroad for damages received by plaintiff while alighting from a passenger train, *held*, although the length of the stop was sufficient to enable him to leave the train in safety under ordinary circumstances, and he was young, presumably active, unincumbered with baggage, and the failure of the company adequately to light its station and platform was not shown to have contributed directly to the injury, yet, the injury having been found by the jury to have been caused by the railroad's negligence in this respect, the court on appeal will not disturb the verdict, it appearing that the instructions given were correct.¹

Appeal from circuit court, Nevada county.

Dodge & Johnson, for appellant. *Smoot, McRae & Hinton*, for appellee.

SMITH, J. White recovered a verdict and judgment for \$1,000 against the railway company for injuries sustained by him as a passenger in alighting from one of its trains. The supposed omissions of duty by the defendant consisted in failing to stop the train long enough to enable the plaintiff to get off in safety, and in imperfectly lighting the station for which the plaintiff was

¹ Stopping a railroad train at such a place and under such circumstances that a passenger cannot safely get on or off is negligence on the part of the company. *Bullard v. Boston & M. R. R.*, (N. H.) 5 Atl. Rep. 838, and note. When the cars stop at a passenger's place of destination, it is his duty to leave the car without unnecessary delay, and the company's to give him a reasonable opportunity to do so with safety. The exact length of time to be given must depend very largely upon circumstances. *Keller v. Sioux City & St. P. R. Co.*, (Minn.) 6 N. W. Rep. 74.

bound. He was in his twentieth year, and the accident happened about 2 A. M. of a dark night. His testimony was that as soon as the station was announced, and the train had come to a stand-still, he arose from his seat, made his way out to the car platform, saw no lights, and was in the act of stepping onto the station platform, when the train suddenly started, and threw him between the train and platform, crushing his foot. He also swore that the train stopped about three minutes or less; that the cars were lighted, and cast some light on the platform, which he could see as he was in the act of stepping off. The other testimony, as well that for the defendant as that given in behalf of the plaintiff, conduced to establish the facts that the train stopped near three minutes, and that the station was insufficiently lighted.

There is no doubt that the plaintiff received a painful injury, permanently impairing his ability to earn a livelihood. But the connection between that injury and the defendant's negligence is not so apparent. The length of the stop was sufficient to give him time to leave the train under ordinary circumstances. He was young and presumably active, unincumbered with baggage, and the only passenger for that station. The failure of the company adequately to light its station and platform is not shown to have contributed directly to the injury. Nevertheless, the jury may have concluded that this circumstance was a potent factor in producing the result; and, as the case was submitted to them under proper instructions, there is no good reason for disturbing their verdict. *Affirmed.*

GATES and another v. STEELE.

(*Supreme Court of Arkansas. March 23, 1887.*)

1. HOMESTEAD—WHO ENTITLED TO—HEAD OF FAMILY.

A man is to be considered as the head of a family, and entitled to homestead, although his family may consist only of a wife, who has deserted him.¹

2. SAME—ABANDONMENT—LEASE FOR LIFE.

A lease of land for life, made by an old man whose old age and ill health compelled him to go and live with his daughter, he reserving the right to return to the place and make it his home, *held* not to be an abandonment of homestead.¹

3. SAME—INTENTION.

The abandonment of a homestead after it has been once in good faith established, is always a question of intention.¹

4. EVIDENCE—PAROL, AFFECTING WRITING—LEASE.

An execution creditor levied on the homestead. *Held*, in an action between him and the lessor, that parol evidence was admissible to prove that the lessor stipulated with the lessee, at the time of making the lease, that he should have the right to return to the land thereafter. As the suit was not between the lessor and lessee who were parties to the written instrument, the rule prohibiting parol evidence to contradict a writing does not apply.

Appeal from circuit court, Prairie county.

C. E. Warner, for appellants. J. E. Gatewood, for appellee.

SMITH, J. Gates & Bro. recovered a judgment against Steele, and sued out an execution, which was levied on 80 acres of land. The defendant filed his schedule, claiming the land as his homestead, and the clerk of the circuit court stayed the sale. The plaintiffs now moved the court to quash the *supersedeas* upon two grounds: (1) That Steele was not a married man, nor the head of a family, within the meaning of the exemption clause of the constitution; and (2) that the land was not occupied as a home at the date of the levy. But the circuit court refused to discharge the *supersedeas*. Steele had established his home upon this tract many years before, and lived upon it at the time of the contraction of this debt, and of the recovery of judgment, with his wife

¹ See note at end of case.

and a son nine or ten years old. These members of his family were still living at the date of the levy and subsequent trial. But his wife had in the year 1879 left him, and had not since lived with him, although the parties had never been divorced. Steele having fallen sick, and being about 70 years of age, his son-in-law, Wray, who lived on an adjoining farm, had removed him to his own house, that he might be nursed and cared for; and in December, 1879, Steele executed to Wray a lease for the premises. This instrument recites the lessor's age and infirmities, and purports to let the farm for the remainder of his life in consideration that Wray will support and provide for him; and, in case of failure to do so, the lease is to be at an end. But Wray's interest is limited to the taking of the annual rents, and Steele expressly reserves his right of homestead in the demised premises. Steele had never regained his health, and had continued to live with Wray for four or five years, and, indeed, until after the writ was levied, when he moved back to his own place. The lease had never been canceled, and Wray still controlled and managed the land. But the oral testimony adduced on both sides tended to show an understanding and agreement that Steele might return and resume possession whenever he felt himself strong enough. The inducement for the lease was his fear lest he might become a burden to his son-in-law. He says he turned the place over to Wray to keep until he was able to go back. A bed and carpenter's tools were carried to Wray's, but the rest of his furniture and effects were left on the farm.

On the first point we have no difficulty. Steele was a married man, and the head of a family. He owed his wife and minor son protection and support. The wife, though living separate, might have returned to her duty at any moment. *Stanley v. Snyder*, 43 Ark. 429, goes much further; holding that a homestead right once acquired is not forfeited by the death of the wife, and the arrival at age and removal of the children. Aside from the authority of that case, and leaving out of view Steele's obligations to his infant son, it is hard to understand how the voluntary desertion of his wife could alter the legal status of Steele. The adjudged cases lend no support to such a view; but, on the contrary, it has been frequently decided that while a marriage *de jure* exists the husband is the head of a family, within the purview of the homestead law, although his family may consist only of a wife, who has left him. *Brown v. Brown's Adm'r*, 68 Mo. 388; *Whitehead v. Tapp*, 69 Mo. 415; *Pardo v. Bittorf*, 48 Mich. 275, 12 N. W. Rep. 164.

The other point presents a closer question. Under ordinary circumstances, the execution of a lease for life would furnish conclusive evidence of an abandonment of the homestead; for the owner thereby puts it out of his power to use the premises for a family residence. But Steele's absence was involuntary, and his lease stipulated for the retention of his homestead. Even in a controversy between lessor and lessee, some effect should be given to this clause, if it is susceptible of any. The most obvious meaning is that Steele reserves the right to make his home upon the land, and such is the construction the parties to the lease have themselves practically put upon this provision. But this is not a suit between the parties to the instrument. Hence the rule which prohibits the contradiction of the written contract by parol evidence does not apply. It might be and was shown that other agreements were made concerning the property besides those expressed in the writing. 1 Greenl. Ev. § 279; *Hensley v. Brodie*, 16 Ark. 511; *Talbot v. Wilkins*, 31 Ark. 411.

The abandonment of a homestead, after it has once been in good faith established, is always essentially a question of intention. *Thomp. Homest. & Ex.* § 263 *et seq.*; *Tumlinson v. Swinney*, 22 Ark. 400; *Euper v. Alkire*, 37 Ark. 283; *Brown v. Watson*, 41 Ark. 309. Deference is accordingly due to the decision of the trial court, if there is any sufficient evidence that the claimant, at the time of leaving, contemplated a return. Here the plaintiffs

themselves introduced a witness from whose statements the court below might infer that the abandonment was not final. **Affirmed.**

NOTE.

HOMESTEAD—ABANDONMENT. An actual removal from the homestead constitutes an abandonment thereof, in *Town, Newman v. Franklin*, 28 N. W. Rep. 579; *Leonard v. Ingram*, 10 N. W. Rep. 804; *Massachusetts, Foster v. Leland*, 6 N. E. Rep. 859; *Minnesota, Williams v. Moody*, 28 N. W. Rep. 510; *Robertson v. Sullivan*, 17 N. W. Rep. 336; *Donaldson v. Lamprey*, 11 N. W. Rep. 119; *Texas, Bowman v. Watson*, 1 S. W. Rep. 273. But a merely temporary change of residence does not, *Earl v. Earll*, (Mich.) 26 N. W. Rep. 822; *Coad v. Neal*, (Iowa,) 8 N. W. Rep. 342; although the homestead is rented to other parties during such temporary absence, *Earl v. Earll*, (Mich.) 26 N. W. Rep. 822; *Shirland v. Union Nat. Bank*, (Iowa,) 21 N. W. Rep. 200; *Coad v. Neal*, (Iowa,) 8 N. W. Rep. 342; if the owner retains the use of a portion of it for the purpose of storing furniture, *Earl v. Earll*, (Mich.) 26 N. W. Rep. 822; *Shirland v. Union Nat. Bank*, (Iowa,) 21 N. W. Rep. 200.

The homestead will be deemed to be abandoned, unless the purpose to return is a fixed and definite one. *Kimball v. Wilson*, (Iowa,) 13 N. W. Rep. 748; *Cotton v. Hamil*, (Iowa,) 12 N. W. Rep. 607. The intention not to return, if successful at the new home, is not such a purpose, but is an intention to permanently reside at the new home, qualified by a contingency, and constitutes an abandonment. *Kimball v. Wilson*, (Iowa,) 13 N. W. Rep. 748. But it has been held that where a debtor removed from his homestead, that he might be more favorably located for the purposes of his business, and contracted to sell the land, but the contract was never carried out, his intention being to invest the proceeds in another homestead, and to return to the land if he could not sell it, and acquire another home, the purpose for which the removal was made was not inconsistent with an intention again to use the land for a home; and that the qualified intention not to return to the land if it could be sold, and a more suitable home acquired with the proceeds, was not the intention which, connected with change of domicile, would operate an abandonment. *Sanders v. Sheran*, (Tex.) 2 S. W. Rep. 804.

The exercise of suffrage at the new home is evidence that the removal was not intended to be temporary, *Cotton v. Hamil*, *supra*; *Ross v. Hellyer*, 26 Fed. Rep. 413. Where the intention is to sell the new home and procure another, and the homestead is repeatedly offered for sale, no such fixed purpose is shown. *Cotton v. Hamil*, *supra*.

The husband is the head of the family, and it is for him to determine and fix its domicile. *Williams v. Moody*, (Minn.) 28 N. W. Rep. 510. It is not material whether the wife lived with him or not. *Earl v. Earll*, (Mich.) 26 N. W. Rep. 822; *Pardo v. Bittorf*, (Mich.) 12 N. W. Rep. 164. The mere fact that the wife has left her husband, while a circumstance to be considered in determining the question of abandonment and loss of his homestead right, is not conclusive. *Griffin v. Nichols*, (Mich.) 17 N. W. Rep. 63. When the family leaves the domicile, it is the husband's intention as to returning which controls as to the departure being permanent or temporary; and, if he has no intention of returning, it constitutes an abandonment. *Williams v. Moody*, (Minn.) 28 N. W. Rep. 510. But his absence does not operate as an abandonment of the homestead which the family continues to occupy, *Dennis v. Omaha Nat. Bank*, (Neb.) 28 N. W. Rep. 512; *Savings Bank v. Kennedy*, (Iowa,) 12 N. W. Rep. 479; *Griffin v. Sholey*, (Iowa,) 8 N. W. Rep. 343; although the object of such absence is the establishment of a new homestead, *Robertson v. Sullivan*, (Minn.) 17 N. W. Rep. 336; *Savings Bank v. Kennedy*, (Iowa,) 12 N. W. Rep. 479. The acquisition of a new homestead is an abandonment of the first. *Donaldson v. Lamprey*, (Minn.) 11 N. W. Rep. 119; *Windle v. Brandt*, (Iowa,) 7 N. W. Rep. 517.

Where a man occupies property as a homestead, and, during an absence of his wife for five months, keeps articles of furniture in the house, but lets it to a tenant with an intention of returning, and during the time resides elsewhere, this is a temporary absence, and will not defeat the homestead right. *Earl v. Earll*, (Mich.) 26 N. W. Rep. 822. The sale of that portion of a homestead upon which the house was situated, though the vendor remained in occupancy thereof for some time afterwards as a mere tenant at will, amounts to abandonment of his homestead rights in the remaining portion of premises forming the original homestead, so that it becomes liable to sale on execution. *Windle v. Brandt*, (Iowa,) 7 N. W. Rep. 517. The absence of the family while the husband is attending to his ordinary business, and the wife was keeping house elsewhere for the purpose of enabling her to board her only son while he was attending school, do not constitute an abandonment of their homestead, though it had been rented to other parties, the owners retaining the use of certain rooms for storing their furniture. *Shirland v. Union Nat. Bank*, (Iowa,) 21 N. W. Rep. 200. Where a widow remarried, and removes, with her children and household goods from the homestead which she occupied as widow, to the home of her second husband, in another county, and resided there four years, with no special intention of returning, held, she could not afterwards claim the homestead, as, notwithstanding her coverture, the in-

tention not to return affects her right, and her continued absence constitutes an abandonment, just as if she were *sui juris*. *Kaes v. Gross*, (Mo.) 3 S. W. Rep. 840. While the length of a person's absence may not be conclusive proof of his intention to abandon his homestead, yet where such absence has continued for some years, and there is no circumstance or act which shows an intention to return and occupy the homestead, then, in such case, the length of the absence may become a controlling circumstance in determining the question of an intention to return. *Newman v. Franklin*, (Iowa,) 28 N. W. Rep. 579.

LENOW v. FONES.

(Supreme Court of Arkansas. April 2, 1887.)

1. DOWER—PARTNERSHIP—CONVERSION.

Equity converts real estate held for partnership purposes into personality, so far as may be necessary to settle all the equities between the firm and its creditors and between the partners themselves; but this doctrine of equitable conversion of realty will not be carried further than the interests of the partners and the creditors of the partnership require. And, in the division of the land between the widow and heirs of a deceased partner, the property will resume its original character, and the widow be entitled to her dower or share in it as realty only.¹

2. DESCENT AND DISTRIBUTION—PERSONALTY OR REALTY—CASE.

Under Dig. Ark. § 2540, regulating descents and distributions, and defining real estate as including every estate in lands, "except such as are determined or extinguished by the death of the intestate seized or possessed thereof in any manner, other than by lease for years and estate for the life of another person," a lease for years is, as at common law, personal property for all purposes of descent and distribution; and this construction is not affected by other statutory provisions treating leases as real estate for certain purposes.

Appeal from chancery court, Pulaski county.

D. G. Fones, J. A. Fones, and Alvin T. Fones, three brothers, were partners in a mercantile business in Little Rock. While partners, each having an equal interest, they bought a large amount of real estate, which they held as tenants in common, the deeds being taken in their joint names. A. T. Fones died, leaving his wife, Ella D., and two children, Mary, who died a few days after him, and Alvin T., who is the real defendant in the cross-bill. The original bill in this case was filed by D. G. and James A. Fones, surviving partners, seeking a partition of the real estate between the three partners, share and share alike. Mrs. Ella D., who subsequently married J. H. Lenow, filed her cross-bill, in which, after setting up her marriage with A. T. Fones, deceased, alleges that the *certain real estate* named—the store-house, warehouse, and leasehold interest—was partnership property, and in law was and must be treated as personality; and that, as personality, she was entitled, (1) to her one-third dower interest therein, (which is an absolute interest), as the widow of A. T. Fones, deceased; (2) that as heir at law of her daughter, Mary, who died intestate, she was entitled absolutely to a one-half of the remainder; and (3) that Alvin T. Fones, her minor infant child, was only entitled to the remainder, a one-third interest in her father's estate. The lower court adjudged against Mrs. Lenow, and she appeals.

U. M. & G. B. Rose, for appellant. *Dodge & Johnson*, for appellee.

COCKRILL, C. J. 1. The first question presented by the record is, are lands bought with partnership funds for partnership purposes to be realty or personality under the laws of descents and distributions? Or, to state the question with more particularity, shall Ella D. Lenow, as the widow of a late member of the firm of Fones Bros., the business of which has been closed and the debts paid, take her dower in the real-estate assets of the firm remaining after the winding up of the affairs absolutely, as in personal property, or for life, as in real estate? The estate is valuable, and the solution of the question is important to Mrs. Lenow and the infant heir of her deceased husband,

¹ See note at end of case.

as the interest of one will be increased or diminished at the expense of the other. The question is presented for determination to this court for the first time.

The doctrine which obtains wherever the English system of jurisprudence prevails, that equity "converts real estate, held for partnership purposes, into personality, so far as may be necessary to settle all the equities between the firm and its creditors, and between the partners themselves," was recognized, in the language quoted, by this court in the case of *Percifull v. Platt*, 86 Ark. 456; but the court have not, as we are aware, approached nearer the solution of the question. See, too, *Drewry v. Montgomery*, 28 Ark. 256; *Jones v. Fletcher*, 42 Ark. 422. This assumed conversion is an equitable fiction devised for the accomplishment of equitable results, and to carry into effect what is presumed to be the intention of the partners themselves; for, when they put land into a commercial firm, it must be taken that they intend it to be considered or treated as personality, since commerce concerns itself with personal property alone. "If the partners mean to deal honestly," says Kent, "they cannot have any other intention than the appropriation of the investment, if wanted, to pay the partnership debts;" and so the law necessarily implies the agreement that the partnership lands shall be treated as other partnership stock. 3 Kent, Comm. *39, note b. When there is an agreement between the partners for an out and out conversion and sale of the lands after the partnership affairs are closed, and a distribution of the proceeds, equity regards the lands as personal property, not only for partnership purposes, but for distribution as well, upon the principle that what the parties have directed to be done shall be taken as actually done. *Foster's Appeal*, 74 Pa. St. 391; *Lowe v. Lowe*, 18 Bush, 688. The authorities are uniform upon these questions. But when the case goes further, and is relieved, as this is, from any special agreement to affect the consideration of the question, and is left to stand alone upon the fact that lands are a part of the residue of the stock of a solvent defunct firm, the question whether they are distributable, like other partnership stock, as personality, or are reconverted into and descend as realty, is one upon which a great deal of learning, and more discussion, with much conflict of opinion, have been expended.

The doctrine that is drawn from the conflicting cases in the English court, seems to be that, the partners having evinced the design to treat the lands as personality by putting them into the partnership stock, the conversion into personality is presumed to continue for all purposes, unless the contrary intention is in some way shown; and while the legal title, upon the death of a partner, will go in the ordinary course of descent without survivorship, yet the equitable interest will, after an ascertainment of its value by sale, be distributable, according to the supposed intention of the deceased partner, as personal property. Colly. Partn. 76; Gow, Partn. 256 *et seq.*; 3 Kent, *supra*; *Randall v. Randall*, 7 Sim. 271; *Bell v. Phyn*, 7 Ves. 453, and note; *Thornton v. Dixon*, 3 Brown, Ch. 166, and note; *Buchan v. Sumner*, 2 Barb. Ch. 199.

American judges have entertained opposite opinions upon this question, but the stronger tendency in this country, and it seems to us more in keeping with the reason of the thing, is to limit the doctrine of equitable conversion strictly to the purposes which demand its operation. The doctrine was invented for the convenience and accommodation of trade; and, when its purpose is accomplished in any given case, the reason for the rule fails, and its operation ought naturally to cease. This would seem more nearly to attain the object the partners themselves aimed at. The basis of the principle of both classes of the conflicting cases is the presumed intention of the deceased partner. *Howie v. Carr*, 1 Sum. 173, 183; *Coles v. Coles*, 1 Amer. Lead. Cas. *487. When men enter into an agreement of copartnership, or purchase lands with partnership funds for partnership use, and omit from their articles of agreement or their deed of conveyance all mention of facts looking to the creation

of a trust, to reach out beyond the end of the commercial project they have in view, and which will work a sale of the lands, and convert them into cash after the successful close of the joint enterprise, and alter the rule of descent,—to say that they had these results in contemplation when they have not been alluded to, and were not necessary to the accomplishment of the purposes about which they have contracted, is to push the doctrine of implied intention to great length. But eminent judges have held to that view. When the partnership is closed, the joint enterprise ended, and the equities of all parties concerned in it or interested in the joint stock worked out through the doctrine of conversion, why should not conversion cease, and the realty resume its natural character for those having no relation to the partnership? All partnership rights and obligations would thereby be secured, and all equities growing out of that relation met and answered. "To require equitable interference to go further," say the Massachusetts court in *Shearer v. Shearer*, 98 Mass. 107, "and convert all real estate into personality for the mere purpose of a division, seems to us to be an unnecessary invasion of the rights of the copartners; and, when undertaken in the interests of one class of the representatives of a deceased partner against another class of representatives of the same partner, it seems to be a departure from the legitimate sphere of equitable jurisdiction. It is not the province of equity to seek to counteract or modify the operation of the laws of descent and distribution."

According to the American cases, equitable conversion of real estate, in the absence of an agreement, goes no further than this. The mere circumstance that land is bought with joint funds for partnership use is not regarded as sufficient to convert it into personality after the partnership is closed and its affairs settled. This proposition may be taken as clearly established by these cases, viz.: "As between the personal representatives and the heirs at law of a deceased partner, his share of the surplus of the real estate of the copartnership which remains after paying the debts of the copartnership, and adjusting all the equitable claims of the different members of the firm as between themselves, is considered and treated as real estate." *Buchan v. Sumner*, *supra*; *Foster's Appeal*, *supra*; *Shearer v. Shearer*, 98 Mass. 107; *Wilcox v. Wilcox*, 13 Allen, 254; *Wooldridge v. Wilkins*, 3 How. (Miss.) 373; *Dilworth v. Mayfield*, 36 Miss. 52; *Seruggs v. Blair*, 44 Miss. 406; *McGrath v. Sinclair*, 55 Miss. 89; *Clay v. Freeman*, 118 U. S. 97, 6 Sup. Ct. Rep. 964; *Coles v. Coles*, 1 Amer. Lead. Cas., notes, *498; *Uhler v. Semple*, 20 N. J. Eq. 294; *Tillinghust v. Champlin*, 4 R. I. 173; *Campbell v. Campbell*, 30 N. J. Eq. 415; *Griffey v. Northcutt*, 5 Heisk. 746; *Jones v. Sharp*, 9 Heisk. 660; *Williamson v. Fontain*, 7 Baxt. 212; *Hewitt v. Rankin*, 41 Iowa, 39; *Bopp v. Fox*, 63 Ill. 540; *Simpson v. Leech*, 86 Ill. 286; *Galbraith v. Gedge*, 16 B. Mon. 631; *Lowe v. Lowe*, 13 Bush, *supra*; *Sherley v. Thomasson's Ex'r*, 1 S. W. Rep. 530, and note; *In re Codding*, 9 Fed. Rep. 849, and note; *Logan v. Greenlaw*, 25 Fed. Rep. 299; *Loubat v. Nourse*, 5 Fla. 363; 1 Washb. Real Prop. *159, 423; 1 Scrib. Dower, c. 26, p. 563; Pars. Partn. p. 388.

What is said by the court in *Shearer v. Shearer*, *supra*, is applicable to the facts in this case upon the further consideration of conversion for the assignment of dower: "The widow's right of dower in her husband's interest in partnership real estate is not held subject to the payment of his private debts. As a general fact this incident makes dower a more valuable interest than the distributive share of the widow would be if the real estate were to be converted. But we do not regard that circumstance as of any weight in determining the general rule against such conversion. On the other hand, in our view, the special facts which, in the present case, would make it more advantageous for the widow that the partnership realty should be converted into personal estate, furnish no ground for such conversion." "There are no equities between heirs and distributees, under our laws, which can call into exercise or quicken the powers of the court for the conversion of realty into personality.

We do not understand that in the English courts any such supposed equities have ever been made a ground for the doctrine of equitable conversion, as held there. In the case of *Cookson v. Cookson*, 8 Sim. 529, such a ground of interference was emphatically discarded. That case, however, is not one in which the full extent of the English doctrine was asserted."

As the trusts of the partnership of Fones Bros. have been discharged, equity no longer has occasion to make use of the machinery of trusts, and through it to deal with the lands as personalty, but will leave them to be governed by the laws applicable to realty. Mrs. Lenow, the widow of the deceased partner, must therefore take her dower in his share of the residue of the real estate of the firm as in other lands of which he was seized. There was no error in the decree in this respect.

2. The remaining question concerns the leasehold interest in block 77, which was also a part of the firm assets. The guardian of the minor contends that under the statutes of Arkansas this leasehold interest must be taken and considered as *real estate*, and that, as such, it has, by the death of the father, A. T. Fones, descended and vested absolutely in the child, subject alone to Mrs. Lenow's dower. The chancellor adopted this view, and decreed that dower should be assigned in this interest as in land. Mrs. Lenow contends that the interest is personal property, and that she is entitled to two-thirds of her deceased husband's share of it absolutely,—a third as dower in personalty, and one-half of the residue as next of kin of her deceased child. *Loftis v. Glass*, 15 Ark. 680.

"No proposition has been better settled from the earliest days of the common law than that a lease, of whatever duration, is but a chattel." *Murdock v. Ratcliff*, 7 Ohio, 119; 1 Tayl. Landl. & Ten. § 14, note; 2 Bl. Comm. 312; 2 Kent, Comm. 342. It was there regarded within the definition of personal things; and, although it was denominated a chattel real, to distinguish it from mere movables, it was not, when speaking with legal accuracy, considered as real estate. It was not an estate of inheritance; but, like other chattels, went to the executor or administrator, and not to the heir. It was not, therefore, the subject of dower. "So strict was the law in this respect that an estate for two thousand years, no matter in what form or by what instrument created, would not confer dower upon the widow of the lessee." 1 Scrib. Dower, 363; Park, Dower, 47, 48.

Our statute, however, confers the right of dower in personal property, (Mansf. Dig. 2591;) and it is conceded here that, if the estate for years is not realty by virtue of the statute, Mrs. Lenow should take the full two-thirds interest, as claimed, absolutely. Section 2540, Mansf. Dig., in the chapter regulating "Descents and Distributions," declares that "the term 'real estate,' as used in this act, shall be construed to include every estate, interest, and right, legal and equitable, in lands, tenements, and hereditaments, except such as are determined or extinguished by the death of the intestate seized or possessed thereof in any manner other than by lease for years and estate for the life of another person." From this definition of real estate a "lease for years" is expressly excepted. The exception is awkwardly framed, and why the clause "except such as are determined or extinguished by the death of the intestate seized or possessed thereof in any manner" should have been required at all, is difficult to perceive. The estate of the heir is but a continuation of that of the ancestor; and, if the estate is determined with the life of the ancestor, there can be nothing for the heir to take. If these words are placed in parenthesis, the relation of the "other than by lease for years" to the general definition given, is more apparent, though by no reading can it be taken in any light other than an exception.

We are referred by the counsel for the appellees to other provisions of the statute where a chattel real comes within the definition of real estate as there used. Mansf. Dig. §§ 645, 660, 3002, 3956. But these provisions merely

direct the manner in which leasehold property shall be conveyed and the conveyance admitted to record, or regulate judgment liens thereon, and prescribe how it shall be subjected to levy and sale under execution. They do not undertake to fix and declare the nature of the estate for the purpose of descent or distribution. Section 2540, quoted above, does that, and leaves it, as it was before the statute, personal property.

In the case of *Kinney v. Watts*, 14 Wend. 38, the court applied the definition of real estate as found in the statute governing the recording of conveyances in a case where the nature of the estate was involved; but, on a subsequent examination of the question, the court of appeals said the construction in *Kinney v. Watts* had been reached through inadvertence, and ruled that the statute did not affect the nature of the estate. *Mayor of New York v. Mable*, 18 N. Y. 151, 159, 160. See, too, *Tone v. Brace*, 11 Paige, 566. The Ohio cases cited in 1 Scrib. Dower, pp. 365-367, are in point, and sustain the position that the provisions relied on by the appellees were not intended to change the nature of the estate, and do not control the question now presented.

The leasehold interests retain, then, the character or incidents of personal property as at common law, and the statutes which govern the right to distribution of and dower in other personal property are applicable to them. The chancellor erred in treating them as real estate for the purposes of this controversy. Otherwise the decree is right, and is affirmed. As to the leasehold interests, it is reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

NOTE.

Real estate purchased for partnership purposes is partnership property, and is treated as personalty until all partnership business is settled, *Logan v. Greenlaw*, 25 Fed. Rep. 299, and note, and 12 Fed. Rep. 10; *Paige v. Paige*, (Iowa.) 32 N. W. Rep. 360; *Mallory v. Russell*, Id. 102; *King v. Remington*, (Minn.) 29 N. W. Rep. 352, and note; *Sherley v. Thomasson*, (Ky.) 18 W. Rep. 530, and note; but when the partnership affairs are wound up, and the surplus ascertained, such surplus is reconverted into realty. *Logan v. Greenlaw*, *supra*, and note.

Real estate owned and held by copartners as partnership property, and brought into the firm stock, is not converted absolutely and for all purposes. It is to be treated as personalty, in so far as may be necessary to secure the payment of the firm debts and advances made by the partners respectively; but for every other purpose it remains real estate. In re *Codding*, 9 Fed. Rep. 849, and note.

VICK v. SHINN.

(Supreme Court of Arkansas. April 16, 1887.)

ASSUMPSIT—MONEY HAD AND RECEIVED—PAYMENT UNDER DURESS.

A. purchased a lot of corn, giving his note secured by chattel mortgage, with a power of sale, in payment. Only a part of the corn was delivered, but the vendor insisted upon payment of the note in full. A. objected to paying the full amount, and the vendor agreed to make a small deduction, but threatened to take the property mortgaged from A.'s possession, and sell it to satisfy his claim, if A. did not pay the amount claimed. After some negotiation between the parties, A. paid the full amount under protest, and sued to recover the amount overpaid. *Held*, that the payment was voluntary, and that A. was not entitled to recover.

Appeal from circuit court, Pope county.

W. C. Ford, for appellant. *Jeff. Davis*, for appellee.

COCKRILL, C. J. Vick brought his action against Shinn to recover money which he alleged had been received for his use and benefit. The dispute was about an overpayment made by the plaintiff to the defendant upon the purchase of a lot of corn. The corn bargained for was 500 bushels at 75 cents a bushel. The plaintiff made his note for the amount, and, to secure payment, executed a mortgage upon some mules and wagons and a lot of lumber. Seventy-seven bushels of the corn, as the court finds from the testimony, were

never in fact delivered, but the defendant, Shinn, insisted upon payment of the full amount of the note after it fell due, and informed the appellant that he would take possession of the mortgaged property, and sell it in pursuance of a provision of the mortgage authorizing a sale in case of default in payment, unless the full amount demanded was paid. The case was tried in the circuit court without a jury. The court found that the payment was voluntary, and gave judgment for the defendant. The motion for a new trial questions only the adequacy of the proof to sustain the findings and judgment. There is no conflict in the proof, and the question is simply, was the payment voluntary?

The doctrine established by the authorities is that "a payment is not to be regarded as compulsory, unless made to emancipate the person or property from an actual and existing duress imposed upon it by the party to whom the money is paid." This language of the court of appeals of Maryland is quoted with approval by the supreme court of the United States. *Mayor, etc., of Baltimore v. Lefferman*, 4 Gill, 425; *Radich v. Hutchins*, 95 U. S. 210. The coercion produced by what is sometimes called duress of goods exists, says Judge COOLEY, speaking for the supreme court of Michigan, "when one is compelled to submit to an illegal exaction in order to obtain his goods from one who has them in possession, but refuses to surrender them unless the exaction is submitted to." *Hackley v. Headley*, 45 Mich. 569, 8 N. W. Rep. 511. The remedies afforded by the courts are presumed to be inadequate to the necessities of such an occasion, and the aggrieved party is not forced to submit to the law's delay, but may pay the exaction, and rely upon the effect of this species of duress to get it back. The coercion is effectual when produced by menace as well as by actual duress. It is sufficient, say the court in *Radich v. Hutchins, supra*, when there is "some actual or threatened exercise of power possessed, or believed to be possessed, by the party exacting or receiving the payment over the person or property of another from which the latter has no other means of immediate relief than by making the payment." See, too, *Burr v. Burton*, 18 Ark. 233. It will be seen from this that there must be a pressing and controlling necessity upon the party making the payment to render it compulsory or involuntary. The illegal demand must be accompanied by the apparent power, at least, to carry the threat of enforcement into immediate execution. *Town of Ligonier v. Ackerman*, 46 Ind. 552; *Brumaght v. Tillinghast*, 18 Cal. 265. When one so holds the rod that the weak needs bow to it, the law commiserates the submission.

But such is not the present case. The mortgaged chattels were in the debtor's possession. There was no circumstance or threat of the use of violence or force to take them. The debtor voluntarily met his creditor in the office of the attorneys who held the note for collection to effect a settlement. He admitted a liability of about \$300, but claimed a credit on the note to the extent of the corn that was not delivered to him. A small credit was conceded, but less than he contended for, and less than the circuit court found he was really entitled to. The mortgagee would not agree to his terms of settlement, and finally informed him that he would take possession of and sell the mortgaged property if he did not pay the full amount demanded. The mortgagee's attorney repeated the same thing to him. He protested throughout that the excess over the amount he was willing to pay was unjust, and that he did not owe it, but he agreed to pay the whole, and, after having time to arrange to raise the money, caused it to be paid, saying he did it to protect his property from sale, and that he would sue for and recover the excess over his just debt. There was no compulsion, in a legal sense, to this. It was incumbent upon the mortgagee, before he could effect a legal sale of the mortgaged goods, to get possession of them; and, if this could not be done peaceably, he must have resorted to the action of replevin for the purpose. But it is not shown that he had the power or opportunity to put his threat of seizing

the property into execution against the will of the debtor; and a threat to enforce a demand by suit is not sufficient to create duress of goods. If there is in fact a cause of action in such case, the plaintiff would only enforce a legal right. If there was no cause of action or a demand for more than is due, the party threatened should exercise the ordinary degree of firmness which the law presumes every man to possess, and meet the issue of the unjust suit. One cannot be heard to say that he had the law with him, but feared to meet his adversary in court. It is only when he has no chance to be heard that he can pay under protest and afterwards recover. *Marriot v. Hampton*, 2 Smith, Lead. Cas. pt. 1, 455. By proper defense to the action of replevin the plaintiff could have protected himself against surrendering his property, without paying more than the mortgage debt. *Jones, Chat. Mortg.* § 635. Having chosen to make terms with his creditor, instead of pressing his rights when there was nothing to prevent him from so doing, he could not afterwards change position, and complain that the terms were forced upon him. *Wald's Pol. Cont.* 554. A protest is of no avail except in case of duress of some sort, and then it only tends to show that the payment was the result of the duress. *Springfield & M. Ry. v. Allen*, 46 Ark. 217; *Marriot v. Hampton*, *supra*, 456.

The cases of *Drew Co. v. Bennett*, 43 Ark. 364, and *Town of Magnolia v. Sharman*, 46 Ark. 358, do not sustain the appellant's position. The plaintiff in each of those cases was entitled to receive a license to sell liquor, and enjoy the privilege it afforded, upon payment of a stated sum, but the officers in authority refused in each case to deliver the license unless a larger amount was paid. They paid the exactions, and were permitted to recover. The decisions are distinctly referable to the principle which permits a recovery in case of an extortion laid as a condition to the exercise of a legal right. *Hackley v. Headley*, *supra*; *McPherson v. Cox*, 86 N. Y. 472.

Several text writers have stated the rule to be that when a mortgagee, with power of sale, threatens to use his power unless he be overpaid, the overpayment may be recovered in an action for money had and received. 2 Whart. Cont. § 737; *Jones, Mortg.* §§ 903, 1819. But the broad statement of the text is not supported by any adjudicated case cited. The case of *Cluse v. Phipps*, 7 Man. & G. 590, 49 E. C. L. 585, is mainly relied upon to sustain the position. The case is meagerly reported, and in Chitty's work on Contracts it is placed in that class of cases where an exaction is submitted to in order to recover the possession of property, inasmuch as it appears that the mortgagee's agent refused to deliver up the title deeds of the mortgaged property. 2 Chit. Cont. 941, 942. The opinion, also without argument, likens it to a case of a common carrier withholding goods upon a demand of exorbitant freight charges. Besides, the case related to real estate, no act to gain possession of which before sale was necessary.

The court's finding of facts is sustained by the evidence, and the judgment is affirmed.

WATSON, Assignee, etc., v. THOMPSON LUMBER CO. and others.

(Supreme Court of Arkansas. April 16, 1887.)

CHATTEL MORTGAGE—REGISTRATION—FOREIGN CORPORATION.

A foreign corporation doing business in Clay county, Arkansas, executed a mortgage on its real and personal property to secure payment of certain promissory notes, and the mortgage was recorded in Clay county. Subsequently certain creditors obtained judgments against the corporation, and seized the personal property under execution. The mortgagees afterwards sought to foreclose the mortgage, joining the judgment creditors as defendants. *Held* that, as the corporation has no residence in Arkansas, the recording of the mortgage did not give the mortgagee a lien as against the creditors who had sued upon the foreclosure proceedings, as, under Mansf. Dig. Ark. § 4742, a mortgage of personality, to be valid as against third parties, must be recorded in the county in which the mortgagor resides.

Appeal from circuit court, Clay county. In chancery.
J. C. Hawthorne, for appellant.

BATTLE, J. The Thompson Lumber Company, a foreign corporation, being indebted to McMillion & Ebbert, in the sum of \$14,569.05, executed to them its three promissory notes for the same, and a trust mortgage to secure the payment thereof. The property mortgaged consisted of lands and personal property, and remained in the possession of the mortgagor until seized by its creditors under execution. The mortgage was filed, after it was acknowledged, for record in Clay county, in this state, where the mortgagor at that time was doing business, and all the mortgaged property was situated. McMillion & Ebbert, being involved in debt, assigned the notes and mortgage, with other property, to Howard Watson, for the benefit of their creditors. Thirty-five of the creditors of the Thompson Lumber Company sued and recovered judgments against it before a justice of the peace of Clay county, and, after the mortgage was filed for record, sued out executions on their several judgments, and caused the same to be levied on a portion of the personal property which was mortgaged. After they were issued and levied, Watson brought this action to foreclose the mortgage, making the Thompson Lumber Company, the 35 creditors, and others defendants therein. As to the property seized under execution, the court below found and decreed in favor of the 35 creditors, and, as to the remainder, in favor of plaintiff, and plaintiff appealed.

It has been repeatedly held by this court that "a mortgage is good between the parties thereto, though not acknowledged and recorded, but constitutes no lien upon the mortgaged property as against strangers, unless it is acknowledged and recorded, even though they may have actual notice of its existence." *Main v. Alexander*, 9 Ark. 112; *Jacoway v. Gault*, 20 Ark. 190; *Hannah v. Carrington*, 18 Ark. 105.

Section 4742 of Mansfield's Digest reads as follows: "All mortgages, whether for real or personal estate, shall be proved or acknowledged in the same manner that deeds for the conveyance of real estate are now required by law to be proved or acknowledged; and, when so proved or acknowledged, shall be recorded, if for lands, in the county or counties in which the lands lie, and, if for personal property, in the county in which the mortgagor resides." It follows, then, that, while the mortgage sued on was good as between the parties, it was no lien on the personal property seized under execution, as against the creditors suing out the executions, unless it was acknowledged or proved, and filed for record in the county of the mortgagor's residence. The mortgagor was a foreign corporation, and was actively and continuously engaged in business in Clay county, in this state, at and before the time the mortgage was executed and filed for record. Where did it reside?

Chief Justice **TANEY**, in delivering the opinion of the court in *Bank of Augusta v. Earle*, 13 Pet. 588, said: "It is very true that a corporation can have no legal existence out of the boundaries of the sovereignty by which it is created. It exists only in contemplation of the law, and by force of the law; and where that law ceases to operate, and is no longer obligatory, the corporation can have no existence. It must dwell in the place of its creation, and cannot migrate to another sovereignty. But, although it must live and have its being in that state only, yet it does not by any means follow that its existence there will not be recognized in other places; and its residence in one state creates no insuperable objection to its power of contracting in another. It is, indeed, a mere artificial being, invisible and intangible; yet it is a person, for certain purposes, in contemplation of law, and has been recognized as such by the decisions of this court. It was so held in the case of *U. S. v. Amedy*, 11 Wheat. 412, and in *Beaston v. Farmers' Bank of Delaware*, 12 Pet. 135. Now, natural persons, through the intervention of agents,

are continually making contracts in countries in which they do not reside, and when they are not personally present when the contract is made, and nobody has ever doubted the validity of these agreements. And what greater objection can there be to the capacity of an artificial person, by its agents, to make a contract within the scope of its limited powers, in a sovereignty in which it does not reside, provided such contracts are permitted to be made by them by the laws of the place? The corporation must no doubt show that the law of its creation gave it authority to make such contracts through such agents. Yet as, in the case of a natural person, it is not necessary that it should actually exist in the sovereignty in which the contract is made, it is sufficient that its existence as an artificial person, in the state of its creation, is acknowledged and recognized by the law of the nation where the dealing takes place, and that it is permitted by the laws of that place to exercise there the powers with which it is endowed." See, also, *Ex parte Schollenberger*, 96 U. S. 377; *Stafford v. American Mills Co.*, 13 R. I. 310; *Cowardin v. Universal Life Ins. Co.*, 32 Grat. 446; *Blackstone Manuf'g Co. v. Inhabitants of Blackstone*, 13 Gray, 488.

The Thompson Lumber Company, then, was not a resident of this state. We therefore conclude that the mortgage sued on was not valid against the creditors who sued out executions, and caused the same to be levied, before the commencement of this action, as to the personal property levied on. *Smith v. Moore*, 11 N. H. 63; *Bither v. Buswell*, 51 Me. 601; *Cook v. Hager*, 3 Colo. 386; *Stewart v. Platt*, 101 U. S. 731; *Briggs v. Leitelt*, 41 Mich. 80, 1 N. W. Rep. 942.

Decree affirmed.

WILLIAMS v. STATE.¹

(Court of Appeals of Texas. December 4, 1886.)

1. HOMICIDE—INDICTMENT—SUFFICIENCY.

An indictment conforming to section 357, Willson, Crim. Forms, is sufficient to charge the offense of murder.

2. SAME—SELF-DEFENSE—INSTRUCTION.

By the charge of the court upon the issue of self-defense, in this case, the right of the accused to kill his assailant before resorting to other means than retreat to avoid the threatened injury, was restricted to the prevention of murder, maiming, or disfiguring, giving no such right until he had resorted to all other means except retreat, where the threatened injury might have been other serious bodily injury. *Held* erroneous.

3. SAME—THREATS.

See the opinion *in extenso* for a state of proof where, under the failure of the trial court to charge the jury, the law relating to threats was material and fatal error.

4. EXCEPTIONS, BILL OF—SUFFICIENCY.

Bill of exceptions, which assails generally the entire charge of the court, specifying no particular errors, is entitled to no consideration at the hands of the appellate court.

5. CRIMINAL PRACTICE—EVIDENCE—FLIGHT.

Evidence of the flight of the accused after the return of indictment against him, and of his effort to obtain false testimony to be used on his trial, is always admissible for the state, and especially when the inculpatory evidence is circumstantial.

Appeal from district court, Falls county.

The conviction in this case was for an assault to murder one G. H. Gassaway. The penalty assessed against the appellant was a term of three years in the penitentiary. The opinion sufficiently states the case.

Alexander, Winter & Dickenson, for appellant. *Asst. Atty. Gen. Burts*, for the State.

¹ Reported by Messrs. Jackson & Jackson, official reporters of the Texas court of appeals.

WILLSON, J. 1. The indictment is in the usual form, and the court did not err in overruling exceptions to it. Willson, Crim. Forms, § 357, p. 161, and cases there cited.

2. It is the well-settled law of this state that, when any unlawful and violent attack is made by one person upon another, which reasonably indicates to the person attacked that *serious bodily injury* is about to be inflicted upon him, he may kill the assailant at once, without resorting to other means for the prevention of such threatened injury. *Hunnicut v. State*, 20 Tex. App. 642, and cases therein cited; *Lee v. State*, 21 Tex. App. 241, 8 S. W. Rep. 89. In this case the charge of the court upon the issue of self-defense restricts the right of the defendant to kill his assailant, without first resorting to all other means except retreat to prevent the threatened injury, to the prevention of murder, maiming, or disfiguring, giving him no such right where the injury threatened might have been other serious bodily injury, until he had first resorted to all other means except retreat to prevent such other serious bodily injury. In this respect the charge is defective.

3. It was in proof by two witnesses that prior to the alleged assault by defendant upon Gassaway, and on the same day, said Gassaway had threatened to kill the defendant, and that said threat had, prior to said alleged assault, been communicated to defendant. There was also testimony that at the time of the difficulty, and before the commission of the alleged assault, Gassaway attempted to draw a pistol with which to shoot the defendant, and thus execute said threat. In view of this evidence, the court should have charged the law relating to threats, and it was material error to omit to do so. *Sims v. State*, 9 Tex. App. 586.

4. Other objections than those above noticed are urged to the charge of the court by counsel for defendant, but the errors complained of are not of a character deemed material; and, in the absence of a bill of exceptions specifically pointing out such errors, we are not called upon to notice them. There is in the record a general bill of exception to the entire charge, specifying no error. Such a bill is entitled to no consideration. *Smith v. State*, 3 S. W. Rep. 684.

5. It was not error to admit the testimony in regard to the flight of the defendant from the state after he was indicted, and of his effort to obtain false testimony to be used on his trial. Such testimony is always admissible in cases of circumstantial evidence, and we know of no rule of law which would exclude it in any case, though the reason for its admission in a case like this, where the evidence relied upon by the prosecution to establish the guilt of defendant is direct, is not so apparent as in a case where the evidence is all circumstantial. Whart. Crim. Ev. § 750.

Because of the errors in the charge of the court which we have mentioned as material, and which might have prejudiced defendant's rights, the judgment is reversed, and the cause remanded.

IRELAND, Governor, etc., v. TAYLOR and others.

(*Supreme Court of Texas. March 25, 1887.*)

RAILROAD COMPANIES—SALE OF RAILROAD BY STATE—POWER OF GOVERNOR.

The legislature of Texas passed an act empowering the governor to sell the Houston Tap & Brazoria Railroad, and directed him to require bonds of the purchaser to keep the railway in running order. At the sale the state bought in the road. The legislature afterwards passed a resolution, again directing the governor to sell the road "by public or private sale, upon such terms and to such parties as he may deem best for the security of the school fund." The governor sold the road, and appellee became the purchaser, and the governor required of him the bond provided in the first act. *Held*, (1) that as a sale had been made under the act, it had performed its functions, and, as the second sale was made under the resolution, the governor had no authority to require the bond; and (2) that the resolution

authorizing the governor to sell upon such terms as he saw best referred only to the price and times of payment, did not authorize him to demand the bond, and the condition of the bond could not be enforced in a suit at his instance.

Appeal from district court, Harris county.
W. C. Oliver, for Ireland.

GAINES, J. This suit was brought by appellant, as governor of the state of Texas, to recover the sum of \$50,000, the penalty of a bond executed by Moses Taylor as principal, and B. A. Shepherd and William M. Rice as sureties. Plaintiff also sought to recover the title and possession of the Houston Tap & Brazoria Railroad, which was alleged to be in possession and under the control of the International & Great Northern Railroad Company and the Missouri Pacific Railway Company, both of which were made parties defendant. Demurrers to the petition were sustained in the court below, and plaintiff declined to amend. The suit was accordingly dismissed, and plaintiff now appeals.

In the petition and supplemental petition (called a "replication") the following facts appear: The Houston Tap & Brazoria Railroad Company being indebted to the state, the legislature, on the fifteenth of August, 1870, passed an act directing a sale of the railway of the company, which contained the following provision: "Said sale shall be made at the front door of the capitol, in the city of Austin, and shall be conducted by the governor, or by some one appointed by him for that purpose. It shall be to the highest and best bidder for cash, and the governor is authorized and required to execute and deliver to such purchaser a deed of conveyance to the property so sold, whenever such purchaser shall have entered into good and sufficient bond, payable to the governor of the state, in the sum of (\$50,000) fifty thousand dollars, conditioned that such purchaser will keep said railway in running order, and will not remove or cause to be removed any of the iron from the track of said railway, or any of the rolling stock therefrom." Gen. Laws 12th Leg. 233. The governor accordingly sold the road, and the state became the purchaser. Thereafter, on the eighteenth of May, 1871, the legislature passed a joint resolution authorizing a sale of the railroad. This resolution is referred to in the petition, and, though not copied therein, for the sake of convenience we here set it out: "Be it resolved by the legislature of the state of Texas that his excellency, the governor of the state, be, and he is hereby, authorized to dispose of the Houston Tap & Brazoria Railroad, now in possession of the state; the disposition of said railroad to be by public or private sale, upon such terms and to such parties as he may deem best for the security of the school fund of the state: provided, that no sale or transfer shall be made to any parties until thirty days from the passage of this joint resolution, and not for less than the actual value of the iron on the track: and provided, further, that the governor may give the citizens residing on said road, or tributary to it, the preference of buying said road, so that the rails of said road may not be removed from the track of said road as at present located." On the twenty-first of July, 1871, the governor sold the property to Masterson and Wagley, but, before the transaction was consummated, by agreement of the parties, Moses Taylor was substituted to the rights of the purchasers. He accordingly made the bond sued upon, and paid the purchase money, amounting to \$130,000, and a conveyance was thereupon made to him. This provided that it was subject to the conditions stated in the bond which is mentioned above.

Was the governor authorized, either by the act of August 15, 1870, or the joint resolution of May 18, 1871, to require this bond of the purchasers of the railroad? We are of opinion that he was not. In the first place, the act of 1870 applied only to the first sale. After the state became the purchaser, the act had performed its function, and the authority conferred by it upon the

governor had wholly ceased. But if it could be said that the joint resolution revived his power to require a bond as given by the previous act, it is sufficient to say that the conditions of the bond required, and that actually given, are substantially different, and for that reason alone the authority of the act cannot be invoked to support the validity of the instrument in question. But it is also claimed that so much of the joint resolution as provides that "the disposition of said road to be by public or private sale, upon such terms and to such parties as he [meaning the governor] may deem best for the security of the school fund of the state," empowered him to annex such conditions to the conveyance as he saw fit, and that, therefore, he was authorized to require the bond. But we do not so construe the resolution. The word "terms" was evidently intended to apply to the amount of the price, and the times of payment, and the clause was doubtless inserted to enable him to obtain a better price by selling upon credit, provided he could so sell to such parties as could make the payments secure. The object of the provision was to protect the interest of the school fund. It was not to invest the governor with powers to annex conditions to the contract, which were calculated to reduce the price rather than enhance it. Instead of making a provision for keeping up the road, the legislature seemed to contemplate that in the event "the citizens residing on the road or tributary to it" did not buy, that the purchasers should have the right to remove the rails. The authority to require railroad companies to keep their roads in operation and repair is a function which properly belongs to the legislature, and we do not think that body intended to leave this matter to the discretion of the governor in the particular instance under consideration.

It follows from what we have said in our opinion the governor was not authorized to require this bond of the purchaser of the road; and, since the legislature did not invest him with power to annex any such conditions to the sale of the property, it must be held that the instrument was without a lawful consideration to support it, and is therefore invalid. This principle is substantially held by this court in the case of *Leona, I. M. & C. Co. v. Governor, etc.*, 62 Tex. 615.

The petition prays for a recovery of the title and possession of the road,—we presume upon the ground that the deed makes a compliance with the stipulations of the bond a condition of the conveyance. But if such stipulations could have been lawfully embraced in the contract, and if the governor had the right to bring a suit in behalf of the state in his own name to enforce the forfeiture, we do not think the property could be recovered without an offer to pay back the purchase money. But this is not insisted upon in the brief, and we need not discuss the question.

The court did not err in sustaining the general demurrer to plaintiff's petition, and this necessarily disposes of the other errors assigned. The judgment is therefore affirmed.

WILSON and others v. WICHITA Co.

(Supreme Court of Texas. April 5, 1887.)

1. OFFICE AND OFFICER—LIABILITY—OBLIGATION TO ACCOUNT.

An officer who is custodian of public money does not occupy the relation of a mere bailee for hire, who is responsible for such care only as a prudent man would take of his own; he is bound to account for and pay over the public money, less his commissions, or his sureties must do it for him; following *Boggs v. State*, 46 Tex. 10.

2. SAME—CONDITION PRECEDENT TO ACTION—ACCOUNTING.

In an action against a county treasurer and his bondsmen for failure to pay over public moneys, it is not necessary that the account should be passed upon by the court before the bringing of the suit. If he has any credits, he can plead them.

3. SAME—QUALIFICATION OF SUCCESSOR—PLEADING.

In such an action the petition sufficiently alleges, by reasonable intendment, that the treasurer's successor had qualified, when it avers that he failed to pay over to his successor in office the money sued for.

4. BONDS—OFFICIAL—APPROVAL.

The fact that the county judge approved an official bond in open commissioners' court does not make the approval the act of that court, and not the act of the judge.

5. SAME—BREACH—"DISBURSEMENT."

A condition in a bond that the treasurer "will safely keep and faithfully disburse" a fund according to law is broken by his refusal to pay over the balance of the fund remaining in his hands to his successor, such payment being a disbursement.

6. PLEADING—STRIKING OUT AMENDMENT.

An amendment to an answer, admitting everything of importance to plaintiff's recovery contained in the petition, without seeking to avoid their effect, presents no defense to the action, and is properly stricken out.

Appeal from district court, Wichita county.

Suit by Wichita county against Wilson and others, upon an official bond alleged to have been given by the appellant Wilson, as treasurer of Wichita county, for the school funds of said county, and by the other appellants as his sureties thereon. The neglect of duty complained of is Wilson's alleged failure to deliver money to his successor in office. The defendant filed a special answer, which alleged that Wilson, as treasurer, with the consent of the county commissioners, deposited his funds (the county school funds among the rest) in a bank; that as money was received it was deposited and checked out when needed; that the bank failed, owing him, as treasurer, the sum sued for. General demurrer to the special answer sustained. Answer of general denial filed, by leave of court, which on plaintiff's motion was stricken out. Trial by the court, and judgment for plaintiff. Defendants appeal.

L. T. Miller and S. B. McBride, for appellants. *J. P. Boyd and R. Cobb*, for appellee.

WILLIE, C. J. There was no error in sustaining the demurrer to the special plea of defendant. It is too well settled to require discussion that an officer who is custodian of public money does not occupy the relation of a mere bailee for hire, who is responsible only for such care of the money as a prudent man would take of his own. He is bound to account for and pay over the public money, less his commissions, or his sureties must pay it for him. This has been expressly decided in our own state, and also in frequent decisions of the supreme court of the United States. *Boggs v. State*, 46 Tex. 10; *Boyden v. U. S.*, 13 Wall. 17; *U. S. v. Prescott*, 3 How. 578; *U. S. v. Morgan*, 11 How. 154; *U. S. v. Dashiell*, 4 Wall. 182.

The trial amendment was properly stricken out. It admitted everything of importance to the plaintiff's recovery which was contained in the petition, and was not such a plea as would put the plaintiff upon proof, or would authorize proof on the part of the defendant. The special plea to which it referred, and whose admissions it adopted, confessed every allegation of the petition essential to a recovery by the plaintiff, but sought to avoid them by an excuse for the loss of the money in possession of the defendant Wilson, when his successor was qualified. The trial amendment reiterated all these confessions, without seeking to avoid their effect, and so presented no defense to the action.

The proposition that the bond was not approved by the county judge is not sustained by the record. His approval to the bond appears over his own name and official designation. The fact that he approved it in open commissioners' court does not make it the act of that court, even if it would be vitiated were this the case. It was not necessary to have a statement of the treasurer's account passed upon by the court before bringing suit. If he had any credits

to which he was entitled as against the debit with which he was charged, it was his duty to plead them.

The allegation that Wilson failed to pay over to his successor in office the money sued for was, by reasonable intendment, an allegation that his successor had qualified. This, under our rules, would have made the argument good against a general demurrer, and the benefit of such a demurrer is all the appellants can claim in the state of the pleading. Rule 17, District Courts.

The bond is conditioned that the treasurer would safely keep and faithfully disburse the school fund of said county according to law, and that he would pay such warrants as might be drawn upon said fund by competent authority. The breach assigned was that Wilson retained and refused to deliver to his successor in office the sum of \$642.23, although often requested so to do. To disburse money is to pay it out. When the proper authority requested the treasurer to pay out to his successor in office the money belonging to the school fund remaining in his hands, they in effect demanded that he make a disbursement of it. In failing to do so he committed a plain breach of this particular obligation, and his sureties became liable for the money.

This disposes of all the points made in the brief of counsel. Many of these would not have been noticed, as errors were not assigned upon them, but for the fact that delay was suggested by the appellee, which opened the whole record to revision. The points relied on for a reversal have no merit in them; but, as the appellants may have thought that some of them deserved an adjudication by this court, we cannot say that the appeal was taken solely for delay, and the judgment will be affirmed, but without damages.

GARRISON v. CROWELL and others.

(*Supreme Court of Texas. April 15, 1887.*)

DEED—DESCRIPTION—BOUNDARIES—BONA FIDE PURCHASER.

In a deed of land the grantor described the land by the true distances bounding the tract, but, by mistake, used a boundary line that made the grant convey a strip in excess of the land he intended and agreed to convey. The grantee moved his fence so as to include the extra strip, recorded his deed, and conveyed to C., a *bona fide* purchaser. In a suit for the possession of the strip, *held*, that the first grantor could not recover of C., since he could not be presumed to know that the distances would not reach the erroneous boundary line, and since he found his grantor in possession under a deed which, under the rule that boundaries govern distances, embraced the land so possessed.

Appeal from district court, Montague county.

Sparks & Smith, for appellant. *Davis & Garnett and Stephens, Matlock & Herbert*, for appellees.

GAINES, J. Appellant and one John H. Stephens were claiming adversely to each other the Hezekiah Frost survey of land in Montague county, of which the tract in controversy is a part. They agreed upon a compromise of their claims, and, in pursuance of their agreement, appellant conveyed to Stephens a portion of the tract. The former now claims that the agreement was that he should make a deed to the latter to 640 acres only, and that quantity of land was actually measured off and surveyed, and the south boundary thereof distinctly marked upon the ground; but that, supposing that the south-west corner of the land so surveyed was the same as the south-east corner of the G. Hodge survey, and on the north boundary line of the A. C. Davis survey, he in his deed described the boundaries as extending to that corner and that line. Beginning at the north-west corner of the land intended to be conveyed, the deed calls for the west line as running "south 839 varas, to the south-east corner of said Hodges survey, in the N. B. line of the A. C. Davis survey," and "thence east at 450 varas, said Davis N. E. corner at

3550 varas, the E. B. line of said Frost survey," etc. The distance called for in the west boundary line does not reach the Davis survey by me 79 varas, but does reach the line actually run at the time the survey was actually made. The strip lying between the latter line and that made by the north boundary of the Davis tract, and its extension, is the matter of contention in this suit. Some time after the conveyance Stephens moved his fence upon the more southern line, and took actual possession of the disputed land. Stephens subsequently sold the land to defendant Crowell. This suit was brought against Crowell, and also against one George Schick, whose connection with the subject-matter of the controversy is not disclosed by the testimony.

The judge below, to whom the cause was submitted without a jury, found, among other things, that Stephens had taken possession of the disputed strip after the execution and recording of the deed to him, and sold the same to appellee Crowell, who paid for the same without notice of appellant's claim. Judgment was accordingly given for the defendants.

If it be determined that Crowell is a *bona fide* purchaser, without notice, of the land in question, the judgment must be affirmed, without reference to any other question presented by this appeal; and we have no doubt that he must be so held. It does not appear that he knew that the distance of the west line called for in the deed would not reach the Hodges corner and the Davis line. Therefore there was nothing on the face of the conveyance to put him upon inquiry as to any claim upon part of appellant. He found Stephens in possession of the premises in controversy, holding under a duly recorded deed from appellant himself, which, according to well established rules of construction, embraced the land so possessed. He paid his money upon the faith of a conveyance which imported an absolute title in his vendor at least against appellant in this case, and we fail to see any reason why he should be excepted from the rule which protects the innocent purchaser for value against the claim of his adversary, which was unknown to him at the time of his purchase.

The case of *Houston v. Sneed*, 15 Tex. 307, cited by appellant's counsel, does not sustain the proposition submitted by them upon this point. In that case Sneed was held not to be an innocent purchaser, because at the time of his conveyance Houston was in actual possession of the land up to the disputed line. This was considered as constructive notice to him of Houston's claim. But the court say: "Had there been no settlement up to this agreed line, and no notice to him of it, he might have insisted upon the line originally established between Horton and McKinney, called for by his deed." It is evident that, in so far as the opinion bears upon this case, the authority is against appellant, and not in his favor.

The court below found against appellant upon the main proposition presented by his pleading, — that is, that the Hodges corner and Davis line were called for in the deed by mistake; and we are inclined to think that the finding is correct. But we need not consider that question; appellee Crowell being a *bona fide* purchaser for value, appellant cannot recover. The judgment is therefore affirmed.

MOFFETT v. MOFFETT and others.

(Supreme Court of Texas. April 15, 1887.)

WILLS—NUNCUPATIVE—REAL PROPERTY.

Under article 4882, Rev. St. Tex., declaring that any person who is competent to make a written will may dispose of his property by a nuncupative will, under certain conditions and limitations, the word "property" does not include realty, since the statute was substantially the same as the law was before the Revised Statutes, which was interpreted as not permitting nuncupative wills of real property; and section 19 of the final title of the Revised Statutes provides "that the provisions of

the Revised Statutes, so far as they are substantially the same as the statutes of this state in force at the time when the Revised Statutes shall go into effect, or of the common law in force in this state at said time, shall be construed as continuations thereof, and not as new enactments of the same."

Appeal from district court, Dallas county.

S. C. McCormick, for appellant. *Watts & Word*, for appellees.

WILLIE, C. J. In September, 1885, W. R. Moffett, during his last illness, made a nuncupative will in due form of law, giving to his wife and two sons a lot in the town of Waxahachie. He attempted in this will to dispose of no other property. When the will was offered for probate it was contested by the appellees, on the ground that real estate could not be devised by a nuncupative will. The county judge sustained this view, and refused to admit the will to probate. Upon appeal to the district court, the judgment was affirmed, and from that court the case comes here upon appeal. The record shows that counsel for both parties agree that, if real estate is not under our law devisable by nuncupative will, this will should not be admitted to probate; if it is thus devisable, then there is no reason why the present will should not be probated. The only question, therefore, is, can real estate be devised by a nuncupative will under our Revised Statutes in force when the present will was made?

In the case of *Lewis v. Aylott*, 45 Tex. 190, it was settled by this court that, under our law as it existed previous to the Revised Statutes, real estate could not be devised by a nuncupative will. The former law merely provided as to the time, place, and manner in which such a will could be made, without saying what property could be disposed of thereby. The Revised Statutes enact that any person who is competent to make a written will may dispose of the property by a nuncupative will, under certain conditions and limitations. Article 4862. The whole question, therefore, turns upon whether, by using the words "his property" in the above article, the legislature intended so to change the former law as to allow property, both real and personal, to be disposed of by nuncupative will. The decision in *Lewis v. Aylott* is put upon the ground that the general policy of our law, as shown by our statute concerning conveyances, is to require every conveyance of land, including devises, to be in writing. The statute as to conveyances then in force has not been changed by the Revised Statutes, tit. 19. The state's general policy as to real-estate conveyances is therefore the same under them as it was under the former law. If anything contained in article 4862, tit. 99, which title regulates the subject of wills, is to engraft an exception upon title 19, concerning conveyances, and to change the policy as to conveyances of land by devise, the intention of the legislature in this respect must clearly appear.

Article 3140, Rev. St., in defining the meaning of certain terms used in these statutes, says, in substance, that the word "property" includes real and personal property, unless a different meaning is apparent from the context. This is, of course, equivalent to saying that it shall not always include both real and personal estate. If the context demands, it may be confined in its meaning to personalty alone. Immediately preceding these articles, which regulate nuncupative wills, are those which apply to written wills, and provide what property may be disposed of in such instruments. The enumeration is thus made: "All the estate, right, title, and interest in possession, reversion, or remainder * * * of, in, or to any lands, tenements, hereditaments, or rents charged upon or issuing out of them, * * * or of, in, or to any personal property, or any other property whatever." Article 4858. The legislature in this article has mentioned the same kinds of property which under the former law could pass by a written will; and it was doubtless thus specific so that there should be no misunderstanding as to the power of a testator, by a written will, to pass all the property which he might own at his death. The articles enumerated include every species of property that can be pos-

sessed. The legislature then proceeds to regulate the making of verbal wills, and changes the language from the specific terms already employed to the general expression "property." This change of language must have been made for some purpose. If the word "property" was intended to include everything, both real and personal, why did not the legislature use it in reference to written wills? They knew the dangers of fraud and perjury that attend the making of any last will and testament. Why should they be so particular in granting the power of disposing property by written will, and at the same time so general in providing for nuncupative will? The former were less liable to be influenced by fraud than the latter. They could be made in health as well as in sickness. The latter were necessarily to be made when the testator was in his last illness, and liable to be imposed upon as well as misunderstood. If certainty as to the property to be disposed of by either class of wills was required, it was specially demanded as to those of a nuncupative character.

By the common law land could not be devised even by written will. Ancient statutes of England had changed the common law so as to allow such devises by written will, but not by words spoken in last sickness. Our statutes in force when the Revised Code was adopted, had, in regard to lands, gone no further than the law of England on the subject. The legislature, in adopting the Revised Statutes, knew that in reference to written wills they were but re-enacting the law as it already existed; yet they were so specific as to leave no doubt that the right to devise lands by written wills should be preserved. Yet the claim of the appellant is that when they came to make a radical change, not only in the common law as it had existed for centuries, but in time-honored statutes of our own state, and its cherished policy as to the disposition of lands by writing, they effected this change by the use of a word which might or might not have this effect, according as it was or was not controlled in its meaning by other enactments on the same subject. We cannot believe that this was the meaning of the legislature, unless it were shown in a more satisfactory manner. But that this is not the effect of the use of the word "property" in reference to verbal wills is apparent from other reasons. Section 19 of the final title of the Revised Statutes says "that the provisions of the Revised Statutes, so far as they are substantially the same as the statutes of this state in force at the time when the Revised Statutes shall go into effect, or of the common law in force in this state at said time, shall be construed as continuations thereof, and not as new enactments of the same." At the time these statutes went into effect there was an act in force authorizing and permitting all persons to dispose of their own estate, real and personal, by will. Pasch. Dig. art. 3868. No distinction is made in this statute between written and unwritten wills; and property, both real and personal, under the broad language of the statute, might be devised in either way. The same law, specifying what might be disposed of by written will, was in force then that exists under our Revised Statutes. These two statutes, taken together, and construed literally, without reference to the intention of the law-maker, gave a special power to devise lands by written will, and a general power to devise all property, real and personal, by will, either written or nuncupative. According to the argument of the appellant, the law as it now stands gives special power to devise real estate by written will, and a general power to devise all property by nuncupative. The provisions of the former law are the same in substance, and the one must be considered as a continuation of the other. It is a cardinal rule of construction that when a new statute, substantially the same as a former one, is enacted, it must be treated as adopted with the construction given to the former by the judicial authorities.

The construction given in *Lewis v. Aylott* to the former acts upon the subject of nuncupative wills must still prevail, and it must be held that they are

ineffectual to dispose of real estate. But, if there were still any doubt upon the subject, it is resolved by the report of the commissioners who revised our statutes, when the result of their labors was laid before the legislature. In respect to the title, "Wills," they say: "This old statute has been rearranged, and its different sections have been subdivided into a number of articles, so as to make it more easy of reference. Beyond this we have not felt authorized to change a law that has so long been in force, and whose provisions have so often been the subject of judicial interpretation." This title was adopted as reported, without any changes made by the legislature. They adopted it with the report of the commissioners before them, and with the distinct understanding that the new law had not changed the law as to wills of any character, in any respect; that the provisions as to nuncupative wills found in that title was the same, in substance, as the law in force; that the commissioners did not intend to interfere with that judicial interpretation which refused to sanction the disposition of land by such unwritten wills. The legislature, in effect, made the report of the commissioners, with the former judicial construction, a part of the new law, and as effectually prohibited a devise of real estate by nuncupative will as if they had so enacted in express terms. This leads us to the conclusion that the nuncupative will offered for probate did not convey the lot in question, and was of no validity whatever.

The judgment of the court below, refusing to admit it to probate, is therefore affirmed.

HAGERMAN v. SUTTON.

(*Supreme Court of Missouri.* February 23, 1887.)

1. HUSBAND AND WIFE—REAL ESTATE OF WIFE—MORTGAGE.

A wife, being seized in her own right of real estate, joined her husband in executing a note and mortgage thereof. *Held* that, though under the rule of *Musick v. Dodson*, 76 Mo. 624, her signing the note was a nullity, since she had no separate estate in the land, this did not avoid the mortgage, since it was competent for her thus to mortgage her land.

2. MORTGAGE—FORECLOSURE—JUDGMENT—MARRIED WOMAN—DEFICIENCY.

The mortgage was foreclosed, the wife being made a party defendant. The judgment contained the usual deficiency clause, giving a personal judgment against her. *Held*, that this did not invalidate the sale under the foreclosure, since only the property mortgaged was sold.

3. MORTGAGE—ASSIGNMENT—TRANSFER OF NOTE—RELEASE.

In Missouri the transfer of a note secured by mortgage transfers the mortgage; and, after the transfer, the mortgagee has no power to release any part of the property mortgaged, and such a release by him is void.

4. VENDOR AND VENDEE—BONA FIDE PURCHASER—NOTICE.

A purchaser of real estate incumbered with a mortgage, but which purports to be released by an attorney in fact, is charged by the record with notice that the power of attorney describes a different tract of land from that released, and is not an innocent purchaser.

Appeal from circuit court, Schuyler county.

M. & H. Hagerman, for appellant. *Higbee & Bailey*, for respondent.

SHERWOOD, J. Ejectment for N. E. $\frac{1}{4}$ of S. E. $\frac{1}{4}$ of section 1, township 66, range 15, in Schuyler county, Missouri. In 1871, Mary F. Gray was seized in her own right of the property in suit, as well as of other real estate. She joined with her husband in executing a promissory note and mortgage to Downing, the mortgage embracing the land in controversy as well as other lands. The note had five years to run, was negotiable in form, and was transferred, as

Downing testified, immediately after being executed for value to plaintiff. In November, 1872, Mary F. Gray and husband executed a bond for a deed to defendant for the land now in controversy, the bond being recorded on the day of its execution. Afterwards, on the eighth of March, 1873, Downing executed a power of attorney to John Baker, authorizing him to release a mortgage on the Schuyler county record, state of Missouri, wherein James M. Gray and wife are mortgagors, and William G. Downing mortgagee, as to the N. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 1, township 66, range 15. This power of attorney was acknowledged and recorded on the day of its execution, and on the same day a release was entered on the margin of the record of the Gray mortgage, as follows: "I, John Baker, attorney in fact for William G. Downing, do hereby release the north-east qr. of the south-east qr. of section 1, township 66, range 15, as described in this mortgage, this eighth of March, 1873. JOHN BAKER."

An objection to the introduction of this release in evidence was made by plaintiff on the ground that the same was made after he had purchased the note and mortgage, and because Baker had no power to make the same; but this objection was overruled, and the point saved. On the twenty-sixth of March, Gray and wife conveyed the land in suit, correctly described by general warranty deed, to defendant, and this deed was put to record May 6th of that year. Defendant on his part testified that he bought the land through Richardson at \$5 per acre; paid \$100, when title-bond was executed, the bond being made because the land was mortgaged. Afterwards he paid the other half of the purchase money, relying on the statements of Richardson and Baker that Downing told them that he still owned the note and mortgage, and relying on the statement of Baker that he had released the land from the mortgage, showing him at the same time the entry of release already mentioned; but defendant also admitted that the N. E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$, etc., belonged to himself and Graves. This land is the same as that described in the power of attorney from Downing to Baker. Defendant stated that he took possession of the land in suit 11 years before the trial of this action, and as this trial occurred in November, 1883, presumably he took possession in 1872, when the title-bond was made. After taking possession, he fenced the land, cleared it, paid taxes from time he bought land up to 1882, and never heard of plaintiff's claiming it until the present action was brought. Plaintiff testified that he resided in Keokuk, Iowa, and bought the note in 1871 or in 1872, in good faith, in the ordinary course of business, and had never heard of any claim that Downing had given Baker a power of attorney to release the land in controversy until after receiving the sheriff's deed at the foreclosure sale. This occurred in October, 1877. Before the suit for foreclosure was brought, James M. Gray died, and Mary F. Gray, remaining unmarried, was duly served with process, and was the sole party defendant, against whom the judgment of foreclosure was rendered. At the conclusion of the judgment is the usual general deficiency clause where a mortgagor is personally summoned, but only the property mortgaged was sold. Mrs. Gray is the common source of title. The answer of defendant, in substance, charged that the power of attorney from Downing to Baker, owing to a mistake of the scrivener, failed to properly describe the land, asked for reformation, charging the plaintiff with knowledge at the time he purchased the note from Downing. The reply denied all notice, and claimed that the purchase of the note was made in good faith, and prior to maturity, etc.

As to the release, Downing's testimony shows that he never intended to release any of the land mortgaged by Gray and wife to him, but only to release from the mortgage a 40, which was said to be inadvertently inserted therein, and did not belong to Mrs. Gray. On this point there was conflict in the testimony. When the evidence was closed, the court gave the following declaration of law: "That plaintiff cannot recover herein, because the decree

of foreclosure offered in evidence, and set out in paragraph three of plaintiff's evidence, was void for the reason that Mrs. Gray, the defendant therein, having been a married woman at the time the note and mortgage were executed." Thereupon plaintiff excepted, and comes here by appeal. I have thus briefly outlined the testimony, as prefatory to the discussion of the points presented by the record.

1. Under the ruling made in *Musick v. Dodson*, 76 Mo. 624, the act of Mrs. Gray in signing the note in conjunction with her husband, she not being possessed of a separate estate in the land granted, gave her act validity neither in law nor equity. But it does not thence follow that because this is so, that the mortgage of her land which she joined her husband in executing was null. It was perfectly competent for her thus to mortgage her land. *Wilcox v. Todd*, 64 Mo. 388. And when her husband died, and the mortgage debt matured, she was properly made the party defendant to the suit for foreclosure, and the result of such a suit would ordinarily be to cut off her equity of redemption as effectually as if she had been discovered at the time the note was executed. Of course, she could not properly be made personally responsible for the debt, but her land was bound by the mortgage for the note and interest, and the statute authorized her, as the mortgagor, to be sued, and her equity of redemption foreclosed. Rev. St. 1879, § 8805. With the exception above noted, the judgment of foreclosure is in usual form, and cannot be regarded as a personal judgment against her, except the general deficiency clause already noted. Does this clause render the judgment void in so far as to affect plaintiff's title acquired under another clause of that judgment? I am not of the opinion that it does, and these are my reasons: There was no sale made under the foreclosure proceedings except of the property mortgaged. In *Fithian v. Monks*, 43 Mo. 502, which is erroneously mentioned as a judgment against a *married woman*, the judgment, one of foreclosure, was collaterally attacked; but there Mrs. Fithian was not a *mortgagor*, but only the grantee in a deed poll made by Barnard to her, wherein it was stated that she had assumed, as a part of the consideration for the premises, to pay off the incumbrance; and it was adjudged that notwithstanding that Mrs. Fithian had been personally served with process, that such relief was expressly asked for in the petition, that judgment should go against Barnard, the mortgagor, and Mrs. Fithian, if the mortgaged premises should be insufficient to pay the mortgage debt; yet that the proceedings, being simply one *at law* for the foreclosure of a mortgage, and Mrs. Fithian *not being a mortgagor*, the court had *no jurisdiction* to render a judgment against her *personally*, though it had a "general jurisdiction as to matters of both law and equity, and had a special jurisdiction at law under the statute, yet that it had no authority, under the constitution and laws of this state, to take cognizance of such a cause, and grant such relief;" and that *such portion* of the judgment was a nullity, and no title passed by a sale of her land, not included in the mortgage. The clear intimation given in that case is that the *residue* of the judgment, *though at law*, was valid, so that, applying the principle of that case to the one at bar, the foreclosure sale should be held valid; for here only the mortgaged premises were sold, and, besides, Mrs. Gray was a mortgagor, and the only mistake made was in that portion of the judgment which allowed other land of hers to be sold, a portion which was never enforced by execution.

In *Massey v. Scott*, 49 Mo. 278, a general judgment was rendered in an attachment suit where the only service was by publication; and it was ruled that the jurisdiction of the court to render judgment against the attached property was complete, and, though the judgment which should have been *special*, was a *general* one, and was therefore informal, yet that it was valid until set aside or reversed, and was such a judgment as the court would correct by entry *nunc pro tunc*, and, the execution having gone only against the attached property,—property over which the court had acquired jurisdiction,

—that neither the judgment nor the sale thereunder could be overthrown by collateral attack.

So, too, in *Hardin v. Lee*, 51 Mo. 241, a judgment rendered in attachment proceedings, the service being by publication, was assailed as void because the judgment was for a sum in gross, the attachment having been sued out for taking personal property, and also for personal injuries, the law at that time not permitting an attachment on the latter ground; but it was ruled that the judgment, though "grossly erroneous," was not void, the court having jurisdiction of the subject-matter, and having acquired jurisdiction in the special case by the method pointed out by the statute.

The like principle was maintained in *Lenox v. Clarke*, 52 Mo. 115, where two persons were sued, but one of them served, and joint judgment against both; where it was held that, although the judgment was void as to the party not served, yet it was valid as to the party served, and, his property only having been sold, that the sale was impregnable to collateral attack.

A more recent case illustrates the same principle,—of a judgment being void as to one defendant, yet valid as to the others,—when attempted to be overthrown by collateral attack, as well as the sale made thereunder, where the land only of such others was sold. *Holton v. Towner*, 81 Mo. 360. I take it that no sound distinction can be made between the invulnerability of a judgment to collateral attack, when erroneous as to one of two defendants, and where erroneous in some other particular, where such error does not go to the extent of invalidating the very jurisdiction of the court, upon which jurisdiction the validity of the judgment and title aforesaid rest. In a word, error and nullity are not legal equivalents or synonyms. A judgment may be so erroneous as to be null, but it is not necessarily null because erroneous. It may be null as to some particular person, or null as to some particular clause, yet, if enforced only as to those persons upon whom service has been had, or enforced as to those particular and independent clauses, confessedly valid, no ground will exist for destroying, by a collateral attack, the whole judgment, and all subsequent proceedings based thereon.

2. By the foregoing remarks I am not to be understood as impeaching in any point or particular the entire validity of the judgment of foreclosure now in question. That the court had jurisdiction over the general subject-matter of the foreclosure of mortgage cannot be denied; that by the service of its process it brought Mrs. Gray before it, and thus subjected her to that general jurisdiction, is equally undeniable; that it had power to render judgment against her as mortgagor the statute already cited is express; but undoubtedly it erred in holding her personally liable for any deficiency which might arise in case her land, which she had mortgaged, failed to satisfy the debt her husband had contracted, and which she had no capacity to contract. But does this error, palpable though it is, oust the jurisdiction of the court, and prevent that clause of the judgment from being enforced? The answer to this question is forcibly expressed by Senator SEWARD in *Davis v. Packard*, 10 Wend. 71, where he says: "The power to decide correctly, and to enforce a decision when correctly made, necessarily implies the same power to decide incorrectly, and to enforce a decision when incorrectly made."

An answer is also furnished by the supreme court of Ohio in *Patne v. Mooreland*, 15 Ohio, 485, saying: "The distinction is between a lack of power or want of jurisdiction in the court, and a wrongful or defective execution of the power. In the first instance, all acts of a court not having jurisdiction or power are void; in the latter, voidable only. A court, then, may act—*First*, without power or jurisdiction; *second*, having power or jurisdiction, may exercise it wrongfully; or, *third*, irregularly. In the first instance, the act or judgment of the court is wholly void, and is as though it had not been done. The second is wrong, and must be reversed upon error. The third is irregular, and must be corrected by motion. The latter is where the power

is rightfully exercised, but in an irregular way. Hence there is a vast distinction between a defect of power, a wrongful exercise of power, and an irregular exercise of power."

The question is answered by the language of the court in *Colton v. Beardsley*, 38 Barb. 51, that "the test of jurisdiction is whether the court has power to enter on the inquiry, and not whether its decision is right or wrong."

It is answered in *Werthenheimer v. Boonville*, 29 Mo. 258, where an ordinance prohibited in certain circumstances the purchase of "wild game." Werthenheimer bought "fresh fish," and was fined five dollars by the mayor; and as no appeal lay in cases of that sort, except the fine exceeded that sum, the Cooper common pleas awarded prohibition to prevent the collection of the fine, on the ground that the mayor had no jurisdiction to impose a fine on Werthenheimer; but, in delivering the opinion of the court in reversal of the judgment, SCOTT, J., said: "It is unnecessary to determine whether fresh fish is wild game, or whether the mayor exceeded his authority in punishing the plaintiff for purchasing fresh fish out of the market place during market hours. It is hard to conceive how the question of jurisdiction can be made to depend on the fact whether the judgment was right or wrong. The mayor unquestionably has authority to decide whether the ordinance had been violated; and, after he has determined it, how can it be said he had no jurisdiction? According to the argument, the court had to decide the case before its jurisdiction could be ascertained. If it was of opinion in favor of plaintiff, it had jurisdiction; if of opinion against him, it had none."

The question is answered by *O'Reilly v. Nicholson*, 45 Mo. 160, BLISS, J., saying: "A judgment, though informal, even to the extent of granting a relief not contemplated in the petition, when the parties are before the court, and the relief is within its jurisdiction, is not a void proceeding."

The question is answered by *Gray v. Bowles*, 74 Mo. 419, where it was ruled that, though the law did not authorize a judgment on a special tax-bill, except as against each particular lot, yet that a judgment *in solido*, against several lots, for the aggregate amount of the tax-bills due on all said lots, was, although erroneous, yet not void, because rendered by a court having jurisdiction of the person and of the subject-matter.

It is answered by *Hoskinson v. Adkins*, 77 Mo. 537, where it was ruled that where husband and wife were notified by publication of foreclosure proceedings, but the deed was not acknowledged before an officer capable of taking the acknowledgment, and in consequence of this the title of neither the wife nor husband passed, yet that the foreclosure proceedings were not subject to collateral attack, and were good as a basis of an ejectment brought by the purchasers from the husband and wife.

The question is also answered by the case of *Chase v. Christianson*, 41 Cal. 253, where it is said: "It is not the particular decision given which makes up jurisdiction, but it is the authority to decide the question at all. Otherwise all distinction between erroneous exercise of jurisdiction on the one hand, and the total want on the other, must be obliterated."

These extracts abundantly show that the rule laid down in the case of *Fithian v. Monks*, *supra*, is at variance with the great current of authority, both in this state and elsewhere, in that it fails to make the readily observable distinction between jurisdiction to act in a given cause and the erroneous exercise of such jurisdiction; and I am of opinion that the rule there announced should no longer be followed. In the case under consideration, the court, when trying the foreclosure proceedings, was invested with full authority by the law of its organization to try causes of that nature. This constituted its general jurisdiction over the subject-matter of the action. By its process it brought Mrs. Grady within the purview of its power; thus making up the sum total of the authority to act in that particular case, to-wit, jurisdiction. That in the exercise of the power conferred by the law of its organization, and

by the service of its process, it erred in holding Mrs. Grady personally responsible for a debt she never contracted, and was indeed incapable of contracting, does not go a hair towards impairing or impeaching its jurisdiction to make that erroneous ruling. Jurisdiction being acquired, error could not oust it, although that error consisted in granting a relief not warranted by law. So much for the judgment of foreclosure.

3. The next point for consideration is the effect of plaintiff's purchase of the note which was secured by the mortgage. When plaintiff purchased the note, the mortgage passed with it as an incident thereto. This has been the rule since an early day in this state. *Laberge v. Chauvin*, 2 Mo. 179; *Ander-son v. Baumgartner*, 27 Mo. 87; *Mitchell v. Ladew*, 36 Mo. 526; *Watson v. Hawkins*, 60 Mo. 550; *Joerdens v. Schrimpf*, 77 Mo. 383; *Boatmen's Sav. Bank v. Grewe*, 84 Mo. 477. And when a note is underdue when transferred, and is negotiable, the presumption arises of want of notice, which presumption holds good till countervailing proof be made. The mortgage, being the incident, partakes of the negotiability of its principal, to-wit, the note, without any formal assignment or delivery, or even mention, of the former. But for the note, the mortgage never would have existed. It owes its birth and being to the note, and ceases to exist when the latter is discharged.

At the outset of his case, then, plaintiff started with the presumption before mentioned in his favor. *Prima facie* he took the mortgage, as he took the note, upon the same footing of equality, and with the same rights, that equity accords to both instruments. *No hidden lien, undisclosed priority, or secret trust, between Downing and any third person, could affect his interests, or prejudice his claims, to full satisfaction out of the mortgaged premises. He took the mortgage as he took the note.* *Carpenter v. Longan*, 16 Wall. 271, and cases cited; 1 Daniel, Neg. Inst. §§ 834, 834a, and cases cited; 1 Jones, Mortg. § 834; *Lewis v. Kirk*, 28 Kan. 497, and cases cited.

Now, was there anything, apart from the transaction between Downing and the plaintiff, any matter of record, or matter *in pats*, to cast notice upon the latter at the time of his purchase of the note? He says that he bought the note and mortgage in 1871 or 1872. Taking the latter year as the correct date, and there is nothing in the record showing a later date for the purchase; taking it that such purchase was subsequent to the time when the title-bond from Gray and wife to Sutton was put to record,—was there anything in this in the nature of a *caveat* to plaintiff not to purchase the note? Certainly not. All that such a matter of record could apprise him of would be that the mortgagors had agreed to convey their equity of redemption in the mortgaged premises to the defendant; but this was not at all calculated to inform the plaintiff that any hostile right or adverse claim would be asserted against the mortgage, or tend to diminish the security which it afforded. Its obvious and only tendency would have been to make known to him that the land, *cum onere*, had been transferred to another; that, and nothing more.

4. And it is clear that the plaintiff, after his purchase of the note in good faith, and before due, could not be affected by any subsequent notice of defendant's rights, even of the most positive character. *Leavitt v. La Force*, 71 Mo. 353.

5. It is equally clear under our statute, and under the rulings of this court, that, after Downing parted with his title to the note, it was out of his power to release any portion of the mortgaged premises. *Ewing v. Shelton*, 34 Mo. 518; *Joerdens v. Schrimpf*, 77 Mo. 383; *Lee v. Clark*, 1 S. W. Rep. 142.

6. But it is said that the present litigation is a contest between the "innocent purchaser of the mortgaged land and the innocent purchaser of the note." The rulings already made in this opinion show that, if the plaintiff was the innocent purchaser of the negotiable note which took the mortgage with it as its inseparable incident, causing it to partake of its own negotia-

bility, and if, as already asserted, it was out of the power of the mortgagee, after transferring the note, to release or discharge any portion of the mortgaged premises, it is difficult to see how plaintiff and defendant could both occupy the attitude of innocent purchasers. But, leaving out of view the points already discussed, in what way can the defendant lay claim to being an innocent purchaser of the land? "Generally it may be stated, as a rule on this subject, that where a purchaser cannot make out a title but by a deed which leads him to another fact, he shall be presumed to have knowledge of that fact. So the purchaser is in like manner supposed to have knowledge of the instrument under which the party with whom he contracts, as executor or trustee or appointee, derives his power." 1 Steph. Eq. Jur. § 400, and cases cited. Applying this rule to the case at bar, the defendant must be presumed to have had knowledge of the power of attorney from Downing to Baker, and of its failure to describe the land in controversy, and cannot, therefore, be deemed an innocent purchaser.

For these reasons, the judgment will be reversed and a judgment for plaintiff will be entered in this court.

(All concur.)

SLATTERY and others v. ST. LOUIS & NEW ORLEANS TRANSP. CO. and others.

(*Supreme Court of Missouri. March 21, 1887.*)

1. CORPORATIONS—ACTION BY—REFUSAL OF DIRECTORS TO BRING.

Where a cause of action accrues to a corporation, the general rule is that suit must be brought in the name of the corporation, and not by the stockholders. And in all those cases where, on account of the wrongful refusal of the directors or officers managing the affairs of the corporation to sue, the stockholders are allowed to do so, the recusant directors or officers must be made defendants, and the action is to be considered as primarily against them.

2. SAME.

The St. Louis Dispatch Company having a right of action against the St. Louis Transportation Company, the stockholders instructed the directors to bring suit thereon; but the directors fraudulently conspired with the transportation company, and refused to bring suit. The plaintiffs, a minority of the stockholders of the dispatch company, thereupon brought this action in their own name against the transportation company, without making the directors defendants. *Held*, that the action could not be maintained.

3. SAME—SALE OF FRANCHISE AND PROPERTY—LIABILITY UNDER.

Where an old-established corporation sells out to a newly-organized one, and turns over all its property, the new company becomes liable upon the debts and contracts of the old.

Appeal from St. Louis circuit court.

Dyer, Lee & Ellis, for plaintiffs in error. *Given Campbell* and *Joseph Dixon*, for defendants in error.

BLACK, J. This case is here from a judgment sustaining separate demurrers to the petition. The defendants are the St. Louis, New Orleans & Foreign Dispatch Company, the St. Louis & New Orleans Transportation Company, known as the "Transportation Company," and the St. Louis & Mississippi Valley Transportation Company. The plaintiffs are three of the shareholders in the dispatch company, and they own 380 of the 1,000 shares of stock.

The dispatch company was organized for the purpose of soliciting freight, and making contracts for the transportation of the same, by means of and through the agency of inland and ocean carriers. It issues through bills of lading, but is not a carrier. At the dates hereafter named, the transportation company was engaged in moving merchandise upon the Mississippi river. On the fifth of March, 1881, these two corporations made a written contract to continue for five years, whereby the dispatch company agreed to open offices

and appoint agents to solicit business and make contracts at St. Louis and New Orleans, in the United States, and at Liverpool, England, and at such other places as might be agreed upon. For the freight received and turned over by the dispatch company to the transportation company, the latter agreed to pay the former 10 per centum of the amount by it earned and charged for the carriage of the merchandise over its own line.

The petition proceeds to state that the dispatch company, pursuant to the contract, established agencies in the United States and foreign countries at an outlay of \$25,000, made contracts for and turned over to the transportation company a vast amount of tonnage; that in December, 1881, the members of the transportation company, and other persons not named, organized the St. Louis & Mississippi Valley Transportation Company, with a capital stock of \$2,000,000; that thereupon the old transportation company turned all of its boats, barges, elevators, and other property over to the new corporation, for which the latter issued to the members of the former \$1,000,000 of paid up stock; that the new corporation succeeded to the rights, property, business, and good-will of the old one; and that the old transportation company is insolvent. It is also stated that the new company was organized, and the property of the old one turned over to it, in pursuance of a conspiracy between the members of the old company and other persons to dissolve the old company, and to thereby evade and escape the duties and obligations arising out of the contract with the dispatch company; that the new company, which is the old one under another name, refused to carry out the contract, and refuses to pay the commissions due under it; that 10 per cent. of the amount charged and earned by the transportation company and its successor for carrying the freight called for by the contract has been and will be \$300,000; and that this amount, with the \$25,000, is the amount in which the dispatch company has been damaged by the breach of the contract.

Plaintiffs sue for themselves and all other stockholders, and state that more than a year previous to the commencement of this suit, the stockholders, by resolution, instructed the directors to commence a suit in the name of the company to vindicate their rights, which they refused to do; that the present officers obtained a majority of the stock for the purpose of preventing the corporation from asserting its rights; that the managing directors refuse to bring the suit, but have conspired with the other defendants to surrender all rights of the dispatch company arising from the contract. The prayer is for the recovery of the damages, and that the property of the new corporation, received from the old one, be declared a trust fund for the payment of the same, the appointment of a receiver, and for general relief. The demurrers present the question whether these plaintiffs can maintain this suit.

It is to be observed at the outset that the directors who refuse to bring the suit are not made defendants. It is not a suit to require any of the officers to account for their maladministration of the affairs of the company. It is an effort by the plaintiffs as stockholders in their own names to collect damages due to the dispatch company from the transportation company arising from the breach of a contract,—a contract which had been made in the legitimate conduct of the affairs of the two corporations. The cause of action accrued to the corporation, and not to the shareholders; and the general rule undoubtedly is that all such suits must be brought by and in the name of the corporation. The question, then, is whether this case comes within any of the exceptions to that rule, for there are exceptions as well established as the rule itself.

The vice-chancellor in *Foss v. Harbottle*, 2 Hare, 492, so often cited, after speaking of the general rule, made these remarks: "If a case should arise of injury to a corporation by some of its members, for which no adequate remedy remained, except that of a suit by individual corporators in their private characters, and asking in such character the protection of those rights to which

in their corporate character they were entitled, I cannot but think that the principle so forcibly laid down by Lord COTTENHAM in *Wallworth v. Holt*, [4 Mylne & C. 635,] and other cases would apply, and the claims of justice could be found superior to any difficulties arising out of technical rules respecting the mode in which corporations are required to sue."

Where there has been a waste or misapplication of corporate funds by the officers or agents of the company, a suit in equity may be brought by the corporation to compel them to account for the waste or misapplication. "But as a court of equity never permits a wrong to go unredressed merely for the sake of form, if it appear that the directors of a corporation refuse in such case to prosecute, by collusion with those who had made themselves answerable by their negligence or fraud, or if the corporation is still under the control of those who must be the defendants in the suit, the stockholders, who are the real parties in interest, will be permitted to file a bill in their own names, making the corporation a party defendant." Ang. & A. Corp. (11th Ed.) § 312.

Mr. Pomeroy, in his work on Equity Jurisprudence, § 1095, states the rule as follows: "Wherever a cause of action exists primarily in behalf of the corporation against directors, officers, and others for wrongful dealing with the corporate property, or wrongful exercise of corporate franchises, so that the remedy should regularly be obtained through a suit by and in the name of the corporation, and the corporation, either actually or virtually, refuses to institute or prosecute such a suit, then, in order to prevent a failure of justice, an action may be brought and maintained by a stockholder or stockholders."

These principles of equity jurisprudence have been well considered and applied in a number of adjudicated cases. The following are some of them: *Brewer v. Boston Theater*, 104 Mass. 399; *Peabody v. Flint*, 6 Allen, 52; *Robinson v. Smith*, 3 Paige, 222; *Pond v. Railroad Co.*, 12 Blatchf. 280; *Detroit v. Dean*, 106 U. S. 537, 1 Sup. Ct. Rep. 560; *Haves v. Oakland*, 104 U. S. 450. The relief awarded is often of a preventive character, and in many cases the officers have been required to account for a breach of the trust reposed in them, and for the misapplication of the funds and property of the company. If other parties have participated with the officers in such proceedings, they may be joined as defendants, and held to their just responsibility; and property of the company may be followed into their hands. *Peabody v. Flint, supra*; *Russell v. Wakefield Water-Works Co.*, L. R. 20 Eq. 474. But in all these cases the defaulting directors or officers were made defendants, and the suits were primarily against them. That the suit must be primarily against them is also the deduction to be made from the above extracts from the text-books. The relief, when awarded against other persons, flows incidentally from their complicity with the officers in the wrong complained of. No officers of the plaintiffs' corporation are parties to this suit. It is simply a suit against the debtor company only to collect a debt or damages due to the dispatch company, and we do not understand that a suit for such a purpose only comes within the exceptions of the general rule before stated. If these managing officers were sued for the abuse of the trust imposed upon them as officers, they might possibly assign a good reason why the suit should not be brought, and why the affairs of the corporation should not be taken out of their hands. They are the proper persons to show, if they can, why the management of the affairs of the company should not be taken out of their hands, as must be done to sustain this suit.

The case specially cited by the plaintiffs, as giving them a right to prosecute this suit, is that of *Haves v. Oakland*, 104 U. S. 450. There a stockholder filed his bill against his company, the directors thereof, and the city. The complaint was that the city demanded, without compensation, water for certain municipal purposes, to which demand the company yielded, to the great loss of the company, the complainant, and the other stockholders. The

conclusion is there reached that in the state courts the right of a stockholder to sue, in cases where the corporation is the proper party to bring the suit, is limited to cases where the directors are guilty of a fraud or a breach of trust, or are proceeding *ultra vires*. The enumeration of the different cases there made in which such suits may be brought certainly does not include the one in hand. Mr. Justice MILLER, who prepared that opinion, refers to *Samuel v. Holladay*, Woolw. 418, where, after reviewing *Dodge v. Woolsey*, 18 How. 331, he says: "But no case is cited, nor does any dictum in that opinion go to the length of asserting that, when a corporation has been injured by a tort or a breach of a contract, or has any right of action, legal or equitable, against a party, an individual stockholder can come into court and prosecute the cause of action because the corporation fails or refuses to do so." These authorities are in entire accord with and in confirmation of the conclusion before stated.

If the matters stated in the petition are true, the plaintiffs have a complete remedy under sections 948, 949, Rev. St.; and when a receiver is appointed, that officer of the court will stand invested with authority to sue for all demands and debts due to the company. This result renders it useless to discuss the other questions raised by the demurrers. We may say in conclusion that we are all agreed that, from the statements of the petition, the new transportation company is liable for the debts of the old transportation company,—certainly, to the full extent of the value of all of the property received from the old company. The judgment of the circuit court is therefore affirmed without prejudice.

(All concur.)

DESCOMBES v. WOOD and others.

(Supreme Court of Missouri. February 28, 1887.)

1. CORPORATIONS—STOCKHOLDER—ACTION TO SET ASIDE ASSIGNMENT.

Any shareholder may be complainant in an action to set aside an assignment for the benefit of creditors made by the board of directors of an insolvent banking corporation, on the ground that such assignment was *ultra vires*.

2. SAME—POWER OF DIRECTORS—ASSIGNMENT FOR BENEFIT OF CREDITORS.

Plaintiff, a shareholder and creditor of a savings bank, brought an action to set aside an assignment for the benefit of creditors because made without authority from or notice to the shareholders. *Held*, that a demurrer to the petition was properly sustained. The consent of all the stockholders need not be first had and obtained, if the assignment is made in good faith.

3. SAME—ACTION BY STOCKHOLDER.

In such case that action properly purports to be brought on behalf of plaintiff and others similarly situated, without stating who they are, or how numerous, or whether they constitute a majority of the stockholders or otherwise.

4. LACHES—DELAY IN BRINGING SUIT.

In such a case it is laches for a shareholder and creditor to delay bringing his suit for four years after the appointment of the assignee, during which he was engaged in administration, if no excuse is alleged in the way of disability or want of knowledge.

Appeal from circuit court, Johnson county.

Brinker, Sparks & Campbell, for plaintiff in error. *A. Comings*, for defendant in error.

RAY, J. Plaintiff brought this action against Joseph Brown, assignee of the Warrensburg Savings Bank, and against said bank, to set aside a deed of assignment from the bank to said Brown, and to divest the assignee of all right, title, and interest in and to the property conveyed, and to restore and

invest title to and control over same to the bank, and to enjoin the assignee from asserting title thereto. Since the institution of the suit, and while the same was pending in this court on writ of error, as appears by stipulation in the cause, said Brown has departed this life, and said Woods has been duly appointed his successor as such assignee, and duly qualified as such. Plaintiff was a stockholder in the bank, and also one of its creditors, at the time of the assignment, on account of money theretofore loaned to it, and evidenced by certain certificates of deposit, and in February, 1881, he recovered judgment against the bank upon said indebtedness in the circuit court of Johnson county, Missouri, which said judgment remains in force, unpaid and unsatisfied. On January 17, 1880, a majority of the board of directors of said bank met in regular session, and, upon motion duly seconded, resolved that they believed it to be to the interest of all concerned that Joseph Brown be appointed assignee to settle up the business of the bank, and that William Calhoun, president, and Amos Markee, cashier, be authorized and directed to execute and deliver to said Brown, as assignee, a deed of assignment, in form of law, conveying to him all the property owned by the bank, to be held for the benefit of all its creditors, according to the laws of this state. Afterwards, on the twenty-sixth day of January, 1880, a deed of assignment was, under authority of said resolution, executed, acknowledged, and delivered to said Brown, who caused the same to be recorded in the office of the recorder of deeds for Johnson county, Missouri, on the twenty-sixth day of January, A. D. 1880, and immediately thereafter, and in pursuance and by virtue of said instrument, took possession of all the property and effects of the bank, and is asserting title thereto, and exercising control thereof, to the exclusion of all other persons. Said deed of assignment, and the acknowledgment thereof, are set out in the petition, but are omitted from this opinion, for the reason that they already appear in full in the case of *Eppright v. Nickerson*, 78 Mo. 484, 485, to which reference is here had.

The above facts, except as to the successorship of said Wood, (which appears by said stipulation filed in this court,) appear from the petition in this case, which further avers, in substance, that the said majority of said board of directors adopted, and caused to be entered upon the records of the proceedings of said board, the said resolution of January 17, 1880, without authority from or notice to the owners and holders of the shares of capital stock of said corporation, and without notice, assent, or knowledge, and against the desire, of plaintiff; and that the said deed of assignment, having been executed without the assent or knowledge of the said several shareholders, is void, and of no binding force as against them; that the specified directors, constituting a majority of the board, have conspired to and with defendant Brown, and are aiding and abetting him to claim possession of the property and effects of said corporation, under the said instrument, and refuse to bring this suit in the name of the corporation against said Brown for the relief of the shareholders, and that plaintiff, therefore, brings the same on his own behalf, and in behalf of all other shareholders in said corporation similarly situated.

Defendants interposed a demurrer to the petition, assigning the grounds thereof that the same does not state facts sufficient to constitute a cause of action; that there is a defect of parties plaintiff; and that, if plaintiff ever had a right of action as claimed, he is by his own showing estopped from now asserting it. This demurrer was sustained by the court, and the propriety of its action in this behalf is the only question before us for review and determination.

The plaintiff, it will be perceived, sues in his own behalf, and in behalf of those similarly situated, without stating who they are, or how numerous, or whether they constitute a majority or otherwise of the creditors and stockholders, both of which he shows himself to be. If the assignment, however, is *ultra vires* and void, as claimed, any portion of the shareholders may, it

seems, be complainants, or even a single one of them; and in that event the action properly purports to be brought by the given plaintiffs and others similarly situated. Mor. Corp. § 408, and cases cited. The petition in this case, it will be seen, does not directly and in terms charge either one way or the other as to the solvency or insolvency of the corporation at the date of the resolution, or at the date of the said deed of assignment; nor does it charge the directors with any fraudulent intent, or fraud in fact in the premises; nor does it negative the grounds given in the resolution to assign, that such course was required in the best interest of all concerned. Moreover, we may add that it is not alleged that the assignee had mismanaged or wasted, or is about to mismanage or waste, the assets, or that the interests of the stockholders would be promoted by the grant of the relief prayed for. The resolution, in itself, does not purport the insolvency of the bank, but only perhaps failing circumstances, and present inability to convert its assets into cash, and to pay its debts on demand; but, as against the pleader so failing to allege the solvency of the bank, or its ability ultimately, with proper management, to meet its liabilities, taken in connection with the actual assignment, by said deed, for the benefit of creditors, we think the case presented is one solely as to the power of a board of directors of an insolvent banking corporation, acting in good faith, to make an assignment of all its property for the benefit of all its creditors, without the consent first had and obtained of all its stockholders.

The question thus presented was not, we may say at the outset, up for decision in the case of *Eppright v. Nickerson*, 78 Mo. 482. In the course of that opinion the following statements occur: "In the case at bar no stockholder is complaining of the action of the directors, and the only stockholder who is a party to the suit relies upon the assignment to defeat plaintiff's action against him. It does not appear that the stockholders did not consent, nor that any of the stockholders ever complained of the conduct of the directors." The plaintiff in that action was a creditor, and had proved up his debt before the assignee, and was then proceeding against the defendant by motion under section 13, art. 1, c. 37, Wag. St.; and this court there held that, as against him, the assignment was valid, and that he could not make the objection that the same was *ultra vires* and void. The single remark of the learned judge in the course of that opinion, to the effect that the assignment by the directors was *ultra vires* and void as to the stockholders, if they did not consent thereto, is a mere *dictum*, as is apparent from the above statement of the actual question before the court for decision.

The *dictum* is expressly based upon the authority of the case of *Abbot v. Hard Rubber Co.*, 33 Barb. 578, which decides, we think, a very different question from the one at bar, as is apparent from the language employed in the opinion of SUTHERLAND, J., at page 584, where it is said: "The sale and transfer in question was not, and did not purport to be, a sale of the property of the corporation for the benefit of its creditors." In that case four of the seven directors, after passing a resolution to that effect, perfected an absolute sale in gross of all the stock, consisting of articles composed of India rubber belonging to the corporation, and of all the dies, tools, etc., and of all rights held by the corporation, under the Goodyear patents, to manufacture such articles; thus destroying the corporation in its said business of manufacturing India-rubber goods, which was the object and purpose for which it was organized. There were other features in the transaction, such as the immediate association and incorporation of said purchasers and said four directors of the old corporation into a new company for the manufacture of goods composed of India rubber; and the immediate transfer to the new corporation, by the said purchasers, of the effects and rights transferred to them by said directors of the old corporation; but the case was disposed of upon the ground that as against the plaintiff, who was a stockholder not consenting thereto, the sale was invalid for a want of power in the corporation or said directors to make.

Section 157, Field, Corp., also referred to in *Eppright v. Nickerson*, in this connection, is to the same general effect as the *Abbot Case*, which is cited in the note. The instances mentioned in said section of acts not within the power of the directors belong to this class of attempted sales and alienation of property essential and necessary to the transaction of the business of the corporation, and to the prosecution of the purposes of its creation, and to application by them for legislative changes or enlargement of corporate powers, or to acts destructive of its corporate existence.

In the recent case of *Chew v. Ellingwood*, 86 Mo. 260, at page 273, this dictum of the *Eppright-Nickerson Case*, *supra*, is expressly ruled otherwise by this court, where it is said that "the point made by appellant's counsel, that the assignment made by the directors is void, must be ruled against them. The right of the directors of a bank in failing circumstances to make an assignment for the benefit of creditors, where there is nothing in the charter or general laws forbidding it, we think is clear." This position is abundantly supported by numerous authorities elsewhere, and among them may be cited *Dana v. Bank of U. S.*, 5 Watts & S. 223; *De Camp v. Alward*, 52 Ind. 468; *Union Bank v. Ellicott*, 6 Gill & J. 368; Burrill, Assignm. § 64; Ang. & A. Corp. § 191; Mor. Corp. § 240; and many others to the same effect which be added if necessary.

The directors of such corporations are, it is true, agents appointed to manage the business in which the stockholders have embarked, and the desirability or advisability of continuing or discontinuing the business are questions, it is true, for the shareholders, or a majority of them, and not for their agents. They have no power, it is said, to dissolve the corporation, or inflict upon it political death. But the insolvency of such a corporation, without new action and subscription and contribution of new capital by the shareholders, itself defeats the purpose and object of the corporation, and the stockholders have no interest in the assets, which in that event equitably belong to the creditors, and the fiduciary relation of the directors, in that event, is no longer to the stockholders, who are without beneficial interests in assets insufficient to pay the debts of the corporation, but to the creditors, whose equitable rights have intervened, and whose equitable lien attaches thereon. Mor. Corp. §§ 578, 579.

In *Chew v. Ellingwood*, *supra*, this court further says that "many of the authorities cited go to the extent of saying that under such circumstances the directors not only have the right, but that in justice they ought to make an assignment, so that creditors might share equally in its assets. Indeed, under constitution and laws which make it a felony for directors and officers of a bank to receive deposits knowing it to be in failing circumstances, it would seem to leave them no other alternative but to close its doors."

We think we may, without further discussion, rest our conclusion upon these authorities in favor of their right to so assign, in good faith, equally for all creditors, under the facts of this petition, as we understand them to be. And, further, we think it may well be questioned whether the plaintiff, upon his own showing in this behalf, has seasonably begun his action in this behalf. At the date of the institution of the suit, the assignee had been in charge of the property for about four years, during which time he must be presumed to have been engaged, as the law requires, in execution of his trust, making exhibits of accounts, auditing and allowing the same, incurring cost and expense such as are incident to the execution of such trusts, and perhaps paying dividends on the claims of creditors. Nothing is alleged by way of disability, or want of knowledge in the premises, or otherwise showing excuse for so much delay; and as plaintiff is a creditor, protected as such equally with all others under said assignment, we do not see that his attitude as stockholder not consenting thereto, and invoking the doctrine of *ultra vires* after the lapse of so much time, is a meritorious one.

We are also earnestly asked to review our ruling in *Epwright v. Nickerson*¹ as to the sufficiency of the signing and acknowledgment of the said deed of assignment; but we see no good reason to change the views in that behalf expressed in that case, and in the case of *City of Kansas v. Hannibal & St. J. R. Co.*, 77 Mo. 180, to which reference is there made.

For these reasons the judgment of the trial court, which was for the defendants, should be, and is hereby, affirmed.

(All concur; SHERWOOD, J., in the result.)

CAMDEN and another v. PLAIN.

(*Supreme Court of Missouri. February 28, 1887.*)

1. JUDGMENTS—OF PROBATE COURTS—COLLATERAL ATTACK.

The judgments and orders of probate courts in matters within their jurisdiction have the same import of verity as those of courts of general jurisdiction, and, like them, are not to be impeached in collateral proceedings.

2. EXECUTORS AND ADMINISTRATORS—SALE OF REALTY—PUBLICATION.

In ejectment, defendant claimed under an administrator's deed, which plaintiff attacked on the ground that the petition for the sale of decedent's realty failed to show that his personal estate was not sufficient to pay existing debts. *Held*, that the judgment of the probate court upon that question, after jurisdiction obtained by publication, could not be collaterally attacked.

3. SAME—APPROVAL OF COURT.

There was no formal entry of approval by the probate court, but the deed acknowledged before the probate court contained a recital of approval. The administrator in his settlement charged himself with the purchase money, and the judge's minutes contained this entry: "Report of sale of real estate of W. C. approved. Deed ordered, and deed acknowledged." *Held*, that it was sufficient if the approval could be thus gathered from the record.

4. SAME—ADMINISTRATOR'S DEED—EVIDENCE.

In Missouri, an administrator's deed properly executed and acknowledged, which contains the recitals required by law, is evidence of the facts therein stated.

Appeal from circuit court, Cass county.

Sparks & Campbell, for plaintiff in error. *Ratley & Burney*, for defendant in error.

BRACE, J. This is an action in ejectment for 120 acres of land in Cass county, Missouri, commenced in the circuit court of said county on the twenty-fifth of February, 1884. The plaintiffs claim as heirs at law of their grandfather, William H. Camden, who died intestate a short time prior to the twelfth of March, 1867, seized in fee-simple of the premises, leaving surviving him three children, his only heirs; one of whom, Lewis Camden, died prior to the first day of October, 1884, leaving plaintiffs, his only children and heirs at law. The plaintiff George was born February 29, 1860, and William C. on the twenty-eighth of November, 1861. On the twelfth of May, 1867, James A. Horn was appointed administrator of the estate of said William H. Camden, deceased, by the probate court of Johnson county, qualified, and entered upon the discharge of his duties as such. On the tenth day of January, 1868 said administrator presented a petition to said court praying for an order for the sale of the premises for the payment of the debt of said intestate. The order was made, and the premises sold to one Loudermilk, who received a deed therefor from the administrator, and afterwards conveyed the same by general warranty deed to the defendant, who was in possession of the premises at the time the suit was instituted. The defend-

¹ In that case it appeared that to an assignment for the benefit of creditors executed by a corporation was appended a notary's certificate that M. C., president, and A. M., cashier, of the corporation, "acknowledged that they executed and delivered the same as their voluntary act and deed, for the uses and purposes therein contained." *Held*, that this was a sufficient certificate that the corporation acknowledged the instrument.

ant and his grantor had been in the open, notorious, continuous, and adverse possession of the premises ever since October, 1868. Defendant claims title under the deed of said administrator, and by virtue of the adverse possession aforesaid. The case was tried before the court without a jury, and the court found for the defendant, and rendered judgment in his favor. The deed from the administrator to defendant's grantor is as follows:

"Whereas, on the sixth day of April, A. D. 1868, probate court of the county of Johnson, state of Missouri, at the April term for the year 1868, of said court, ordered by an entry of record that I, as administrator of said estate, sell at private sale, for cash in hand, the south-west quarter of the south-west quarter of section number twenty-nine, (29,) the north-east quarter of the north-east quarter of section number thirty-one, (31,) and the north-west quarter of the north-west quarter of section number thirty-two, (32,) of township number forty-four, (44,) of range number twenty-nine, (29,) situate in the county of Cass, state of Missouri, or so much thereof as might be necessary to pay the debts of said estate; and whereas, previously to the day of sale, I, as such administrator, had said real estate appraised in due form of law by Harrison Hoover, Amos Holcomb, and Joseph S. Holcomb, three disinterested householders of said county, and immediate residents in the vicinity of said lands, who on the nineteenth day of May, A. D. 1868, having first made the affidavit required by law, appraised said real estate to be of the value of nine hundred and sixty dollars, and so certified in their certificate of appraisement, by virtue of which said order of sale and appraisement, and the power in me by law vested so to do, I, as said administrator, did on the eighth day of September, A. D. 1868, expose at private sale for cash in hand all the right, title, and interest which the said William H. Camden had in and to said real estate at the time of his death, and William A. Loudermilk being the highest and best bidder for said real estate, he bidding the price and sum of one thousand and fifty dollars, the same was sold to the said William H. Loudermilk for that sum; and whereas, at the term of the probate court for said county of Johnson the next following the sale of said real estate, being the October term, 1868, of said probate court, and on the sixth day of October, A. D. 1868, I, as such administrator, made to said court a report, verified by my affidavit, and accompanied by the certificate of appraisement, of my proceedings touching such sale including the manner, time, and terms of sale, and of the property sold and to whom sold, all as heretofore set forth, and which report was thereupon approved by said court by its proper order entered of record; now, therefore, in consideration of the premises, and of the sum of one thousand and fifty dollars to me, said administrator, paid by the said William A. Loudermilk, the receipt whereof I do hereby acknowledge, and by virtue of the authority in me vested by law, I, James A. Horn, administrator as aforesaid, do hereby grant, sell, and convey to the said William A. Loudermilk all the right, title, and interest which the said William H. Camden had in and to said real estate at the time of his death, to have and to hold the right, title, and interest hereby conveyed, unto the said William A. Loudermilk, his heirs and assigns, forever, with all the rights and privileges thereto belonging."

The deed was duly executed by the administrator on the sixth day of October, 1868, and properly acknowledged in open court before the judge of said probate court. To the admission of this deed in evidence plaintiff objected, which objection was overruled by the court. The deed was properly executed and acknowledged, contained all the recitals required to be made by law, was evidence of the facts therein stated, and had the effect of conveying to the purchaser all the right, title, and interest of the deceased, (sections 35, 37, c. 122, Gen. St. 1865;) and there was no error in overruling the objection thereto.

Plaintiff, to disprove the recitals of said deed, and destroy the legal effect thereof, introduced the original papers and the record entries of all the pro-

ceedings of said probate court in the premises, of which, for the purposes of this opinion, it will only be necessary to set out the following:

"At the January term, 1868, and on the sixth day thereof, the following proceedings were had: Now at this day comes James A. Horn, administrator of the estate of William Camden, deceased, and presents to the court here his petition praying the court that an order be made for the sale of the real estate belonging to said estate, for the payment of debts due and owing thereby, accompanied by a true account of his administration, and a list of the debts due to and by said estate and remaining unpaid, and an inventory of the real and remaining personal estate, and all other assets in his hands, showing to the satisfaction of the court that the personal estate is not sufficient to pay the debts due and owing thereby. It is therefore ordered by the court that all persons interested in the said estate be notified of this application, and, unless the contrary be shown on the first day of the next term of this court, to be begun and held on the sixth day of April, A. D. 1868, at the court-house in the town of Warrensburg, Johnson county, Missouri, an order will be made for the sale of the whole or so much of said real estate as will be sufficient to pay debts due and owing thereby."

"Afterwards, on the sixth day of April, 1868, the further proceedings were had, to-wit: Now at this day comes James Horn, administrator of the estate of William Camden, deceased, and proves to the satisfaction of the court here that the order of publication heretofore made by the court for the sale of real estate belonging to said estate, for the payment of debts due and owing thereby, has been fully complied with as required by law; and, no person appearing to show cause why an order should not be made for the sale of the real estate aforesaid, it is therefore ordered by the court that said administrator proceed and sell at private sale the whole or so much of the real estate belonging to said estate as will be sufficient to pay the debts due and owing thereby."

At the October term, 1868, and on the sixth day of October, the administrator made his report of sale as follows:

"To the Honorable, the Judge of the Probate Court of Johnson County, State of Missouri: The undersigned, administrator of the estate of William H. Camden, deceased, would respectfully report that in pursuance of an order of said court made at the ——— term, A. D. 186—, for the sale, at private sale, of the real estate belonging to the estate of said deceased, or so much thereof as would be sufficient to pay the debts due and outstanding against said estate, he did cause to be appraised, on the nineteenth day of May, A. D. 1868, by Harrison Hoover, Amos Holcomb, and Joseph Holcomb, the following described tract of land situate in the county of Cass, state of Missouri, to-wit: The south-west quarter of the south-west quarter of section number twenty-nine, (29,) the north-east quarter of the north-east quarter of section number thirty-one, (31,) and the north-west quarter of the north-west quarter of section thirty-two, (32,) all in township number forty-four, (44,) of range number twenty-nine, (29,) who, being three disinterested householders of C—— county, after being duly sworn and qualified according to law, did view and appraise said real estate as follows, to-wit:

"The N. E. qr. of the N. E. qr. of sec. 31, twp. 44, range 29, to be of the value of	-	-	-	-	-	-	\$320
The N. W. qr. of the N. W. qr. of sec. 32, twp. 44, of r. 29, to be of the value of	-	-	-	-	-	-	320
The S. W. qr. of the S. W. qr. of sec. 29, twp. 44, of r. 29, to be of the value of	-	-	-	-	-	-	320

Amounting to the sum of - - - - - \$960
—Which will more fully appear by reference to the certificate of appraisal hereto annexed.

"The undersigned would further report that, in pursuance of said order, he did offer said real estate at private sale, and the highest and best offer he could

obtain was made by William A. Loudermilk, who offered the sum of one thousand and fifty dollars, on the eighth day of September, being ninety dollars over and above the appraisement. The same was sold to him for that sum, to be paid in cash whenever said sale shall be ratified and a deed ordered to be made. Said administrator would further state that he is in no way interested in said sale.

JAMES A. HORN, Administrator."

The report was properly verified by the affidavit of the administrator, and was accompanied by a certificate of the appraisement of said appraisers as stated in said report; said certificate showing said appraisers were duly sworn and qualified in Cass county.

It was admitted by the parties that the records proper of the probate court did not show that any order had been made approving the report of the administrator of the sale of said real estate, but that the minutes of the judge of said court shows the following, among other, entries, among the proceedings of the sixth day of October, 1868, of said court: "In the matter of the estate of Wm. H. Camden, deceased. Report of sale of real estate of William Camden, deceased, approved. Deed ordered, and deed acknowledged."

The principal contention of the plaintiff is that the order of sale is void, because the petition for the sale of the real estate of decedent, presented to the court by the administrator, with the lists, account, and inventories it contained, failed to show that the personal estate of said decedent was not sufficient to pay his existing debts; but, on the contrary, did show that such sale was only necessary to raise money to pay costs of administration, and a large amount of taxes due in Johnson and Cass counties. Whether this is true or not in fact is immaterial in determining the validity of the order of sale in this case, and therefore we have not incumbered the record with the petition and settlement made by the administrator at the time. The petition substantially averred that the personal estate was not sufficient to pay the debts of the deceased, and stated the facts showing the condition of the estate, as required by section 10, c. 122, Gen. St. 1865; and that the question of fact was judicially determined by the court.

It may be well to here distinguish this case from *Teerbaugh v. Hawkins*, 82 Mo. 180, in which the order of sale was made by the court *ex mero motu*, without any petition therefor being presented to the court asking for such sale, without any statement of the condition of the estate, or any notice given of intended application for such sale. In this case, application was made to the court by the administrator by petition, in accordance with the requirements of section 10, *supra*, verified, as required by law, by his affidavit, and accompanied by an account of his administration, and containing the lists and inventories, as required by section 22, same chapter, and praying for the sale of the real estate, describing it as it is described in the report of sale and in the administrator's deed, or so much thereof as may be necessary to pay off the debts of his intestate. Upon the presentation of the petition, accounts, etc., the court, having found to its satisfaction that the personal estate was insufficient to pay the debts due and owing, entered that finding of record, and ordered that notice be given to all persons interested that an order for the sale of said real estate would be made at the next term of said court, on the first day thereof, said term to be begun and held on the sixth day of April, 1868; and at its next term, and on the sixth day of April, 1868, the court having found that such notice had been given as required by law, and no person appearing to show cause why such order should not be made, the order was made, which finally culminated in the approval of the sale made thereunder, and the deed of the administrator to the purchaser. The basic fact upon which the power of the administrator to sell the real estate of his decedent, and of the power of the court to make an order for such sale, *i. e.*, insufficiency of his personal estate to discharge his debts, was thus judicially ascertained and determined by the probate court of Johnson county, in the man-

ner and in literal conformity to the requirements of the law in such cases. Said court was a court of record, having exclusive original jurisdiction within that county in all cases arising under the general laws of the state relating to the administration of estates, and when, in such a case, wherein it became necessary to determine a question of fact, that court, thus having jurisdiction of the subject-matter, also, in the manner required by law, by its order of publication, acquired jurisdiction over all persons having an interest in the determination of that question of fact, renders judgment thereon, such judgment must be held conclusive upon all parties in interest in collateral proceedings. The doctrine that the judgments and orders of probate courts in matters of the administration of estates are entitled to the same presumptions of verity as is accorded to courts of general jurisdiction proceeding according to the course of the common law, has been, by the recent decisions of this court, well established, and may now be said to be placed beyond question. *Johnson v. Beasley*, 65 Mo. 251; *Sims v. Gray*, 66 Mo. 614; *Henry v. McKellie*, 78 Mo. 416; *Fenia v. Fenia*, 80 Mo. 27.

The real estate was correctly described in the petition, and the order of sale was made on the day and at the term stated in the order of publication, and there is no force in the objections raised to the order, that it did not contain a description of the land, and that the term of holding the court was changed from the second to the first Monday in April; nor in the objections to the report of the sale, that the sale was not made, and report thereof returned, at the next ensuing term of the court. There was no time fixed in the order limiting the time within which the sale should be made, or when report of his proceedings should be returned. The only provision of law governing the matter in this report is contained in section 33, c. 122, *supra*, which requires the administrator, "at the next term after such sale, to make full report of his proceedings." In this case the sale was made on the eighth of September, and the report at the October term following, which must have been the next term thereafter.

The deed of the administrator shows that the appraisers were householders of Cass county, and nothing in the proceedings even tends to contradict the fact.

The only remaining objection to the validity of the order of sale necessary to be noticed, is to its approval. There was no formal entry of the approval on the record proper of the court, nor is it necessary that there should have been. The approval is sufficiently shown by the entry on the judge's minutes, especially when taken in connection with the further facts that the approval is recited in the administrator's deed, the acknowledgment of which was taken in open court by the judge thereof on the same day that the entry was made on the minutes; and in his second annual settlement the administrator charges himself with the amount of the purchase money. It is sufficient if the approval can be gathered from the whole record. *Jones v. Manly*, 58 Mo. 559; *Henry v. McKellie*, 78 Mo. 416; *Moore v. Davis*, 85 Mo. 464.

The evidence introduced by the plaintiff in this case, whereby he sought to impair the legal effect of the administrator's deed, which upon its face was sufficient to vest in the defendant the legal title to the premises in controversy, instead of accomplishing that purpose, demonstrated that all the requirements of the statute had been complied with, if the judgments of probate courts in matters within their jurisdiction import the same verity as the judgments of courts of general jurisdiction, and, like them, are not to be impeached in collateral proceedings,—a doctrine that now may be considered settled, resting as it does, not only on the authority of many adjudicated cases, but founded in sound principle and good public policy. The general recognition of this principle will inspire confidence in purchasers, in titles acquired at such sales, and give assurance that the property of decedents will at such sales bring something like its true value; while owners of real estate of immense value

purchased at such sales will be relieved of anxiety as to the titles, and cease to be annoyed by vexatious suits growing out of mere irregularities in proceedings not apparent upon the face of the judgments and orders of the probate courts.

The order of sale was valid. The deed of the administrator vested in the grantor of the defendant all the right, title, and interest of the said William H. Camden, deceased, in the premises in controversy, and no error was committed by the circuit court in finding for defendant. This conclusion renders any inquiry into defendant's claim of title by adverse possession unnecessary.

The judgment of the circuit court is affirmed.

Ex parte MARMADUKE.

(*Supreme Court of Missouri.* October Term, 1886.)

CONSTITUTIONAL LAW—PROCESS TO COMPEL ATTENDANCE OF WITNESSES.

Section 4031, Rev. St. Mo., provides that "courts of record, and any judge or justice thereof, shall have power, upon the application of any party to a suit or proceeding, civil or criminal, pending in any court of record, or public body authorized to examine witnesses, to issue a writ of *habeas corpus* for the purpose of bringing before such court or public body any person who may be detained in jail or prison, within the state, for any cause except a sentence for felony, to be examined as a witness in such suit or proceeding on behalf of the applicant." Held, that such section does not conflict with section 22, art. 2, Const. 1875, which provides that "in all criminal prosecutions the accused shall have the right * * * to have process to compel the attendance of witnesses in his behalf." SHERWOOD, J., dissenting.

Petition for writ of *habeas corpus*.

Application to be discharged from an attachment for contempt in disobeying a writ of *habeas corpus ad testificandum*. The facts sufficiently appear in the opinion.

NORTON, C. J. On the twenty-seventh day of January, 1887, the St. Louis criminal court caused to be issued, and served on petitioner, the following writ:

"*City of St. Louis—ss.:*

"*The State of Missouri, to Darwin W. Marmaduke, Warden of the Missouri State Penitentiary at Jefferson City, Missouri, Greeting:* We command that you do, on Monday, January 31, 1887, at 10 o'clock A. M., without excuse or delay, bring, or cause to be brought, before the honorable St. Louis criminal court, the body of Frederick Whittrock, by whatever name or addition he is known or called, who is detained in your custody, as it is said, then and there to testify as a witness in a cause wherein the state of Missouri is plaintiff, and David S. Fotheringham is defendant, and have with you this writ return indorsed thereon, and herein fail not at your peril.

"Witness, Patrick M. Stæd, clerk of said court, and the seal thereof, at the city of St. Louis, this twenty-sixth day of January, A. D. eighteen hundred and eighty-seven.

PATRICK M. STÆD, Clerk."

To this writ petitioner made the following return:

"*State of Missouri, County of Cole—ss.:* Now comes Darwin W. Marmaduke, warden of the Missouri state penitentiary, and for return to the within writ says that he respectfully declines to comply with said writ by producing or having the body of said Frederick Whittrock before the said criminal court as in said writ directed, for the reason that, as such warden or otherwise, he

has no legal authority to remove the body of said Whittrock from the state penitentiary, wherein said Whittrock is now confined under and by virtue of a judgment and sentence of said St. Louis criminal court under a sentence for a felony.

"Done at the city of Jefferson, Missouri, this, the twenty-ninth day of January, 1887.

"DARWIN W. MARMADUKE, Warden Mo. State Penitentiary."

Upon the above being made, the said criminal court, on the thirty-first day of January, 1886, issued its writ of attachment, directed to the sheriff of Cole county, commanding him to arrest the petitioner, and have his body before said criminal court on the third day of February, 1887, to answer as for contempt in not obeying the first writ issued. The said petitioner was arrested by said sheriff by virtue of this writ, and is by him held in custody, and it is from this imprisonment that petitioner seeks to be discharged by the writ of *habeas corpus* issued and served on said sheriff on the first of February, 1887.

The right of defendant to be discharged is mainly dependent on the question whether section 4031, Rev. St., is or is not a valid law. The section is as follows: "Courts of record, and any judge or justice thereof, shall have power, upon the application of any party to a suit or proceeding, civil or criminal, pending in any court of record, or public body authorized to examine witnesses, to issue a writ of *habeas corpus* for the purpose of bringing before such court or public body any person who may be detained in jail or prison within the state for any cause, *except a sentence for felony*, to be examined as a witness in such suit or proceeding on behalf of the applicant." This identical statute is found in the Revised Statutes of 1835, (section 11, p. 623.) It is also found in the Revision of 1845, section 13, p. 1089; also in the Revision of 1855, (volume 2, § 24, p. 1582; also in the General Statutes of 1865, (section 22, p. 588;) and is carried into the Revised Statutes of 1879 as section 4031.)

It will be thus seen that the law now assailed as being unconstitutional has remained on the statute books of the state unchallenged, so far as the judicial records of the state show, for more than 50 years. By way of answer it is stated in the brief, and was so orally argued by respondent's counsel, that previous to and up to 1879 most persons who were convicted of felonies were rendered incompetent to testify as witnesses, and that the section in question forbidding persons convicted of felony from being taken from the penitentiary on a writ of *habeas corpus ad testificandum* into court for the purpose of being examined as witnesses was intended to apply to that class of felons who were disqualified as witnesses. This is no answer, for two reasons,—*First*, because, if the statute meant only this, there existed no reason whatever for its passage, inasmuch as without such statute it is not to be presumed that any court would issue a writ of *habeas corpus* to bring before it a person convicted of a felony to *testify*, who, when brought, *could not testify* by reason of such conviction disqualifying and rendering him incompetent as a witness in any case. It has grown into a maxim that a court will not do a useless thing, and it cannot be presumed that it was the intention of the legislature, in the passage of this statute, to forbid the courts from issuing this writ when they could not have issued it without stultifying themselves. This writ of *habeas corpus ad testificandum*, under any practice either in this country or England, never issued except to bring a witness competent and qualified to testify when brought, and never to bring a person who could not testify, when brought, by reason of his being disqualified as a witness. The *second* reason is because, while the above construction contended for gives no force to the statute, there is another construction which is reasonable, and gives force and efficacy to it. It is this: that previous to 1879, under our Criminal Code, a very great number of persons who were convicted of certain classes of felonies were not rendered, by reason of such conviction, incompetent to testify as witnesses, and it does no violence to

reason to hold that it was the intention of the legislature, in enacting the section in question, while broad enough to include all who were under sentence for felony, to make it peculiarly apply to that class of felons who were not by reason of their conviction disqualified as witnesses.

Section 9 of article 18 of the constitution of 1820, and section 18 of article 1 of the constitution of 1865, provide that "in all criminal prosecutions the accused *has* the right * * * to have compulsory process for witnesses in his *favor*." In the constitution of 1875, § 22, art. 2, it is provided that "in all criminal prosecutions the accused *shall have* the right * * * to have process to compel the attendance of witnesses in his *behalf*." The learned counsel for respondent insists that the change of the words as found in the constitutions of 1820 and 1865, "to have compulsory processes for witnesses in his favor," to the words as found in the constitution of 1875, "to have process to compel the attendance of witnesses in his behalf," has worked such a change as to give some additional right to a person criminally charged, which he did not have under the constitutions of 1820 and 1865, and a change so radical as to bring said section 4081 in conflict with the constitution, and operate as a repeal of it. While there is a change in verbiage,—a change in the form of expression,—the phrase as used in the constitutions of 1820 and 1865 means the same thing as that which is used in the constitution of 1875. Compulsory process for a witness signifies and means a process that will compel the attendance of such witness,—a process that will bring a witness into court who refuses to come without it. And nothing is added to the force of a provision which gives the accused the right to have compulsory process for witnesses in his favor by changing the form of expression so as to give him the right to have process to compel the attendance of witnesses in his behalf. Both forms of expression convey to the mind precisely the same meaning. In the constitutions of 1820 and 1865 the form of expression, that the accused "*has* the right" to have compulsory processes for witnesses in his favor, was changed, in the constitution of 1875, so as to read *shall have* the right "to process to compel the attendance of witnesses in his behalf;" and it might as well be argued that the change of the words "*has* the right" to the words "*shall have* the right," and the change of the words "witnesses in his *favor*" to "witnesses in his *behalf*," altered the meaning of the section, as to argue that the meaning of the clause as contained in the constitutions of 1820 and 1865, "to have compulsory process for his witnesses," was either altered or enlarged by changing the form of expression so as to read, "to have process to compel the attendance of witnesses." It therefore follows from what has been said that, if said section 4081 is invalid under the constitution of 1875, it was also invalid under the constitutions of 1820 and 1865. And although it stood on the statute book of the state for 30 years before the constitution of 1865 was framed, and for 40 years before the constitution of 1875 was framed, the framers of those constitutions did not make the discovery that it was invalid, nor provide against it, nor has it been, as before stated, assailed till now. I do not make this statement to give color or countenance to the idea that an act of the legislature which is unconstitutional at its inception is rendered valid by having remained on the statute book unassailed for more than half a century, or to the idea that such a statute ought not because of its antiquity to be declared void, but to deduce from its non-assailment for so long a time the presumption that its unconstitutionality is neither so apparent or clear as counsel contend it is, or else it would not in all probability have been re-enacted through a long series of years, or remained free from attack.

But, casting aside this presumption, we are of the opinion that the statute in question is valid. The constitution, which confers upon a person criminally charged the right to compulsory process for witnesses, also declares and casts upon the legislature the duty and power of enacting laws for the punishment of crimes; and, in the exercise of this power, laws have been enacted

providing that persons convicted of certain felonies shall be punished by imprisonment in the penitentiary for a term of years in no case less than for two years. The effect of these laws is to bring together in one place this criminal class from all parts of the state, and aggregate them into a community separate and distinct from all others, and now numbering about 1,600 persons. For such as this, composed, in the main, of lawless and desperate men, with all their civil rights suspended during the respective terms of their imprisonment, as declared by section 1667, Rev. St., provision must be made for their safe-keeping, and regulations made for their government and control; and, to accomplish these ends, this class of persons have been put by the legislature under the control and management of a warden, deputy-warden, guards, etc., and confined in a place called the penitentiary, with strong walls, guarded by armed men, to prevent their escape, in the day-time, and with secure cells in which they are locked at night. We do not believe that the legislature, in the exercise of the right to make regulations for the government of this class of convicts, transcended its power by providing, as has been done by said section 4081, that the warden having them in custody should not be required to take such convicts, and surrender them to the various courts of the state to testify as witnesses. Such a regulation we do not regard as unreasonable, but as one proper to be made, in view of the fact that the thing prohibited, if allowed to be done, would interfere with the government of such convicts by affording them facilities for escape, and, for the time being, put it out of the power of the warden, the chief and controlling officer of the penitentiary, to exercise that supervisory control so essential to the management of such a community of persons put by law in his charge. And, besides this, it would place the convict in such a position that it would be in his power to exchange imprisonment in the penitentiary with hard labor to simple imprisonment in a county jail without labor, by his refusal, when produced in court, to answer proper questions, or to testify at all, in either of which events the court could commit him to the jail of the county. This is not an argument *ab inconvenienti*, but is made for the purpose of showing that the regulation made by said section 4081 is a reasonable and proper regulation, and therefore one within the power of the legislature to make, and that the right given to those criminally charged is to that extent subordinated to the power conferred upon the legislature over this class of persons.

The power of the legislature to provide a penitentiary in which all persons from every portion of the state who are or may be convicted of certain felonies are to be confined, carries with it necessarily the power to make such regulations for their government, and detention therein, as are reasonable, and in its judgment necessary to keep them safely where the sentence of the court puts them. The power of the legislature to provide that all persons convicted of felony shall forever be disqualified, is undisputed; and, inasmuch as the greater includes the less, their power to provide that such persons shall not, for the time they are undergoing sentence of imprisonment in the penitentiary, be taken therefrom into the various courts of the state, logically follows, and is equally indisputable; and said section 4081 does nothing more than this.

The sacred right of one criminally accused to have process to compel the attendance of his witnesses stands upon the same footing as other rights conferred and secured by the constitution, and all of them are equally sacred, and should be construed alike, and with reference to each other, so as to avoid conflict.

The constitution provides that private property shall not be taken for private use; but, notwithstanding this, we have a statute which requires railroad companies to pay to the owners of stock killed on their roads by reason of their failure to erect fences along the sides of their road, not only the actual damage sustained, but double the amount of such damage, which is to that extent a taking of private property for a private use; and, although the consti-

tution forbids this being done, the statute has been held to be valid in several decisions of this court, notably so in the case of *Humes v. Missouri Pac. Ry. Co.*, 82 Mo. 221, the judgment in which case was, on appeal to the supreme court of the United States, affirmed. In that case, 20 or 30 statutes, which have long stood upon the statute book, are grouped together, in which double and treble damages are allowed in the classes of cases specified. And what is there said with reference to these statutes may be applied to the one under consideration: "Some of these statutes are old and historic. They are inwoven with the legislative policy of the state. Their long continuance justifies the presumption that the people and their law-makers have found them preservative of the public welfare, and a shield of just protection to private property. Why, therefore, in respect of the constitutional provision under consideration, should the framers of the constitution of 1875 intend, by the general language employed, to sweep away all these sanctioned legislative provisions? Is it not reasonable to assume that had it been in the mind of the framers of the constitution to strike so deep into the body of the legislative branch of the state government, that they would have done so by the employment of words so direct and pertinent as to have made the purpose unmistakable?"

It is provided in the constitution that when private property is taken for public use, and the owner thereof is damaged thereby, that compensation therefor shall be made by the payment of the same to him, or into court for him, before his proprietary rights shall be disturbed. In the case of *St. Louis & S. F. Co. v. Evans & Howard Brick Co.*, 85 Mo. 307, certain sections of the statute relating to condemnation proceedings were drawn in question as being in conflict with the constitutional provision above referred to; and the court, speaking through Justice SHEERWOOD, in effect said "that constitutions are instruments of a practical nature, to be construed with the help of common sense;" that it would be doing violence to all known rules of interpretation to assume that those who framed, or those who by their votes adopted, our constitution were actuated by no intelligent purpose in that behalf. On the contrary, it must be assumed that they were familiar with the vicissitudes incident to condemnation proceedings, and with the statutory provisions relating thereto. And it is further said: "As the legislature has revised the general law relating to condemnation of land, it will be presumed that their attention was directed to the subject of the necessity of conforming that law to the constitutional provisions, and such revision must be regarded as a legislative construction of that section of the constitution under consideration, and that the general law is in conformity thereto. This legislative exposition is entitled to some weight, as the authorities show; and the courts may rely with some confidence upon the conclusions reached by the legislature; and the statute is to be viewed, *pro hac vice*, in the same light as though the legislature had enacted a new statute in compliance with constitutional requirements, and had prescribed by law the manner in which compensation for land taken shall be ascertained. * * * *Prima facie* this law is constitutional. * * * and conforms in all essential particulars to the organic law; and the well-known rule of construction applies, that a statute is not to be presumed repugnant to the constitution until such repugnancy is made to appear beyond a reasonable doubt. * * * As a conflict between the statute and the constitution is not to be implied, it would seem to follow that where the meaning of the constitution is clear, *that the court, if possible, must give the statute such a construction as will enable it to have effect.*"

In the case before us said section 4081 was enacted in 1835, and was a legislative construction of the constitution of 1820 in regard to compulsory process for witnesses. So it was thus construed by the re-enactment of the section in 1845 and 1855. So it was thus construed in 1865, under the constitution of 1865; and also, under the constitution of 1875, by the revision of 1879. So that, if a single legislative construction of the constitution was entitled to

weight in considering the question involved in the case above cited, that weight is greatly increased when the same legislative construction has been put on a clause of the constitution for more than 50 years, and by five legislatures at the end of each decade of 10 years.

So, in the case of *State v. Whitton*, 68 Mo. 92, the court held, speaking through SHERWOOD, J., that it was in the discretion of the court to limit the number of witnesses to be heard on an issue pending upon an application for a change of venue in said case, although it would seem that the constitutional provision giving process to compel the attendance of witnesses was broad enough to give him a right to all his witnesses, without reference to their number; and yet it was held in the above case that the court had the right, as it did in the case, to limit the number to six; and it may be proper to say that the reasoning contained in the opinion fully justifies the conclusion reached.

What is said in the case of *State v. Able*, 65 Mo. 357, may not be inappropriate here, to the effect that, "if either department of the government may slightly overstep the limits of its constitutional powers, it should be that one whose official life would soonest end. It has the least motive to usurp power not given, and the people can sooner relieve themselves of its mistakes. Herein is a sufficient reason that the courts should never strike down a statute unless its conflict with the constitution is clear. The judiciary ought to accord to the legislature as much purity of purpose as it would claim for itself, as honest a desire to obey the constitution, and also a high capacity to judge of its meaning. Of course, the constitution is above and paramount to all statutes; and, where there is a clear and manifest conflict between the two, the former must prevail over the latter."

For the reasons given, we are of the opinion that the prisoner is entitled to be discharged from his imprisonment by the sheriff of Cole county, and he is hereby discharged; in which Judges RAY, BLACK, and BRACE concur,—Judge BRACE concurring in the result, and Judge BLACK in a separate opinion. Judge SHERWOOD dissents.

BLACK, J., (*concurring*.) On the application of David S. Fotheringham, who stands indicted for a felony in the St. Louis criminal court, a writ of *habeas corpus ad testificandum* was issued by that court, directed to the warden of the state penitentiary, commanding him to produce the bodies of Whittrock and Haight, two convicts, to the end that they might testify in behalf of Fotheringham. The warden declined to comply with the command of the writ, and, being attached therefor, he is now before this court on a writ of *habeas corpus*, asking to be released from the attachment.

It seems to me there are but two questions to be considered; and that they should be determined aside from any question of inconvenience, or supposed or real detriment to the good government of the convicts in the penitentiary; for such questions address themselves to the legislature, and not to the courts. The questions to be determined are—*First*, can these convicts, under the terms of existing laws, be taken from the penitentiary to the courts of original jurisdictions throughout the state for the purpose of giving their testimony? *Second*, if they cannot, then, are those laws forbidding it to be done constitutional?

With respect to the first of these questions it may be observed, that prior to the Revision of 1879, persons convicted of certain felonies were thereby rendered incompetent to be sworn as witnesses, or to serve as jurors, and were disqualified from voting at any election, etc. In the Revision of 1879 so much of the several sections as rendered these persons incompetent to be sworn as witnesses was dropped out. It is thence argued that the other sections of the statute which were continued in force by the Revision of 1879 should be so construed as to allow the convicts, not only to be sworn as wit-

nesses during their time of imprisonment, but to be subject to writs like that issued by the criminal court in this case. An examination of the statutes will show that this subject was before the legislative mind at the Revision of 1879. Section 8 of chapter 212 of the Code of Criminal Procedure (Gen. St. 1865) provided: "Every person indicted or prosecuted for a criminal offense shall be entitled to subpoenas and compulsory process for witnesses, in like manner and under like circumstances as parties in civil cases." By Rev. St. 1879, § 1848, the above section was amended so as to read: "Every person indicted or prosecuted for a criminal offense shall be entitled to subpoenas and compulsory process for witnesses in his behalf;" and, when any convict confined in the penitentiary shall be deemed an important witness for the state upon a criminal prosecution against any other convict, then the court or judge thereof may issue a writ of *habeas corpus* for the purpose of bringing such person before the court to testify, and the section concludes as follows: "Such convict may be examined, and shall be considered a competent witness against any fellow-convict for any offense actually committed while in prison, and while the witness shall have been confined in the penitentiary." This amendment of the old section shows clearly that the matter of using these convicts as witnesses was before the legislature and considered by that body, and it is for this purpose reference is made to the amendment at this time.

Again, section 4081, Rev. St. 1879, which is applicable to both civil and criminal cases, is as follows: "Courts of record, and any judge or justice thereof, shall have power, upon the application of any party to a suit or proceeding, civil or criminal, pending in any court of record, or public body authorized to examine witnesses, to issue a writ of *habeas corpus* for the purpose of bringing before such court or public body any person who may be detained in jail or prison, within the state, for any cause *except a sentence for felony*, to be examined as a witness, in such suit or proceeding, on behalf of the applicant." It is true, this section comes down through the Revisions of 1855 and 1865, but there is nothing in the Revision of 1879 which undertakes to repeal it, and we have seen that the legislation then had is perfectly consistent with the continued existence of the section last cited. There is therefore not only no statutory authority for removing a convict from the penitentiary while undergoing a sentence for a felony, for the purpose of testifying in any case other than where a fellow-convict is charged with a crime, but the right of such removal for any such purpose is clearly denied. That Whittrock and Haight are each undergoing a sentence for a felony is conceded.

But the next contention is that the section of the statute last quoted is in conflict with section 22 of the bill of rights, which provides, among other things, that in criminal prosecutions the accused shall have the right to have process to compel the attendance of witnesses in his behalf. The same provision, though stated in different words, was a part of the former constitutions of this state, is found in the seventh amendment to the constitution of the United States, and in the constitutions of many of the states. Stinson, Amer. St. Law, p. 29. This, and the other provision that the accused shall have the assistance of counsel, are retained as safeguards against a return to such practices as formerly existed in England. Under the practice which then prevailed, the accused was not only denied, in capital cases, the assistance of counsel, but at one time was not allowed to call witnesses in his own behalf; and still later, when permitted to call witnesses, they were not put under oath, and hence their statements had but little weight. 2 Story, Const. § 1792. These provisions of the organic law are not to be disregarded upon any pretext. But they are to be applied within reasonable bounds, and there are other considerations which are not to be overlooked. The state does not engage to produce, or furnish a process which will produce, in court, every person who may be a witness for the defendant. The witness, when competent,

may be beyond the jurisdiction of the state, or he may be within the jurisdiction of the state and still be infirm, and in either case cannot be brought before the court. The state may, but is not, by reason of the constitutional provision under consideration, bound to assume or pay the costs and expenses of the defendant's witnesses. *State v. Waters*, 39 Mo. 54. The legislature may also determine who shall be competent witnesses, and determine the form of the process by which they shall be brought into court, and make reasonable regulations with respect to the use and method of serving the same. It has the undoubted right to declare that a person convicted for a felony shall be forever incompetent to be sworn as a witness, and this as a part of the penalty for the infraction of the law, provided only that such laws are not *ex post facto* or retrospective; and, if it may do this, it may make the convict an incompetent witness while undergoing imprisonment; and so the legislature may prohibit his removal from the place of confinement for the purpose of being used as a witness. The right to have process to compel the attendance of witnesses must be limited to such persons as by the laws of the land are allowed to be produced. The statute before quoted applies to all cases and to all litigants, and there is no discrimination against any person charged with a crime. When the legislature removed the permanent disability to be sworn as witnesses, it had the right to and did prohibit them from being taken out of the place of confinement for the purpose of being used as witnesses. I therefore concur in the judgment discharging the warden.

SHERWOOD, J., (*dissenting*.) The warden of the penitentiary was commanded by a writ of *habeas corpus ad testificandum* to produce the body of Frederick Whittrock before the criminal court of St. Louis in order to testify in a cause then depending in said court, wherein the state of Missouri was plaintiff, and one Fotheringham was defendant. The warden refused to obey the writ, giving as a reason that he had no legal authority to remove the body of Whittrock from the penitentiary, because he was confined therein by virtue of a judgment and sentence of the St. Louis criminal court for a felony. Upon this refusal of the warden, the St. Louis criminal court attached him for a contempt; and the present proceeding was instituted to determine the legality of such arrest, made by the sheriff of this county, in whose custody he now is.

In discussing the matters thus presented, I shall (1) give an outline of the writ of *habeas corpus ad testificandum*, and of instances in England and this country where this writ has been issued; (2) endeavor to ascertain whether the criminal court has jurisdiction to issue such a writ in any case; (3) if it has such jurisdiction, to determine whether the general rule of its jurisdiction finds an exception in the circumstances of the case at bar. And in discussing these questions, I would not be unmindful of their grave importance, since they concern the authority and dignity of a court of record; the duty of an officer appointed by the state to yield obedience to a writ when lawfully issued; the right, under the constitution, of a party accused to compulsory process for his witnesses; and, finally, the duty of this court to obey the behests of that constitution in effectuating the right the organic law has thus conferred on the accused.

The writ of *habeas corpus ad testificandum* is a very ancient one, and was grantable at the discretion of the courts at common law. It was a process whereby the attendance of witnesses was compelled, and it was employed to bring the witness before the court, whether in custody awaiting trial, or when undergoing sentence. *Adam's Case*, 3 Keb. 51; *Rex v. Burbage*, 3 Burrows, 1440; *The King v. Layer*, Fortes. 396; *Rex v. Roddam*, Cowp. 672; 2 Tidd, Pr. (9th Ed.) 809; Starkie, Ev. 104; 4 Bac. Abr. 565, 566; 2 Phil. Ev. 823; *Rex v. Burbage*, 3 Burrows, 1440; 2 Cooley's Bl. 180; Whart. Crim. Ev. § 351; *Geery v. Hopkins*, 2 Ld. Raym. 851; 1 Greenl. Ev. § 312;

Trial of Sir John Freind, 13 How. St. Tr. 1. And there are instances where the state courts have issued the writ in question where the witness was in custody or undergoing sentence. The instances of the issuance of such a writ are not frequent in the state courts; but, whenever they occur or are referred to, they distinctly recognize the principle, and the undoubted right of a defendant in a criminal case to have it enforced. *Shank's Case*, 15 Abb. Fr. (N. S.) 38; *In re Mason*, 8 Mich. 70; *Koecker v. Koecker*, 7 Phila. 364. The statutes of several states expressly enforce this right of a defendant when accused of crime, and his witness is under sentence for a crime in the penitentiary or elsewhere. Acts 1881, Crim. Code Ind. pp. 160, 161, §§ 245, 246; Laws Ohio, 2 Revision, 1880, § 7290; St. Me. 1883, p. 805, § 37; St. Mass. 1882, p. 1070, § 29; Rev. St. Mo. 1879, § 4081. In the federal courts the issuance of this writ has been more frequent; and this, regardless of whether the witnesses were federal or state prisoners. *Ex parte Barnes*, 1 Spr. 133; *Ex parte Cabrera*, 1 Wash. C. C. 232; *Ex parte Des Rochers*, 1 MacAllister, 68; *Ex parte Dorris*, 3 How. 108; *Elkison v. Deliasline*, 2 Wheel. Cr. Cas. 56; *Ex parte Bollman*, 4 Cranch, 75; *U. S. v. Morse*, 3 Cranch, 159.

2. I now proceed to inquire as to the jurisdiction of the criminal court to issue such a writ as the one in question. Under the law of its organization, it has "all the original and appellate jurisdiction, in criminal cases, vested in the several circuit courts of this state." 2 Rev. St. 1879, p. 1507, § 1. And: "All courts shall have power to issue all writs which may be necessary in the exercise of their respective jurisdictions, according to the principles and usages of law." This law has been on the statute book for over 30 years. 1 Rev. St. 1855, p. 538, § 36; Gen. St. 1865, p. 538, § 17; Rev. St. 1879, § 1037. And, independent of any such statute, courts, having been created for the purpose of administering public justice, have, in consequence of their being courts, the inherent right to effectuate their jurisdiction by all process necessary for that purpose, and so this point was ruled in a recent case in this court, (*Yeoman v. Younger*, 88 Mo. 424;) the rule being that, whenever power or jurisdiction is conferred, everything necessary to make either effectual is implied, (1 Kent, Comm. 468, and cases cited.) I therefore conclude that the criminal court had authority to issue writs of the nature now under consideration.

3. Passing to the third point proposed for discussion, is there anything in the circumstances or law of this case which operates to divest the criminal court of its general, and it must be conceded, inherent jurisdiction, to issue the writ in this particular instance? It is urged that this result is accomplished by section 4081, Rev. St. 1879, which, though it grants the issuance of the writ when the person whose attendance is desired is undergoing sentence in a trial for a misdemeanor, yet excepts out of its provisions the case of a person under "sentence for a felony." This section has been in the statute book over 50 years, (St. 1835, p. 623, § 11; Rev. St. 1845, p. 1089, § 13; 2 Rev. St. 1855, p. 1582, § 24; Gen. St. 1865, p. 588, § 22; Rev. St. 1879, § 4031,) and is always found under the title of "Witnesses." During that space of time, however, felons for the most part, were absolutely incompetent to testify; and, as the law never requires the doing of a vain and useless thing, as runs a very familiar maxim, the legislature very wisely, but in a way somewhat general and obscure, excepted out of the list those persons who, if called, could not have been sworn.

But it is said that, as anterior to 1879 there were felons in the penitentiary competent as witnesses, therefore it was the intention of the legislature, in enacting section 4081, though "broad enough to include all who were under sentence for felony," to make it "*peculiarly apply to that class of felons who were not by reason of their conviction disqualified as witnesses.*" The details by which this conclusion is reached are not furnished me. I shall therefore treat such conclusion as a mere assumption.

The assertion is made, however, that it is not to be "presumed that it was the intention of the legislature to forbid the courts from issuing this writ where they could not have issued it without stultifying themselves." On this point I make this reply: that the legislature must have been singularly deficient in general information if they were not aware that courts are sometimes unfortunate in this respect. Besides, as I have already shown, the writ in question lay at common law for a witness undergoing sentence; and it may be that the legislature were desirous of restricting the writ in its operation, and this they clearly had the right to do when the exercise of that right debarred no one of a competent witness. But the writ did go, according to its terms, to all persons who were "detained in jail or prison, within the state, for any cause *except a sentence for a felony*." Now, as is well known, petit larceny was not a felony; that those convicted thereof were imprisoned in the county jail, and therefore were embraced within the terms of the writ, although not competent witnesses. This, also, had been the law for many years, (Rev. St. 1835, p. 178, § 32; Id. p. 182, § 62; Rev. St. 1845, p. 359, § 35; Id. p. 366, § 65; Rev. St. 1855, p. 577, § 31; Id. p. 586, § 70; Gen. St. 1865, p. 785, § 27; Id. p. 791, § 66; Rev. St. 1879, §§ 1318, 1378;) so that the assertion that it was the intention of the legislature that section 4031 should "peculiarly apply to that class of felons who were not by their conviction disqualified as witnesses," finds no support in the statute, and so it was just as easy for a court, prior to 1879, to stultify itself by sending its writ to the county jail for a petit larceny convict as it would have been to have stultified itself by refusing to issue its process for a felon in the penitentiary not laboring under any disability.

It seems clear to my mind that, through some evident legislative oversight, the section in question was made broad enough to embrace within its provisions felons in the penitentiary who were *not* disqualified, and also to embrace within its *literal terms* petit larceny convicts in the county jail, who by express statutory provisions *were* disqualified. With such obstacles in the way of the proper construction of the statute before me, it appears quite legitimate to look to the reason of the statutes being enacted; and, as the incompetency of a witness is the universal ground why he is not permitted to testify, to hold that the legislature did not intend to stultify itself by denying process for those whose testifying capacity had not been at all abated in consequence of their conviction. I think this reasoning will "peculiarly apply" to this case, and is justified by authorities cited elsewhere in this opinion. And it is justified by authorities which hold that the letter of a statute may be enlarged or restrained according to the true intent of the framers of the law. *Whitney v. Whitney*, 14 Mass. 92; *State v. Emerson*, 39 Mo. 80; *State v. King*, 44 Mo. 283; *Kiddick v. Walsh*, 15 Mo. 519. In such cases the reason of the law prevails over its letter, and general terms are so limited in their application as not to lead to injustice, oppression, or an absurd consequence; the presumption being indulged that the legislature intended no such anomalous results. *U. S. v. Kirby*, 7 Wall. 482; *People v. McRoberts*, 62 Ill. 38; *Fuss v. Spannhorst*, 67 Mo. 256.

That the legislature intended, by the Revision of 1879, to weed out of the law as it then stood every trace of disqualification incident to conviction for crime is made manifest by their industry in this regard. Rev. St. 1879, §§ 1378, 1416, 1467, 1485. For the purposes of this investigation, I shall use section 1378 as the type of its associate sections. Since section 4031 first became a law, important changes, as just noticed, have occurred,—changes which would seem to have an important bearing in determining what force and effect that section should now possess. Such radical changes, occurring after the lapse of so many years of unbroken uniformity, would certainly appear to have, and to be intended to have, a very marked significance in determining the question now before us. During the revising session of 1879, as

already seen, felons were made competent witnesses for the first time,—that is, in those cases where the crimes were committed after the statute in that regard took effect, and not retrospectively; for so it was ruled in *State v. Grant*, 79 Mo. 113; and in a subsequent case it was also ruled that, as to a crime committed after section 1878 went into effect, the person convicted thereof was rendered competent by that section to testify. *State v. Loney*, 82 Mo. 82. And the legislature must be presumed to have been aware that the section rendering witnesses competent would only operate on future crimes and not otherwise. With this end in view they retained section 1671, formerly section 26, p. 827, Gen. St., rendering it necessary, in order to restore the competency of a convict as a witness, who theretofore had been convicted, that he should be pardoned by the governor, and this was the view taken in *State v. Grant*, *supra*. In a word, the legislature contemplated that, as to future crimes, the disabilities of a felon convict should be removed, or rather should never attach, so far as being competent as a witness is concerned. Being, however, made a witness, he became one immediately and for all purposes. This being the case, section 1878, in respect to the competency of a felon convict, became at once repugnant to so much of section 4031 as excepts out of its provisions those under sentence for a felony; for, where the reason ceases, the law itself should cease. This view is in strict accordance with section 3161, Rev. St. 1879, which reads: "All acts or parts of acts of a general nature in force at the commencement of the present session of the general assembly, and not repealed, shall be, and the same are hereby, continued in full force and effect, unless the same be repugnant to the acts passed or revised at the present session." And this view is in accord with that of the master of the rolls in *The Dean v. Bliss*, 5 Beav. 582, where he observes: "If two inconsistent acts be passed at different times, the last is to be obeyed; and, if obedience cannot be observed without derogating from the first, it is the first which must give way. Every act of parliament must be considered with reference to the state of the law subsisting when it came into operation, and when it is to be applied. It cannot otherwise be rationally construed. Every act is made either for the purpose of making a change in the law, or for the purpose of better declaring the law, and its operation is not to be impeded by the mere fact that it is inconsistent with some previous enactment." And this view of a partial repeal of a statute being accomplished by a partial repugnancy to another statute is also in accord with the authorities; the rule being that the repeal extends only so far as the repugnancy extends, and leaves all the remainder in full force. *Van Rensselaer v. Snyder*, 9 Barb. 808; *Harrington v. Trustees of Rochester*, 10 Wend. 550; Bac. Abr. tit. "Statutes," D; *Bowen v. Lease*, 5 Hill, 225; *Williams v. Potter*, 2 Barb. 316; *People v. Deming*, 1 Hilt. 271.

Again, section 1848 reads as follows: "Every person indicted or prosecuted for a criminal offense shall be entitled to subpoenas and compulsory process for witnesses in his behalf; [and, whenever any convict confined in the penitentiary shall be considered an important witness in behalf of the state, upon any criminal prosecution against any other convict, by the attorney general or prosecuting attorney conducting the same, it shall be the duty of the court, or judge thereof in vacation, in which the prosecution is pending, to grant, upon the affidavit of such attorney general or prosecuting attorney, a writ of *habeas corpus* for the purpose of bringing such person before the proper court to testify upon such prosecution. Such convict may be examined, and shall be considered a competent witness against any fellow-convict for any offense actually committed while in prison, and while the witness shall have been confined in the penitentiary." I have marked in brackets that portion of the section which was added by the amendment of 1879. This section, as will readily be noted, gives to every person indicted or prosecuted for a criminal offense, subpoenas and compulsory process for witnesses in his behalf. The

writ of *habeas corpus ad testificandum* was of a compulsory character, as already seen from the authorities cited. Sections 4031 and 1848 relate to the same subject; while section 1378 designates, as among those upon whom such process may be served, a class of persons who but for that section would have remained incompetent as witnesses, and therefore not the subjects of any such process. These sections are therefore *in pari materia*; they were revised and adopted at the same revising session; they relate to the same subject-matter; the two first named refer to process whereby the attendance of witnesses is to be compelled; the last to those upon whom such process is to operate. These sections may consequently be regarded as if incorporated into one statute, to be construed together as such,—as much so as if ranged side by side, printed on the same page, and under the same title in the statute book. They were framed together as one system, and have one object in view. Potter's Dwar. St. 189 *et seq.*, and cases cited. This rule applies even though some of the statutes requisite to be considered have expired, or are not so much as referred to in the other acts. 1 Kent, Comm. 468, and cases cited. Even where statutes are not *in pari materia*, yet, if they are enacted or revised at the same session, they are to be taken as if *in pari materia*, and to be construed accordingly. Smith, Com. Law, § 641. And section 1378, being construed in connection with the other sections already quoted, and being itself a remedial section, giving a testifying capacity where none existed before, and all these sections forming but one system, and being construed together as but one statute, they are to be construed liberally,—are to receive an equitable interpretation,—whereby the letter of the act or section will be sometimes enlarged or sometimes restrained, so as more effectually to meet the beneficial end in view, and prevent a failure of the remedy. A noted illustration of this principle is found in the ruling made upon the registry acts, where, notwithstanding the strict provisions of those acts, prior registry of a deed was not allowed to countervail the effect of actual notice. 1 Kent, Comm. 465, and cases cited; Smith, Com. Law, §§ 520, 547.

In this case I am of opinion that section 1378 in this way restrains the strict operation of section 4031, and so enlarges it as to neutralize the exception which it contains.

And section 1848, as amended, is perfectly harmonious with itself. It gives to a person accused compulsory process for his witnesses, which process, as already seen, embraces the writ in question; and such process runs to all who are witnesses, for no exceptions are made. Of course, all laws and all constitutions are confined in their operations within the boundaries of the state where enacted or ordained, as runs the maxim, *Extra territorium jus dicenti impune non paretur*. *State v. Butler*, 67 Mo. 59. And this is a presumption which attends all laws and all constitutions, as much so as if indorsed upon them in express terms. But surely the fact that a law or a constitution cannot operate beyond certain boundaries forms no basis from which to argue that such law or such constitution should not operate, to its fullest extent, within those boundaries. The remaining portions of section 1848 confer similar but more limited privileges on the state; thus showing that the legislature had the whole subject in mind, and expressly gave to the state what already had been more largely bestowed on the defendant; the process for the latter being confined to no locality, and co-extensive with the boundaries of the state; the process for the former being limited, so far as that section is concerned, to the particular instance therein mentioned, supplemented, however, by the provisions of section 4034. And the legislature must be presumed familiar with the history, use, and meaning of the expression "compulsory process," and all that the term implies. Nor is it to be forgotten that these provisions on the part of the accused and on the part of the state are both welded together in one section. This occurrence gives opportunity for the application of the maxim, "*Noscitur a sociis*," and for the

application of the rule laid down by Lord Bacon that "*copulatio verborum indicat acceptationem in eodem sensu.*" By coupling these provisions relating to process in the same section, it will be presumed that the legislature intended that the words employed in reference to a party accused, and in reference to the state, being in such intimate connection, were to be understood in the same sense, and to have the same force and effect, at least so far as relating to convicts in the penitentiary. Smith, Com. Law, 509. The principle here announced was thus applied in *McNichol v. United States Mercantile Reporting Agency*, 74 Mo. 457, where it was ruled that a certain section being amended, authorizing service on a corporation, in addition to service, as formerly, on an individual, that the effect of such service on the former was in consequence of such amendment the same as service on the individual. So that sections 1878 and 1848, did they stand alone, being construed together, would afford ample warrant to uphold the jurisdiction of the criminal court in this particular instance.

In this connection, it is not amiss to observe, what was said in the case last cited, "that it is by no means of infrequent occurrence that sections of the statute that have long outlived their usefulness, the purpose of their enactment, are by some oversight allowed to incurber our statute book," and it was there held that section 3497 had thus become obsolete. A similar remark, if necessary, could not inaptly be made regarding section 4031, superseded as it is, and rendered obsolete as it is, by reason of the provisions of sections 1878 and 1848, going into operation as to crimes committed subsequent to that period. This construction would leave section 4031 in full force until the arrival of the period mentioned. But there is another view to be taken of section 1848. If the first clause of that section, in reference to a party accused, is not to have the force and effect I claim for it, and if the second clause in regard to process for the state is to be taken in an exclusive sense as it reads, without any regard to the first clause aforesaid, then this result will follow: A homicide occurs in the penitentiary. The convict who commits it is forthwith arrested, brought forth to the jail of Cole county, and incarcerated therein. He is indicted, and about to be put on trial for his life. The state has the important witnesses in its *own behalf* duly brought forth to swear against him. The defendant humbly begs for similar process for other convicts in the penitentiary to testify in his behalf, and under the supposed provisions of section 1848 that process is denied him. And inasmuch as no permission is given nor provision made for depositions to be taken of other convicts on his own behalf, though they were witnesses also of the homicide,—and, as the theory goes, he has no right for process *except such as those the legislature chooses to bestow*,—such depositions cannot be taken, and the defendant, in such case, though on trial for his life, and in sight of the penitentiary which contains his witnesses, is forced into trial without any testimony whatever! Is it necessary for me to say that such a result is *barbarous*? Such a result is what is termed in the books an absurdity, and "by an absurdity is meant, not only that which is physically impossible, but that which is morally so. We regard that to be morally impossible which is contrary to reason; or, in other words, that which could not be attributed to a man in his right senses." Smith, Com. Law, §§ 486, 518; *State v. Hayes*, 81 Mo. loc. cit. 585. I have, I trust, too much respect for the legislature of my state to attribute to them any intention that would necessarily result as above indicated. Could I believe that they had any such intention, I would regard them as *worse felons than were ever incarcerated within the walls of yonder penitentiary*.

In addition to what I have said in reference to section 4031, I have this further to say: that if, notwithstanding the revision of 1879, and the amendment of section 1878, making felon convicts competent as witnesses, the former section is to be regarded as in full force, then that section is in palpable violation of section 1 of the fourteenth amendment of the constitution of

the United States, which forbids that any state "deny to any person the equal protection of the laws," because that section, having the force and effect claimed for it, would grant to one defendant tried for a crime in Cole county a *habeas corpus ad testificandum* for a witness under sentence in the jail of that county, and at the same time deny to another defendant, tried in the same court, similar process for a witness equally competent, though under sentence for felony in the penitentiary. And it does not matter that the section in question was originally valid, and became unconstitutional in consequence of subsequent legislation. *State v. Hayes*, 81 Mo. 574.

It has been urged that if a convict could be brought forth from the penitentiary after having been thereto sentenced for a felony, that the effect of this bringing him forth would be to suspend and hold in abeyance the solemn judgment of a court. There are two answers to this objection. The first, that just the same effect is produced where a person under sentence in a county jail is brought forth to testify in a distant part of the state; and this, it is conceded, may be done. The second answer to the objection is that the sages of the law did not deem this objection of any merit, as is shown by the cases cited.

It is also objected that the statute in question makes no provision for the *payment of fees and costs* in bringing a felon convict from the penitentiary, and in guarding him to and from the place of his attendance. The same objection can also be urged against the removal of a prisoner witness from the county jail; and both objections may be answered in the same way, by repeating what has before been said: "That, whenever a power is given by a statute, everything necessary to the making of it effectual or requisite to attain the end is implied. *Quando lex aliquid concedit, concedere videtur et id, per quod devenitur ad illud.*" 1 Kent, Comm. 464. The same objection might be urged against an attachment for a witness under section 4022, because no provision is made for fees or costs.

In relation to the position that, if such a writ as the one in question should be issued, it would afford opportunities for the escape of convicts from the penitentiary, it is enough to say that the same ground of objection could with equal reason be urged where the prisoner is serving out his sentence in the county jail; and that the same ground of objection, as to escape of prisoners from the penitentiary, could be urged with like force of reasoning where, under the provisions of section 1848, a convict is removed from the penitentiary, at the instance of the attorney general, to attend the place of trial in a distant part of the state. So, too, it may be said that, under the provisions of that section, a convict brought forth at the instance of the state would have it "in his power to exchange imprisonment in the penitentiary with hard labor to simple imprisonment in a county jail without labor, by his refusal, when produced in court, to answer proper questions, or to testify at all." Of these arguments it suffices to say that they are but arguments *ab inconvienti*, however much this may be disclaimed,—arguments whose whole theory of procedure is to deny the existence of a power or jurisdiction because such power or jurisdiction might result in its abuse. 1 Story, Const. § 425; *Potters' Dwar*. St. 215.

These considerations induce me to hold and to repeat that, did this case rest merely upon statutory provisions, I am persuaded that the ordinary rules of statutory construction alone, such as are daily enforced and exemplified in the courts, would result in justifying the action of the St. Louis criminal court in issuing its writ of *habeas corpus* in the first instance, and in issuing its attachment because of disobedience of that writ. But there are other considerations to be adverted to before quitting this subject. I refer, of course, to constitutional provisions; and just on the threshold of their consideration I am met by the opinion of the majority, citing, by way of illustration and argument, some cases supposed to be analogous to the present one,—cases which I will now briefly notice.

I am at a serious loss to understand why the case of *State v. Whitton*, 68 Mo. 92, should be referred to, seeing that it relates, not to witnesses who were summoned to testify on the trial of a defendant, but were simply summoned to testify upon the disposition of a *preliminary motion for a change of venue*. Nor can I see why the case of *Humes v. Railroad Co.*, 82 Mo. 221, should have been cited in this connection, since it relates to the exercise of the *police power*, as the opinion therein expressly states. I shall therefore content myself with simply referring to the authorities which discuss that topic, (Cooley, Const. Lim. 706 *et seq.*; Potter's Dwar. St. 445; 2 Story, Const. § 1954,) and by saying that the police power, or "the law of overruling necessity," as it is not inaptly termed, has no more bearing on the point in hand than would be a reference to the *taxing power*.

Similar remarks are not inappropriate touching the case of *Railroad Co. v. Evans & Howard Brick Co.*, 85 Mo. 907, relating to condemnation proceedings and the exercise of the right of eminent domain. There the constitution was literally complied with by the payment of the money, assessed by the commissioners, into court for the owners, just as the constitution and law prescribed; and we held it a reasonable construction of the constitution, where the land-owners were more than willing to receive the valuation fixed by the commissioners, but the railway company insisted that such valuation was exorbitant, far exceeding any "just compensation," that the money paid into court should not be paid over till the exceptions filed were determined. But how can this reasonable construction—this practical construction—of the constitution—a construction which in one case upholds, conserves, and enforces a constitutional right by all the aids of legislation, and all the adjuncts of judicial experience—form the basis in another case for an argument and a ruling which, instead of supporting and protecting the right in question, *absolutely deny its constitutional existence?*

To such straits are those driven who attempt to argue against a plain fundamental right. They appreciate the difficulty without apparently being able to recognize its cause. When the owner of some frail tenement which his hands have builded, feels it rocking upon its foundations, trembling for the safety of his structure, and relying not on its own intrinsic strength, he seeks extraneous aids; he shores it up; he props it. So, too, in similar circumstances, does it oftentimes happen to the builder of some argument; he resorts to the fallacious props of analogy, and endeavors to shere it up with the shop-worn buttresses of public policy and convenience. Potter's Dwar. St. 215.

The constitution of our state provides that in criminal prosecutions the accused shall "have process to compel the attendance of witnesses in his behalf." Section 22, Bill of Rights. This provision is of course co-extensive with the power and boundaries of this state. Wherever the power reaches, the process runs. *Not an acre of land in this state is exempt from its operation.* Mr. Justice Cooley, when treating of the force and effect of that portion of a written constitution termed a "bill of rights," says: "Other clauses are sometimes added declaratory of the principles of morality and virtue; and it is also sometimes expressly declared, what, indeed, is implied without the declaration, that *everything in the declaration of rights contained is excepted out of the general powers of government, and all laws contrary thereto shall be void.* * * * While they continue in force, they are to remain absolute and unchangeable rules of action and decision." Cooley, Const. Lim. 46.

At the time when the present constitution was adopted a large class of criminals was incompetent, as before stated; but under the construction I have given section 4031 the process therein provided for would go as well for convicts in the penitentiary not convicted for certain kinds of felony as it would go for all convicts in the county jail not convicted of petit larceny, and not detained for a species of felony, the sentence for which, under the terms of the statute, rendered the party incompetent to testify. And, under the

Revision of 1879, those convicts, both in the county jail and in the penitentiary, who were convicted after that Revision went into effect, became competent witnesses by force and effect of section 1378, and its associate sections, revised in that year. So that, under the operations of the section last mentioned, *all* the convicts who were convicted of crimes after the Revision of 1879 went into effect, were competent as witnesses, and therefore amenable to process as such.

But, grant that I am wrong in my construction of section 4081, when considered apart from the other sections, or when considered and construed in connection with them, does it thence follow that a party accused is bereft of his constitutional right of process for his witnesses? I trow not. *That right is reared so high that all the legislatures in the land cannot pull it down.* To admit that the legislature, by hostile action or by non-action, can balk the operation of a constitutional right, is to place organic rights on the same level with rights granted by legislation; to elevate the creature on the throne of its creator; to go counter to that axiom of law and of logic that the controlling power cannot be controlled by its inferior or subordinate. Potter's Dwar. St. 671. I illustrate this by supposing that the legislature should on to-morrow, by an act with an emergency clause, repeal all laws for the issuance and service of process in criminal prosecutions. Can it be doubted that the right of a party accused would remain in full force, and be capable of enforcement? To deny this would be to assert the bold and broad proposition that a constitutional right depends on the *will of the legislature*; to be granted, or withheld as to them shall seem meet. If such a proposition be true, what becomes of the statement of Judge Cooley "*that everything in the declaration of rights contained is excepted out of the general powers of government, and all laws contrary thereto shall be void?*" If such a proposition be true, what becomes of those observations of that eminent jurist, Chief Justice MARSHALL, when discussing a similar provision in the constitution of the United States? He said: "The right of an accused person to the process of the court to compel the attendance of witnesses seems to follow necessarily from the right to examine those witnesses; and, wherever the right exists, it would be reasonable that it should be accompanied with the means of rendering it effectual. * * * The eighth amendment to the constitution gives to the accused, 'in all criminal prosecutions, a right to a speedy and public trial, and to compulsory process for obtaining witnesses in his favor.' The right given by this article must be deemed sacred by the courts, and the article should be so construed as to be something *more than a dead letter.*" 1 Burr's Tr. 178, 179.

Whenever a constitutional right exists, it carries with it, as an inevitable consequence, the means of its own enforcement. Bish. St. Crimes, § 137, and cases cited. Whenever a constitutional right comes in contact with a statute, the former tolls the latter: and whenever a constitutional right, such as now under discussion, has no statute specially adopted to enforce it, by its own inherent potency, and leaning not on the adventitious aids of statutory regulation, it supplies the lack of statutory provisions, and enforces itself. A striking exemplification of the latter form of constitutional operation is afforded in *Johnson's Case*, 1 Greenl. 230. Johnson had been prosecuted for a criminal offense before a justice of the peace, and convicted. He demanded an appeal, but as the statute had made no provision for one, the justice refused to grant it; but, when the prisoner was brought before the supreme court of Maine on *habeas corpus*, that court said: "The right * * * in this state is placed on a more durable basis than the pleasure of the legislature. The constitution of Maine, art. 1, § 6, declares that, 'in all criminal prosecutions, the accused shall have a right * * * to have a speedy, public, and impartial trial * * * by a jury of the vicinity.' In order to give effect to this provision, the accused must of necessity be entitled to an

appeal from a sentence of a justice of the peace, who tries without the intervention of a jury, to the circuit court of common pleas, where a trial by jury may be had."

Applying the principle just announced to the case at bar, it is wholly immaterial whether I have correctly construed section 4081, when considered by itself, or when considered in connection with the other sections already noticed. The history of the struggle for the establishment of the right now demanded at the hands of this court is a dark and bloody history. While that eventful struggle was in progress, some of the most gallant spirits that this earth has ever witnessed, perished because of a denial of the very right here claimed, and here also denied. I therefore dissent from the conclusion which has been announced.

SHARKEY v. McDERMOTT and others.

(*Supreme Court of Missouri. March 21, 1887.*)

1. CONTRACT—ADOPTION OF CHILD.

A man and his wife agreed to adopt a child, and leave her their property at their death. The child accordingly went to live with them, obeyed them as parents, and paid them her wages for many years, amounting to \$2,500. The man died devising the estate to his wife, and the wife afterwards died suddenly without making a will. They had failed to formally adopt the child as required by statute, so as to make her their heir at law. *Held*, in an action by the child against the heirs at law, that the agreement was valid, and she was entitled to specific performance of it.

2. ACTION—WHEN ACCRUES—CONTRACT—HUSBAND AND WIFE.

The child's right of action upon such agreement did not accrue upon the death of the man devising the property to his wife, who still survived; the agreement being to leave the child their property upon their death. And, though the wife was not bound by the original agreement, being then *feme covert*, yet she, continuing, after her husband's death, to maintain the child and to collect its wages, must be considered as confirming and ratifying the original agreement, or as accepting the devise from her husband, subject to the child's equitable right to a devise over in its favor upon her death, and the cause of action accrued upon her death without making such devise.

3. STATUTE OF FRAUDS—AGREEMENT NOT TO BE PERFORMED WITHIN ONE YEAR—PART PERFORMANCE.

Although such an agreement was not to be performed within a year, and was not in writing, the statute of frauds is no defense to an action upon it; it appearing that it had been partly performed during the life-time of the parties by the child living with the man and wife, obeying them as parents, and paying them her wages, and by their supporting the child.

4. SAME—PLEADING—PRESUMPTION.

In an action upon a contract or agreement, in which it is not alleged whether the contract or agreement was in writing, it is presumed to have been in writing.

5. EQUITY—PETITION—DECREE.

Under the practice in Missouri, if sufficient facts are stated to entitle the party to relief, the conclusions of law the pleader may draw from them, and the particular relief he may ask, may, if necessary, be disregarded, and in such cases the court may grant any relief consistent with the case made by the plaintiff and embraced within the issues.

Appeal from St. Louis court of appeals.

This is a suit in equity, brought on the twenty-first day of April, 1883, by the plaintiff, Julia Sharkey, against the defendants, the administrator and heirs at law of Catherine McLaughlin, deceased; the principal object of which is to obtain a decree giving plaintiff the *status* of an adopted child of James McLaughlin and the said Catherine McLaughlin, his wife.

Plaintiff states in her petition that, when she was an infant of about the age of four years, and to-wit, on or about the first day of January, 1862, said James and Catherine McLaughlin took her from her mother's care, her father having previously deceased, and placed her in their household, promising plaintiff's mother that they would provide and care well for her, and adopt her as their child, and leave her their property at their death; that from that

time on until the death of the said James, about the year 1876, plaintiff continued to reside in their household; was told by said James and Catherine that she was their legally adopted child, and would inherit their property; that so soon as she was large enough she was put out at service in a store in the city of St. Louis, all of her wages being collected and appropriated by said James and Catherine; that she yielded a willing obedience to the said James and Catherine under the impression that she was their legally adopted child; that, after the death of said James and the publication of his will, it was ascertained that he had willed to plaintiff one-half of his whole estate, but afterwards, by codicil, revoked the bequest, leaving his entire estate to said Catherine, the property so willed being all that the said Catherine died seized and possessed of; that plaintiff was informed by the said Catherine that said codicil was written because the said James feared that, becoming independent by reason of said bequest, plaintiff might refuse to longer recognize the relationship of adopted child, and leave the household and society of the said Catherine; that, after the death of said James, plaintiff still continued under the same conditions to live in the household of said Catherine; that she was by the said Catherine held out to the world as her adopted child, and was by said Catherine repeatedly told that she was her legally adopted child, and would inherit, by reason thereof, all of her property. Plaintiff further states that the defendants were all of age prior to the death of said Catherine, and all resided in the city of St. Louis, Missouri, and were visitors at the house of said Catherine, and had full knowledge of the relationship existing between said Catherine and plaintiff, and were frequently told that plaintiff was her adopted child, and the expectations of plaintiff the defendants acquiesced in and acknowledged. Plaintiff states that, after the death of said James, she still continued in said service in a store in the city of St. Louis, aforesaid, the said Catherine receiving and appropriating all of her wages; that she also did all of the sewing and other household labor for said Catherine, and continued to live with and serve said Catherine, discharging for her all of the duties commonly discharged by a child for its parent; that from the time she first began to work in a store, as above mentioned, until the death of said Catherine, she earned as wages the full sum of \$5,000, all of which was received and enjoyed by said James and Catherine, and that her services in the household were worth more than the board, lodging, and clothing given her; that she rested secure during all of said years in said relationship, yielded all of the affection and obedience due from a child to a parent, at all times supposing, from the statements of the said James and Catherine, that all legal requirements had been complied with.

Plaintiff avers that said Catherine was seized with a spasm, and died suddenly, while plaintiff was engaged in attending to her duties as saleswoman as aforesaid, never speaking after she was taken with said spasm; and that after her death it was found that she died wholly intestate, and plaintiff then, for the first time, learned upon investigation, that no formal statutory deed of adoption was upon record, as provided by law. When she was taken, as aforesaid, into said household, she was of too tender an age to require a formal deed, and, after growing older, trusted entirely to the statements of the said James and Catherine that said requirements had been complied with, and did not know anything to the contrary. Plaintiff further states that the defendants, as heirs at law and as the administrator of said Catherine, now deny her right to said property as the adopted child of said Catherine; deny that the facts and circumstances hereinbefore detailed constitute any reason why she should be held and considered as an adopted child, or that said property, both real and personal, should be turned over to her, and threaten to take and appropriate the estate of said Catherine to themselves. Wherefore plaintiff prays that a decree be herein entered establishing her right of adoption, and declaring her the heir at law by virtue of the adoption of the said

Catherine, and the heir at law by reason of the said premises, and for all other and further relief as the facts in the case may warrant and the court deem proper. To which petition there was a demurrer, on the ground that it did not state facts sufficient to constitute a cause of action. The trial court sustained the demurrer, from which order the plaintiff appealed to the court of appeals, where the case was affirmed, and from which order of affirmance the case comes here.

M. F. Taylor and *F. M. Estes*, for appellant. *Broadhead & Haeussler*, for respondent.

RAY, J. This action was disposed of upon a demurrer to the petition, which is of considerable length, and appears in full in the opinion of the St. Louis court of appeals. 16 Mo. App. 80. The correctness of the ruling of the trial court in sustaining the demurrer, and entering judgment thereon in favor of the defendants, which was afterwards affirmed in the court of appeals, is the only question now involved in the case.

We are not able to concur in the view of the petition and of plaintiff's rights, as therein declared, adopted, and entertained by said courts. In the first place, the statute of frauds, we apprehend, cuts no figure in the case, for the reason that it appears plaintiff has fully performed the contract on her part, and the same has also been performed in part by the other parties thereto, and to the extent of providing for and maintaining plaintiff during said years. *Gupton v. Gupton*, 47 Mo. 37; *West v. Bundy*, 78 Mo. 407; *Anderson v. Shockley*, 82 Mo. 250. Besides this, it is not stated in the petition that the alleged agreement was verbal, but the same is declared on without stating whether it is in writing or not; and, where this is so, the contract is presumed to be in writing. *Browne*, St. Frauds, § 505.

Again, the fact that the suit is instituted after the death of the parties making the contract is not important in determining the demurrer, which admits the facts stated, and from which it appears that there was no breach of the contract, upon which the plaintiff could maintain any action, until the death of the said parties, and each of them. The death of James McLaughlin, which occurred in 1876, did not give her a right of action for the property, as, by the terms of the agreement, it was to be left to her at their death, and not his; so that until the death of the survivor of them no right of action thereon existed in her favor. So far as the original contract is concerned, it is, as has been pointed out, to be taken as the contract of said James McLaughlin alone, the said Catherine being then under the disability of coverture; and while the petition may indicate, in some of its allegations, that said Catherine and said plaintiff both supposed plaintiff had been adopted, still it charges "that, after the death of said James, plaintiff still continued, under the same conditions, to live in the household of said Catherine," which means, we think, the mutual or reciprocal conditions of the original agreement made between said James McLaughlin and the mother of plaintiff. There are other allegations in the petition, material in this behalf; such as that the said James McLaughlin revoked the will in plaintiff's favor, as to one-half the property, by said codicil, devising the whole to said Catherine, which she took under the will, and that this was done to avoid making plaintiff independent, and to secure the continuation of said services and relationship of plaintiff to said Catherine after his death; that said Catherine thereafter continued to hold plaintiff out to the world as her adopted child, and to tell her she would inherit the property, and continued to receive and appropriate the wages of plaintiff, of the alleged value of \$2,500, to her own use and benefit, while the plaintiff on her part continued at the same time to be obedient, dutiful, and affectionate, and to do the family sewing and household labor, and such other duties as are commonly done by a child for a parent. So that, although the original agreement may not have been binding upon her, by reason of her coverture at

the time, yet the facts alleged show, we think, an agreement similar in substance and effect to the original, entered upon by her, after becoming discoverer, upon adequate consideration, which she has held and enjoyed. But, if this were not so, yet, under the facts, the wife's right and title to the property, under the will of her husband, would in equity be coupled with, if not subordinate to, the prior or paramount charge of plaintiff's equities thereto under said contract with the husband; so that in any event the result is the same. As to said original agreement, it clearly appears from the petition that in January, 1862, James and Catherine McLaughlin took plaintiff, then four years of age, from her mother, then a widow, upon a promise made to her, which was, as alleged, "that they would provide and care well for her, and adopt her as their child, and *leave her their property at their death.*"

As between parents and their children, a natural relation of this sort exists, independent of contract between them to that effect, and similar service on the part of the child will not, it is true, give any right to a will in his favor, or to a transfer to him of his parent's property; and it may be conceded that a direct agreement to that effect might, as between them, be non-enforceable for want of consideration. A formal deed of adoption places the child adopted, under the statute, on a similar footing, in all respects, as to the person executing the deed, which the child has by law against lawful parents. If the plaintiff had been duly adopted by the McLaughlins, as was promised, we do not see, as is held by the court of appeals, that, under the facts disclosed, her position would be that of a disinherited daughter first by the father, and afterwards by the mother. So far as the father is concerned, she would be thus disinherited, as his will was drawn in favor of the wife. But she would be the heir of her adopted mother, who, after taking the property under the will of her husband, died intestate, and in that event plaintiff would take under the law as provided in the statute of descents. But the rights of plaintiff, if any, in this case, do not spring either from the general law applicable to parent and child, nor from said statute authorizing the adoption of children, for the reason that plaintiff was not the daughter of these parties by nature, nor had she been formally adopted by them by deed duly executed as the statute requires. Her rights in the premises, if any, depend, we think, entirely upon said agreement, and the action had thereunder by the parties thereto. This agreement was not merely and solely one to adopt the plaintiff, but was in part to leave plaintiff the property at their death. The fact that the parties, and each of them, may have failed and neglected to execute it so far as the adoption was concerned, should not, we think, exonerate them from its further obligation to transfer their property, when they could no longer use it, to plaintiff. But, if the plaintiff is without the *status* of an adopted child through no fault of her own, but through the neglect of those so promising, this is only additional ground for the enforcement of the contract as to the disposition of the property, if the necessary equitable facts and circumstances are properly alleged.

The question, then, is whether this is a valid agreement, executed upon sufficient consideration, and whether, being wholly performed by plaintiff, a party thereto, she is not entitled, upon the death of said James and Catherine McLaughlin without performance thereof on their part, to a specific performance of the contract, and to hold and enjoy the property so contracted for, at their death, as against these defendants, who are the brothers and sisters of the said Catherine, deceased. If such a contract may lawfully be made by the parties, then the parties defendant to this suit stand in the relation of heirs at law, if anything, to the estate of the decedent; while the plaintiff, having performed the services and yielded the obedience required of her by the contract, and having fulfilled the same, has the paramount claim of a creditor or equitable owner of the property contracted to be given her in consideration of her said services.

We see no valid and sufficient reason why the case should not be controlled by the principle and rule laid down by this court in *Wright v. Tinsley*, 30 Mo. 389; *Gupton v. Gupton*, 47 Mo. 37; and *Sutton v. Hayden*, 62 Mo. 101. In the first of said cases just cited it is said that "on principle there would seem to be no ground to doubt that a person may by valid agreement renounce the power to dispose of his property at his pleasure, may bind himself to make a will in a particular way on proper considerations, and that courts of equity would enforce such agreements under proper circumstances, the same as in other cases of valid contracts." In the case at bar it was not specified in said agreement how the transfer of the property was to be made; but, while this is true, it is, we think, immaterial. As was said in *Sutton v. Hayden*, 62 Mo. 101: "The intention to transfer the property is the chief thing. The method by which the intended result was to be attained was wholly immaterial. The contract entered into might well have been discharged by deed or will." In *Gupton v. Gupton*, *supra*, it is said: "Contracts like the one under consideration have been before the courts, and have uniformly been held to be valid when partially performed, and when the refusal to complete them would work a fraud upon the other party."

The cases of *Vanduyne v. Vreeland*, 12 N. J. Eq. 142, and *Davison v. Davison*, 18 N. J. Eq. 246, are both very similar in their facts to the present case, and in these cases verbal promises of the owners of the property were enforced, upon the grounds that the services and support contracted for had been rendered. Under the view we have taken, that plaintiff's rights, if any, depend upon the agreement entirely, the absence of a statute of adoption in New Jersey, which is commented on by the court of appeals, in nowise affects the authority of those decisions. The obligations of the contract in question, as of others, are mutual; but the peculiar character of agreements of this sort, it is said, all the more entitles him who has faithfully performed the service and care to his stipulated reward. *Gupton v. Gupton*, *supra*. In this class of cases it is impossible to estimate by any pecuniary standard the value to the recipient of the services rendered, and such services are not designed or intended to be so measured. The contract is originally so created that the consideration which the party receives, cannot be returned, and after the performance of the services it is beyond the power of the party and of the courts to restore the plaintiff in such cases to the situation in which he was before the contract was made. *Browne*, St. Frauds, § 463.

The objection that, under the facts of this case, a decree for plaintiff would be in effect making a will for said Catherine, is not, we think, at all sound. This the court may not do, but it may by its judgment, under this state of facts, make effectual what the parties have themselves agreed upon, and that is the object and purpose of the petition.

Some of the allegations in the petition would indicate its principal object or purpose to be to obtain a decree establishing plaintiff's right of adoption, and declaring her heir at law of said Catherine McLaughlin in virtue of said adoption. To that effect is the prayer for relief, but the prayer also is to declare her heir at law by reason of the premises, "and for all other and further relief as the facts in the case may warrant, and the court deem proper." Under our practice, if sufficient facts are stated to entitle the party to relief, the conclusions of law the pleader may draw from them, and the particular relief he may ask, may, if necessary, be disregarded, and in such cases the court may grant any relief consistent with the case made by the plaintiff, and embraced within the issues. Section 3683, Rev. St. 1879. The case made by the petition is, we think, a meritorious and equitable one throughout. During a period of 20 years, the plaintiff, who was a girl, lived with the said McLaughlins, was obedient, dutiful, and affectionate, paying these parties all the attention due from a child to parents, and which, as was observed in *Sutton v. Hayden*, "money, with all its peculiar potency, is powerless to pur-

chase," and performed in all that time the labor of the household, and did the family sewing, and gave them all her wages. Said James McLaughlin, after making a will in her favor as to one-half of his property, revoked the same, as we have seen, by codicil, to avoid making her independent, and to secure a continuance of the relation with his wife after his death, which occurred in the year 1876. Some years thereafter said Catherine died suddenly, in a spasm, intestate, and without providing for this plaintiff, or carrying out the said agreement, by which plaintiff was to acquire the property at their death; and the whole property, augmented, as alleged, to the sum of \$5,000 by her own earnings, now goes, if her equitable claim on the property is not enforced, to defendants, who it is alleged were residents of St. Louis, visitors at the house of said Catherine, and were aware of the relations between plaintiff and said James and said Catharine McLaughlin, and of plaintiff's expectations thus acknowledged, and acquiesced therein.

For the reasons indicated, the petition contains, we think, a good cause of action, and we therefore reverse the judgment, and remand the cause for further proceedings in conformity thereto; in which Judges SHERWOOD, BLACK and BRACE concur; NORTON, C. J., absent.

GORDON, Adm'r, etc., v. EANS.

(Supreme Court of Missouri. March 21, 1887.)

1. **APPEAL—WEIGHT OF EVIDENCE.**

Where there is evidence tending to support the verdict of a jury, it will not be disturbed on appeal.

2. **HUSBAND AND WIFE—ANTENUPTIAL CONTRACT—PROPERTY OF WIFE.**

The possession of the husband of the wife's property, secured to her by marriage contract, is the possession of the wife. He is her trustee, and can reap no benefit to himself from the use of the property; nor can he acquire title thereto by investing the same, or its proceeds, in his own name without her consent; and the burden of proof is on him, or those claiming under him, to show such consent.

3. **SAME—LEGAL TITLE.**

Notwithstanding the marriage contract may, by its terms, exclude the husband's marital rights to the wife's separate estate, still the technical legal title thereto vests in the husband during coverture; but in equity he holds it, not as husband, but as her trustee, and upon his death, by operation of law, his marital and fiduciary relations, rights, and powers over the same terminate, and the property thus emancipated goes at once to the wife, and not to his administrator or heir.

4. **LIMITATION OF ACTIONS—ADVERSE POSSESSION—ESSENTIAL ELEMENTS.**

When a husband is in possession of property belonging to his wife as her trustee, nothing short of an open and explicit disavowal and disclaimer of a holding under that title, and assertion of title in himself, brought home to the wife's knowledge, will satisfy the law, or lay a foundation for the operation of the statute of limitations.

5. **APPEAL—HARMLESS ERROR—INTERROGATORIES.**

The refusal of an application by plaintiff for leave to file interrogatories will be disregarded on appeal, where plaintiff examined the defendant on the trial touching all the matters and things contained in the interrogatories, and plaintiff's rights do not appear to have been prejudiced by such refusal.

Appeal from circuit court, Cole county.

Edwin Silver et al., for G. W. A. Gordon, administrator of the estate of W. H. Eans, deceased, appellant. *Smith & Krauthoff et al.*, for Maria L. Eans, respondent.

RAY, J. This was a proceeding commenced in the probate court, under sections 7, 10, and 11, Wag. St. p. 85, to discover and recover alleged assets of the estate of deceased. The case was once before in this court, (*Eans' Adm'r v. Eans*, 79 Mo. 53,) where it was held that the proceeding in question was available, not only in cases where the assets were concealed or embezzled, but also where they were openly held under claim of title; and that in the latter

case the court must try the right of property between the administrator and the claimant. The circuit court on appeal having dismissed the proceeding for want of jurisdiction in the probate court, its judgment in that behalf, when here before, was reversed, and the cause remanded for further proceedings in conformity to the opinion then rendered. The facts of the case and the contention of the parties fully appear in 79 Mo., *supra*, to which reference is here had, and need not again be restated at large; and on a retrial, as shown by the record, the facts of the case and the contention of the parties are substantially the same as when here before.

In the course of that opinion the court use this language: "In the case at bar the question between the administrator and the defendant was as to the ownership of the property in controversy. The plaintiff, on the one hand, claimed that permitting the husband to sell said property, receive the money therefor, and use the same in his business during the period of time and in the manner indicated by the facts in evidence, was of itself an appointment and disposition of the property by the wife in favor of the husband within the meaning of the marriage contract itself. The defendant, on the other hand, denies this position, and insists that where there is a marriage contract like this between husband and wife, and no trustee is appointed by the instrument itself, the law makes the husband trustee for the wife, and, like any other trustee, the husband can reap no benefit to himself by the use of the property, or acquire title thereto by investing the same or its proceeds in his own name, without her assent thereto and therefor, and that in point of fact she made no such appointment or disposition, and the property and its proceeds are still rightfully hers. Whether the property has been thus appointed or disposed of, or still remains the separate property of the wife as contemplated by the marriage contract, is at most a question of intent and fact, to be found by the jury or the court, accordingly as the same is tried, under all the facts and circumstances in evidence, in connection with the marriage contract itself." The court then proceeds to decide in that opinion that the probate court had jurisdiction to hear and determine the cause in the summary manner pointed out; that it was error in the circuit court on appeal to dismiss the complaint for want of jurisdiction; and that it should have proceeded to hear and decide the question under proper instructions or declarations of law, applicable to the case made by the facts as they shall appear in evidence at the trial.

It thus appears that, when the case was here before, the court virtually made two rulings in the case: one, upon elaborate consideration, to the effect that the probate court had jurisdiction to hear and try the cause; and the other to the effect that it was a question of "*intent and fact*," to be found by the jury under proper instructions upon all the evidence, whether the property had been thus appointed or disposed of by the wife in favor of the husband as contended by the administrator, or whether it was still the "separate property" of the wife, as contemplated by the marriage contract and claimed by the defendant. For these reasons, and for that purpose, the judgment was reversed, and the cause remanded for further proceedings in conformity to that opinion.

Upon a retrial, as shown by the record, the facts of the case and the contentions of the parties, with unimportant variations, were substantially the same as when the case was here before, and the ruling of the court on the first point, as to the jurisdiction of the probate court, when the case was here before, must now be taken and held, so far, at least, as this case is concerned, as the law of the case.

As to the second point, as shown by the record, the contemplated retrial has been had, and the question of *intent and fact* has been found by the verdict of a jury in favor of the defendant, upon substantially the same state of facts and the same contention of the parties as when the case was here before, with only such variations and unimportant exceptions hereafter noticed, under

the following instructions; and it only remains to be determined, except as hereinafter stated in that behalf, whether those instructions properly and fairly submitted that question to the jury. Those instructions are as follows:

For the plaintiff, the court gave the following: "(1) The court instructs the jury that if they believe, from the evidence in the case, the goods, chattels, money, papers, and evidence of debts mentioned in the evidence, and in controversy in this case, belonged to Wm. H. Eans at the time of his death, and are a part of his estate, and that defendant has them in her possession, or under her control, they will find the issue for the plaintiff."

The court of its own motion gave the following:

"(2) The court instructs the jury that although the marriage contract read in evidence reserves to defendant a separate estate in the property described in the contract, and in the increase and proceeds thereof, still that under the law the defendant had full power and right to give said property, its increase, proceeds, or the money arising from its sale, to Wm. H. Eans, and had the power and right to permit him to appropriate the same as his own; and therefore, if the jury believe from the evidence in the case that the property described in said marriage contract was sold by defendant and Wm. H. Eans jointly, or by the latter with defendant's knowledge and acquiescence, and that said Wm. H. Eans did receive and appropriate the money or moneys arising from said sales with the knowledge and concurrence of defendant, and with the intent on her part that the same should become his property, then the defendant is not entitled to have or recover the same, and the jury will so find.

"(3) The court instructs the jury that if they believe from the evidence in the case that the property and money owned and held by the defendant in her own name at the time of her marriage with Eans, and charged to her sole and separate use by an antenuptial contract, was sold and disposed of with the assent of the defendant, and with her consent invested and reinvested in other property in the name of W. H. Eans, with intent on the part of the defendant that the same should become his property, and was so held and invested in his name at the time of his death, then they will find this issue for the plaintiff.

"(4) If the jury believes from the evidence that the original estate mentioned in the marriage contract, with its increase, rents, and profits, was lost in the emancipation of slaves, the burning of the mill referred to in the evidence, and in other business adventures, and that the property in controversy is a new estate, created alone by the exertion of Wm. H. Eans, or by said Eans and wife after their marriage, then the jury will find the issues for the plaintiff.

"(5) The court instructs the jury that, in determining the question whether defendant permitted Wm. H. Eans to receive and appropriate the property and money in controversy with the intent for him to have it as his own, the jury should take into consideration all the facts and circumstances in evidence, including the acts and conduct of said Eans and defendant in and about said property.

"(6) The court instructs the jury that, in order to find for the plaintiff, it is not necessary for them to believe or find defendant guilty of embezzlement, but simply that she is wrongfully withholding property belonging to the estate of Wm. H. Eans."

To which the plaintiff at the time excepted. The court also gave the following instructions on the request of defendant, to which the plaintiff also excepted:

"(4) The jury are instructed that the legal effect of the antenuptial contract in evidence was to preclude the marital rights of William H. Eans from attaching to the property described in said contract, its increase, income, profits, rents, interest, and proceeds, or any other property acquired with the proceeds of said property, or into which the same was converted; and the fact

that she permitted said Eans to put such property in his own name, and to handle and use the same, did not make said Eans the owner thereof, unless, at the time she did so, she intended to give said property to said Eans, and to make him the owner thereof, and the burden of proving such intention is upon the plaintiff."

"(6) Before the jury can find for the plaintiff, they must be satisfied, by a preponderance of the evidence, that, after the making of the marriage contract and contracting the marriage between Wm. H. Eans and the defendant, Wm. H. Eans took possession of the said property, claiming the same as his own, and denying the rights of the defendant under said contract, and that Mrs. Eans had actual knowledge of such claim and denial, and consented and agreed to such claim and denial on the part of Eans, and intended that Eans should be thereafter the sole owner of said property, and that she should release her rights under said marriage contract."

"(8) Although Mrs. Eans may have permitted Wm. H. Eans to take possession of the property she had at the time of their marriage, and to use, sell, and dispose of the same, and to invest the proceeds thereof, and to do business with the same in his own name, yet, unless this was done with the understanding and intention, on the part of Mrs. Eans, that Wm. H. Eans should become the owner of said property, and that she should thereafter have no other or further rights under said marriage contract, the jury must find for the defendant.

"(9) The jury are instructed that this is not a suit to recover the value of services rendered by Eans in caring for the property of his wife, or in managing her interests, and they cannot in this proceeding find for the plaintiff for such services.

"(9½) Although part of the property described in the marriage contract was destroyed or lost, yet if the property now sued for consist of increase, income, proceeds, profits, or interest of any part of said original property into which the same was converted by sale or otherwise, such destruction or loss alone will not authorize the plaintiff to recover."

The plaintiff's instructions asked and refused (except those in reference to the statute of limitations, to be noticed hereafter) were either supplied by or contradictory to those given in the case, and need not be further noticed.

An inspection of the instructions thus given shows that they are explicitly directed almost solely and exclusively to the question of *intent and fact* mentioned in the former opinion on that subject; and, in our opinion, they fairly and properly submitted that question to the jury. That, manifestly, is the controlling question in the case. The jury found the issue thus presented for the defendant. That there was ample evidence tending to support their verdict there can be no question. In such cases our uniform rule is not to disturb the verdict so found.

If the rule contended for by plaintiff's counsel, both at the former and the latter trial, and here insisted on in his brief, is to prevail in cases like the present, the *marriage contract*, intended to exclude the marital rights of the husband, and preserve the property, with its increase and proceeds, to the wife, from the control, possession or misappropriation by the husband, would become a snare and a fraud, and operate to defeat the express object of its creation and execution. By law, in such cases, the husband is constituted trustee for the wife, and, as such, usually and properly manages and controls her property. In such cases his possession is her possession, and, like any other trustee, he can reap no benefit to himself by the use of the property, or acquire title thereto by investing the same or its proceeds in his own name, without the assent of the wife thereto and therefor. Why should he? Manifestly, such use and investment of property, *of itself*, and without more, is not, as claimed by plaintiff, an appointment or disposal of the property within the meaning of the marriage contract, unless it further appears that it was so

done with the assent of the wife, and for that purpose. Why should or how can the wife be divested of her property, without her intent so to part with it? In such cases the burden of proving that fact rests with the party alleging the same, and seeking the benefit thereof. This is the fair import of the instructions, and we think the question at issue was thereby fairly and properly submitted to the jury, and their decision is and ought to be conclusive upon us. These positions are, we think, abundantly sustained by the numerous authorities cited in the brief of defendant's counsel, among which may be cited the following: 2 Perry, Trusts, § 666; also Id. §§ 652, 664; *Gover v. Owings*, 16 Md. 91, 99; 2 Bish. Mar. Wom. §§ 116, 132; *Blanchard v. Blood*, 2 Barb. 352; *Strong v. Skinner*, 4 Barb. 546; *Baldwin v. Carter*, 17 Conn. 201; 2 Kent, Comm. 162; *Hook v. Dyer*, 47 Mo. 214, 218, 219; *Bank of U. S. v. Lee*, 13 Pet. 107-118; *Crenshaw v. Anthony*, Mart. & Y. 110; and *Murray v. Fox*, 11 Mo. 556, 563-565.

In the latter case of *Murray v. Fox*, 11 Mo. 556, (s. p.) at pp. 563-565, there is much in common with the case at bar as to the facts and conduct of the wife and husband in reference to the trust property, and also as to the contentions of the parties to that suit and this, as well as in the rulings and reasoning of the court in that case and in the one at bar, except that in that case the contest was between the *creditor* of the husband and the wife, while in this the controversy is virtually and practically between the *heir* of the husband and his widow. The language of the case of *Bank of U. S. v. Lee*, 13 Pet. 107-118, and also that of the Tennessee court in the case of *Crenshaw v. Anthony*, Mart. & Y. 110, approvingly quoted in the case of *Murray v. Fox*, *supra*, is also worthy of consideration as applicable, to a great extent, to the case at bar. The concluding remark of the court in the case of *Murray v. Fox*, *supra*, is striking, and to the effect that, if the *harsh* rule contended for shall prevail, the wife must either abandon her property to save her husband, or abandon her husband to save her property; and then adds that "such doctrine cannot receive the sanction of any judicial tribunal in this land."

The noticeable differences between the record now before us and when here before are as follows: In the former it affirmatively appeared that the estate owed no debts remaining unpaid; that the widow had paid the debts. In the present there is no *express* testimony on that point, but it is apparent, we think, from the entire record, that that fact was taken for granted. The plaintiff is the administrator, the son-in-law of the intestate's husband, and a witness in the cause; but nowhere in his testimony does he say or pretend that there were any unpaid debts or creditors, and the record nowhere or in any manner shows or intimates any such thing; no allowances against the estate anywhere appear, although the time for presenting the same was long past; from all which, it is, we think, fair to presume that no debts or creditors exist, and that this contest is a struggle solely between the heir of the husband and his widow, and exclusively for the property of the wife mentioned in the marriage contract, and its proceeds. The former record, while it showed that the wife had knowledge that the husband was conducting and managing all the business operations in his own name, yet it failed to show any *express* assent or dissent on her part to this mode of managing and conducting the same. Nor did it show any *express* claim by the husband that the property in question was his, and not that of the wife. On these points the present record shows that the wife in her testimony used this language: "I never intended to give Mr. Eans my property. I expected to hold it as my own. He did not ask it; he did not claim it. * * * It was never my intention to give Eans the property. I did not know how the deeds were made. Mr. Eans never claimed the property was his in my presence." On the other hand, the plaintiff, Gordon, in his evidence uses this language: "Eans exercised full control over everything during the marriage, and claimed all the property as his own. Eans never did business in any other name here than his own." W.

H. Short, at the close of all the evidence, being recalled by the plaintiff, testified: "The understanding with me was that all the property was W. H. Eans'; he called it his." This is all the *express* evidence in the present record on that point. But neither the plaintiff, Gordon, nor the witness Short, said or pretended that this claim of the husband was brought home to the knowledge of the defendant. These differences we think do not in the slightest change the character of the controversy then and now, or the principles of law by which it should be decided. The case made by both records in all material aspects is substantially the same.

The common-law rule, well established by the authorities already cited, is, as heretofore indicated, to the effect that, notwithstanding the marriage contract may by its terms exclude the husband's marital rights to the wife's separate estate, still the technical legal title thereto vests in the husband during coverture; but that in equity he holds it, not as husband, but as her trustee; and that upon his death, by operation of law, his marital and fiduciary relations, rights, and powers over the same terminate, and the property thus emancipated goes at once to the wife, and not to his administrator or heir. 2 Bish. Mar. Wom. § 116; 2 Barb. 352, *supra*. The marital common law, as we have seen, would have vested the technical legal title to the promissory notes, certificates of bank deposits and bank stock, accounts, and the like in the husband, whether taken in the name of the wife or husband; and the act of the husband in taking them in his own name could do nothing more, or change the rule of law in that behalf. In either case, as we have seen, the husband is but the trustee for the wife, and under the law can take no benefit to himself, or acquire any title to the trust-estate hostile to his wife, the beneficiary in the trust. *Grunley v. Webb*, 44 Mo. 444; *Rea v. Copelin*, 47 Mo. 76; *Hook v. Dyer*, Id. 214; *Clark v. Maguire*, 16 Mo. 302; *Freeman v. Freeman*, 9 Mo. 772.

This case is distinguishable, in an important particular, from that of *Hook v. Dyer*, 47 Mo. 214, 218, 219. In the latter case, Mrs. Dyer, while trustee for others, was also one of the beneficiaries in the trust-estate. In the case at bar, the husband, so far as the trust property was concerned, which is really the object of the suit, was, in legal contemplation, a dry trustee, with no beneficial interest in the property mentioned in the marriage contract, and from which he was thereby expressly excluded from all beneficial interest.

Plaintiff's refused instructions, designed to show title by limitation, and for the refusal of which error is assigned, are as follows:

"(5) If the jury believe from the evidence that said Wm. H. Eans was in the open and notorious possession of the property in controversy, claiming it as his own, for more than five years next before his death, they will find the issue for the plaintiff.

"(6) If the jury believe from the evidence that said W. H. Eans was in the open and notorious possession of the property in controversy, claiming it as his own, for more than ten years next before his death, then they will find the issue for the plaintiff."

These instructions are clearly inapplicable to the facts in evidence. They omit all reference to the fiduciary relations existing between the husband and wife, to the conceded fact that he was her trustee in reference to said property, and that his possession in its origin was friendly and in subordination to her title as the true owner, or that his alleged adverse claim and holding was in any manner clearly and distinctly brought home to her notice. For these reasons, if for no other, they were properly refused. The rule in all such cases is to the effect "that, when a party is in possession of property in privacy with the rightful owner, nothing short of an open and explicit disavowal and disclaimer of a holding under that title, and assertion of title in himself, brought home to the owner, will satisfy the law, or lay a foundation for the operation of the statute of limitations." *Hamilton v. Boggess*, 63 Mo. 233; *Bud v. Col-*

lins, 69 Mo. 129, 139; *Wilkerson v. Thompson*, 82 Mo. 317; Tyler, Ej. 876; and other cases cited in brief of defendant's counsel.

It is said the trial court erred also in refusing to permit plaintiff to file certain written interrogatories. The offer does not appear to have been in proper time; and, even if it had, the error, if such it was, was not such as to warrant a reversal, especially as the plaintiff thereupon proceeded to examine and question the defendant on oath touching all the matters and things contained in said interrogatories. It does not appear that any error was thereby committed materially affecting the merits of the action to the prejudice of plaintiff. Unless that appears, we are not authorized to reverse for that reason. Section 3775, Rev. St. 1879.

It only remains to consider plaintiff's eighth instruction, and, in that connection, the title deeds to the realty and the husband's watch. The eighth instruction is as follows: "(8) The court instructs the jury that, on the pleading and evidence, they should find for the plaintiff."

Of the title deeds it is sufficient to say that as they pertain to the realty, which, under the facts of this case, is in no way within the scope of this proceeding or affected thereby, it is not apparent how the ruling as to the title deeds materially affected the merits of the action to plaintiff's prejudice.

As to the husband's watch, conceding it to be his, as the evidence shows, this objection, under the circumstances, has the appearance of an after-thought. In no fair or just sense can it be said to have been the subject-matter of the suit. It is not mentioned in the complaint, in any of the instructions asked or refused, nor in the motion for a new trial; and it is manifest, from the entire record and contention of the parties, that the real subject-matter of the suit was to recover the *separate estate of the wife* reserved to her by the antenuptial marriage contract, and its proceeds, but claimed by the plaintiff, at every stage of the proceedings, to have become the absolute property of the husband, by reason of the alleged conduct and course of dealing of the husband and wife in reference thereto. This is the burden of the whole proceeding. But, as a last resort, it is insisted in this court for the first time that the administrator was certainly entitled to judgment for delivery of the watch of the husband, and that the court therefore erred in refusing to direct a finding for the administrator as requested in instruction No. 8. Instruction No. 8, as asked, manifestly contemplated that the jury should find for plaintiff as to the whole case. If the plaintiff, at the time, really intended and sought a recovery of the husband's watch by instruction 8, why did he not specifically call the court's attention to the watch by name, and ask that, as to it at least, the plaintiff was entitled to a recovery. If that was what he really meant, and he had so informed the court, it doubtless would so have directed. It does not appear, however, that that question was ever passed upon by the trial court by said instruction 8, or otherwise; and, if it had been, the court's attention should have again been called to it by the motion for a new trial. But this was not done. There is manifestly no merit in the objection, and no error in the record on that account.

Finding no error in the record, the judgment of the trial court is therefore affirmed; in which NORTON, C. J., and BLACK, J., concur; SHERWOOD, J., dissents; BRACE, J., expressing his views separately.

BRACE, J. I cannot concur in so much of the foregoing opinion as sanctions the doctrine that in this proceeding, under sections 7, 10, and 11, Wag. St. p. 85, the probate court had jurisdiction to try and determine the right of the administrator and the defendant in the property in controversy, openly held and claimed by her under color of right as her separate estate.

STATE V. PHELPS.

(Supreme Court of Missouri. March 21, 1887.)

1. CRIMINAL PRACTICE—WITNESSES—COMPETENCY—INDORSEMENT ON INDICTMENT.

Witnesses other than those whose names are indorsed on the indictment may, by the express provision of Rev. St. Mo. § 1802, be examined by the state at the trial.

2. LARCENY—POSSESSION OF STOLEN GOODS—EVIDENCE.

Where part of the stolen goods are found in possession of a woman whom defendant claims to be his wife, shortly after the taking, evidence of the subsequent finding of the remainder 60 yards from the place where the first finding was made, held competent in connection with other facts tending to connect defendant with the larceny.

3. SAME—JOINT DEFENDANTS.

Where two joint defendants were together when a larceny took place, the possession of the stolen goods, shortly after the larceny, by one of them, is criminating evidence against both.¹

Appeal from circuit court, Douglas county.

The Attorney General, for respondent. *T. H. Mustick* and *J. K. Reed*, for appellants.

NORTON, C. J. The defendants were indicted in the circuit court of Douglas county, charged with having committed larceny from a dwelling. Upon being arraigned, defendant Henry Philips was granted a severance, and on being tried was convicted and sentenced to imprisonment in the penitentiary for two years, from which judgment of conviction he has appealed to this court. On the trial the state proved the following facts: That on the twenty-eighth of August, 1886, in the absence of the family, two dresses and one basque were stolen from the dwelling-house of David Thompson, in Douglas county. That on the same day Henry Phelps was seen with a woman, three-fourths of a mile north of Thompson's, coming along the public road from the north, and, after getting water from the spring, they went back north. They were both riding one horse. This was about 1 o'clock in the afternoon. The next day, between 9 and 10 o'clock A. M., the tracks of a man and horse were seen at Squire's store, one and one-fourth miles south of Thompson's, going south. That about eight miles south of Thompson's a horse had been fed, a fire built, and the tracks of a man and a woman were seen. From this place the tracks were followed a few miles further and lost. That on the thirty-first of August, Delilah reached James Hart's, her brother-in-law, coming from the south, alone, on foot, and carrying a bundle of clothing. This was 24 miles south of Thompson's. That, on the first of September, parties came to Hart's, looking for the goods. Delilah told them they were welcome to see all she had, spread out the bundle before them, including one of the dresses afterwards claimed. That she did not appear excited, but, after they had failed to claim any of them, she commenced weeping. That, on the third of September, Henry came to Hart's, bringing a horse with him. Henry was a stranger to Hart and his wife, but represented that he and Delilah were married in Benton county, Missouri, in July, 1886. That on the fourth of September the defendants were arrested at Hart's.

The state then offered evidence tending to identify the dress found in Delilah's possession as one of the stolen dresses, to which defendant objected as irrelevant, but the objection was overruled, and defendant excepted. A letter was then introduced, signed "HENRY PHELPS," dated at Isabella, Mis-

¹As to the presumption of guilt arising from the possession of recently stolen property, see *State v. Guffin*, (Iowa,) 32 N. W. Rep. 447; *Johnson v. Miller*, (Iowa,) 29 N. W. Rep. 743, and note, and 19 N. W. Rep. 310, and 17 N. W. Rep. 34; *Vaughan v. State*, (Tex.) 2 S. W. Rep. 825; *State v. Buella*, (Mo.) 1 S. W. Rep. 764; *Robinson v. State*, (Tex.) 3 S. W. Rep. 736; *Brothers v. State*, Id. 737; *Hart v. State*, Id. 741; *Clark v. State*, Id. 744.

souri. September 1st, addressed to a friend in Benton county, stating that he and Delilah had had a hard time walking through; that they were on their way to the Indian Nation, and that they had been nine days on the road; that, the day Henry came to Hart's, Delilah was washing at the spring, 60 yards from Hart's house, and Henry stayed with her most of the day; that Hart lives two and a half miles north-west from Isabella; that, when arrested, Henry was informed that one of the dresses could be identified as part of the stolen property, and he said to the constable, if that could be proved, it would be good evidence against them. He also told the officer he got the dress when he got Delilah. The state then introduced Hart to show that, on the twenty-first or twenty-second of September, he found the other stolen dress and basque, with another skirt, wrapped in a bundle, hid in a thicket in his field, about 80 or 100 yards east of his house, about sixty yards from his spring, but not in the direction from which Delilah came; that, being wet, they unfolded and hung them out to dry. To this evidence defendant objected for irrelevancy and incompetency, and because witness' name was not indorsed on the indictment, and defendant had no knowledge that he was to be sworn. But the objection was overruled, and defendant saved his exception at the time. This was all the testimony connecting Henry with the larceny.

The objection that witness Hart should not have been allowed to testify because his name was not indorsed on the indictment was properly overruled; it being expressly provided by section 1802, Rev. St., that other witnesses than those whose names are thus indorsed may be examined by the state, and it is so held in the case of *State v. Day*, 1 S. W. Rep. 759.

The objection that Hart's evidence was incompetent and irrelevant was, in view of the other fact in evidence, properly overruled. It had been shown that a part of the stolen goods was found recently after the theft in the possession of defendant's wife, as he claimed her to be, at Hart's house, when she arrived on the first day of September with a bundle of clothing, defendant stopping at Isabella, a place two and a half miles from Hart's house; that defendant and his wife were seen in the vicinity of the dwelling from which the clothing was stolen on the day it was stolen; that defendant came to Hart's house on the third of September, and spent the most of the day with his wife at the spring where she was washing, and 60 yards from where Hart testified he found part of the stolen goods concealed in the brush, and, when arrested on the fourth of September, he said, if it could be proven that part of the stolen goods had been found in his wife's possession, that would be good evidence against them.

In *State v. Barker*, 64 Mo. 282, it is said: "The possession of part of the stolen goods of the smallest value, in connection with other circumstances, might clearly fix the guilt of stealing all the goods upon the defendant. *State v. Owens*, 79 Mo. 619, and *State v. Davis*, 78 Mo. 29, are to the same effect.

As the evidence tended to show that a part of the stolen goods was found in the possession of defendant's wife, which he admitted, if that could be proven, would be good evidence against them, the circumstance that the remainder were found concealed in a place where they had an opportunity to put them was properly allowed to go before the jury, to be considered by them in connection with other circumstances in the case. If defendant and his wife, Delilah, as the evidence tends strongly to show, were together when the goods were stolen, participating in the larceny, the possession of the goods by one of them recently after the theft is criminalizing evidence against both, and it was on this theory that the case was tried by the circuit court; and there is no analogy between this case and the case of *State v. Wolf*, 15 Mo. 166, to which we have been cited. According to these views, the objection made to the action of the court in refusing instructions asked by defendant, to the effect that the jury should disregard all evidence as to the possession of said

goods, unless such possession was an actual manual possession by defendant, is not well taken.

The court gave nine instructions on behalf of the defendant, which it is unnecessary to further particularize than to say that they were full and fair, and to the effect that unless the jury believed beyond a reasonable doubt that defendant either stole the goods, or was present aiding and assisting when they were stolen, they should acquit, and that they should also acquit if the circumstances in evidence were consistent with any reasonable hypothesis of defendant's innocence. They were further told that, if Hart was in possession of the stolen goods, his possession was not defendant's possession, and could not be considered as evidence against him.

No error appearing in the record, the judgment is affirmed, in which all concur.

STATE v. HILL.

(*Supreme Court of Missouri. March 21, 1887.*)

1. SEDUCTION—EVIDENCE—CORROBORATION.

Evidence of such circumstances as usually accompany a marriage engagement is sufficient to satisfy the provision of section 1912 of the Revised Statutes of Missouri, which provides that the evidence of the woman in trials for seduction under promise of marriage must be corroborated to the same extent as that of the principal witness in perjury.

2. SAME—PROMISE OF MARRIAGE.

Said section applies only to the *promise* of marriage. The other facts constituting the offense may be proven by any competent testimony.

3. SAME—GOOD REPUTE OF PROSECUTRIX.

On a trial for seduction under promise of marriage, the state may prove at the outset the previous good repute of the prosecuting witness.

4. SAME—DECLARATIONS AND ADMISSIONS.

In such case, evidence is also admissible that defendant had boasted to his friends that he had had illicit intercourse with the prosecuting witness, as tending to show, not only an illicit connection, but also, in view of the circumstances under which the admissions were made, the deceptive practices by which it was brought about.

5. TRIAL—INSTRUCTIONS—DISCHARGE OF JURY.

It is error for the presiding judge to notify the jury that, if they agree by a certain hour, they will be discharged, and that otherwise they will be held until they so agree.

Appeal from circuit court, Moniteau county.

B. G. Boone, Atty. Gen., for respondent on appeal. Moore & Williams, for appellant.

BLACK, J. The defendant was indicted for seducing Ida F. Dickson under a promise of marriage. For a reversal of the judgment it is contended there is no sufficient corroborating evidence of the prosecuting witness. The statutory offense is: "If any person shall, under promise of marriage, seduce and debauch any unmarried female of good repute, under twenty-one years of age," etc. Section 1912, Rev. St., provides: "In trials for seduction under promise of marriage, the evidence of the woman as to such promise must be corroborated to the same extent required of the principal witnesses in perjury." From these statutes it is plain to be seen that the corroborating evidence is only required as to the promise of marriage, and in that respect to the extent of the principal witness in perjury. In cases of perjury it is not required that the corroborating circumstances should be equal to a second witness. The additional evidence, it was said in *State v. Heed*, 57 Mo. 254, need not be such as, standing by itself, would justify a conviction in a case where the testimony of a single witness would suffice for that purpose; but it must be at least strongly corroborative of the testimony of the accusing witness. There must be some evidence, independent of the principal wit-

ness. Any material circumstance proved by other witnesses, in confirmation of the witness who gave the direct testimony, will be sufficient. *Rosc. Crim. Ev.* (6th Amer. Ed.) 765. We can then apply these guides to cases like the one in hand. Evidence of circumstances which usually accompany the marriage engagement will satisfy the statute as to supporting evidence. *State v. Brassfield*, 81 Mo. 156. That case, it is true, was overruled in *State v. Patterson*, 88 Mo. 88, in one respect, but not as to the question now under consideration. Of course, there may be many other circumstances equally efficient, and it is not designed to enumerate them; for in this respect each case must, to a great extent, be its own guide.

Now, Mr. and Mrs. Dickson, the father and mother of Ida, testified that defendant had been waiting on their daughter three or four years; that he and another young man had an oyster supper at their house in December, 1882; that on an evening in January following, when the seduction is alleged to have taken place, he and Ida were in the kitchen after witnesses had retired; that defendant was at their house one or two evenings previous to these occasions, as the suitor of their daughter. There is evidence, too, that he had paid her some attention on other occasions. The prosecuting witness swears positively to a marriage promise made by defendant on the night they were in the kitchen; and we think the foregoing evidence is sufficient by way of corroborating circumstances. It is true, the visits of the defendant were not frequent; and this evidence may all be true, and there have been no promise made to marry the girl, but the circumstances are such as usually attend such engagements. Whether they, and the testimony of the prosecuting witness, outweigh the positive denial of the defendant, was a question for the jury to determine.

2. Two witnesses, young men, testify to two different conversations in which defendant said he had had sexual intercourse with Ida Dickson. Although these conversations occurred when these young men were boasting of their exploits, still it was properly received. It was not only evidence of the fact that defendant had had illicit connection with the girl, but the admissions, in view of the circumstances under which they were made, show that he had induced her to yield by his seductive arts. Of course, every illicit intercourse is not seduction. Nor is every seduction an offense under the statute. It is a seduction under promise of marriage which constitutes the offense. Though the evidence is of no value as tending to show a promise of marriage, it is of great value as tending to show an illicit connection, and of some value as tending to show that the intercourse was brought about by the deceptive practices of the defendant.

3. There was no error in allowing the state to prove the good repute of the prosecuting witness at the outset, and as a part of the case for the state. Good repute is made an element of the offense by the statute; and, as both parties are presumed to be innocent, the better conclusion seems to be, it is said, that some such evidence should be brought forward in the first instance. *Bish. St. Crimes*, (2d Ed.) § 648. Mr. Bishop states the rule under statutes which make "previous chaste character" an element of the offense; but there is no such difference between that expression and "good repute" as to call for any variation of the rules of evidence in the respect under consideration.

4. The bill of exceptions contains the following recitals: "The cause, after argument, was submitted to the jury at 11 o'clock, on Wednesday evening. Afterwards, at 9:30 o'clock, Thursday morning, the jury was called into court, and inquiry made by the judge whether they had agreed upon a verdict. Receiving a negative reply, the judge addressed the jury as follows: '*Gentlemen*: I will be here until 11 o'clock to-day, at which time I expect to go home; and, if you agree upon a verdict against that time, you will be discharged; if you cannot agree by that time, court will adjourn from day to day until such time as you may agree.' To which verbal charge to the jury de-

fendant excepted. The jury then retired to their room, and at 10:30 o'clock A. M. returned a verdict finding the defendant guilty."

Here there was no secret communication between the judge and jurors. What was said by him was said in open court; and in this respect the case is unlike that of *State v. Alexander*, 66 Mo. 163. But the remarks were made for a purpose, and what was that purpose? Clearly, to induce them to make a verdict by 11 o'clock. They were told if they made a verdict by that time they would be discharged; if not, they would be held until they did agree. In this the judge stepped beyond the bounds of his proper province. In *Railroad Co. v. Jackson*, 81 Ind. 19, the judge, without the knowledge of the appellant, sent word to the jury, by a bailiff, that if they did not agree upon a verdict he would keep them until Saturday night, a period of four days. The court ruled, without hesitancy, that the action of the judge could not be justified. The object of a jury trial is to get the free judgment of the jurors as to the disputed facts. The judge has no right to influence or coerce a verdict by threats of any kind. For this error, if for none other, the judgment must be reversed.

5. The third instruction for the state seems to convey the impression that the prosecuting witness must be supported by other evidence both as to the seduction and the promise of marriage. This is only required, we have seen, as to the promise of marriage. This was an error in favor of defendant, but the instruction had better conform to the law, and thereby be in harmony with the fourth for the defendant. In other respects it is unobjectionable. The fourth seems to apply to the whole case, and is a singling out and giving undue prominence to some of the evidence. It should be omitted. We see no objection to an instruction which tells the jury that, if the reputation of Ida F. Dickson was never called in question, then that is evidence of good reputation for virtue, but the instruction ought not to go so far as to say it is the very best evidence. The chastity of the woman is directly in issue in these cases, (*State v. Patterson*, *supra*,) and it is not the proper province of the court to determine the weight of the evidence.

The judgment is reversed, and the cause remanded for a new trial.

NORTON, C. J., absent. The other judges concur.

HART v. HARRISON WIRE Co. and others.

(*Supreme Court of Missouri*. March 21, 1887.)

1. NEGOTIABLE PAPER—ESSENTIALS—PLEADING.

Rev. St. Mo. § 547, defines a negotiable promissory note to be one "for the payment of money to the payee therein named, or order or bearer, and *expressed to be for value received*." *Held*, under this section, that the allegation, "was expressed to be for value received," is an essential averment in a petition which seeks to set up a cause of action against the indorsers of a negotiable promissory note.

2. SAME—DENIAL UNDER OATH.

Rev. St. Mo. § 3653, provides that, in an action on an instrument purporting to have been executed by the other party, the execution of such instrument will be adjudged to be confessed, unless the denial thereof be verified by affidavit. *Held*, that this section will not authorize a judgment for plaintiff upon the pleadings if the complaint is otherwise fatally defective.

NORTON, C. J., and BLACK, J., dissenting.

Appeal from St. Louis circuit court.

Frank J. Bowman, for plaintiff, respondent. *Edmund T. Allen* and *N. O. Gray*, for appellants.

RAY, J. The amended petition, on which this action was tried, is as follows: "Plaintiff states that the defendant the Harrison Wire Company is a corporation duly incorporated under the laws of the state of Missouri, with its principal office and place of business in the city of St. Louis, in the state of Missouri, and was, at the dates hereinafter mentioned, engaged in carry-

ing on a manufacturing business in said city of St. Louis; that on the sixteenth day of June, 1884, in the due course of its said business, for value received, it made and executed its certain promissory note, a true copy of which is herewith filed, dated June 16, 1884, whereby it promised to pay to the defendant James M. Leete, or his order, twenty-five thousand dollars, five days after the date thereof, with interest from maturity, at the rate of ten per cent. per annum until paid; that thereafter, on the same day, the said defendant James M. Leete and the defendant Edwin Harrison indorsed said note, and assigned by indorsement said note to the plaintiff, for value received; that thereafter, on the twenty-fourth day of June, 1884, on the day when said note was due and payable, the plaintiff demanded, and caused demand to be made, of said defendant the Harrison Wire Company the amount due by said note, but said Harrison Wire Company wholly neglected and refused to pay the same; notified the said James M. Leete and Edwin Harrison, the indorsers thereon, of said demand and refusal, and required and demanded of them, and of each of them, the payment of said note, which they wholly refused and neglected to pay; that said note was duly protested at maturity, as fully appears by the original protest herewith filed, and no part thereof has been paid. Wherefore plaintiff asks judgment against the defendants for the sum of twenty-five thousand dollars, with interest, damages, and costs." The answer of defendants was a general denial of the allegations in the petition.

The evidence in plaintiff's behalf consisted of the testimony of plaintiff, in substance, that he saw the two defendants Edwin Harrison and James M. Leete place their names on the back of the note; also of the said note, and notarial protest thereof, the note being in words and figures as follows:

"\$25,000.

ST. LOUIS, June 16, 1884.

"Five days after date we promise to pay to the order of James M. Leete twenty-five thousand dollars, for value received, negotiable, and payable without defalcation or discount at the Bank of Commerce, with the interest from maturity at the rate of ten per centum per annum until paid.

"EDWIN HARRISON, President.

HARRISON WIRE CO.

"By CHAS. MILLER, Treas.

Indorsed: "JAMES M. LEETE, EDWIN HARRISON, AUGUSTUS B. HART."

This evidence was objected to, when offered, upon the grounds of incompetency and immateriality; that the note offered in evidence was expressed to be for value received, whereas no such note was described in the petition, and exceptions were taken by defendants to the adverse ruling of the court in this behalf. No evidence was offered in the behalf of defendants, or either of them, but the Harrison Wire Company and said Leete and Harrison respectively asked, at the close of the evidence for plaintiff, an instruction that, on the pleadings and evidence, the plaintiff could not recover, which the court refused, and at plaintiff's instance instructed the jury that under the evidence the plaintiff was entitled to recover the face of the note, and interest thereon, from June 24, 1884, to date, at the rate of 10 per cent. per annum, and 4 per cent. damages upon the principal sum. Under the instructions of the court, the jury found a verdict against all three of the defendants, who have appealed to this court from the judgment entered thereon.

The petition contains, it will be perceived, no averment that the Harrison Wire Company, the maker of the note, is insolvent or non-resident of this state, or that the holder, in the exercise of diligence, has been unsuccessful in an action upon the note against the maker, so that, so far as the defendants Leete and Harrison are concerned, there is no cause of action stated against them as indorsers of a non-negotiable promissory note. *Jaccard v. Anderson*, 32 Mo. 190; *Simmons v. Belt*, 35 Mo. 466. The cause of action stated, if any, as against them, is as indorsers of a negotiable promissory note, and whether or not the facts stated are sufficient to hold them as such constitutes the real controversy in the case.

Section 547, Rev. St., defines a negotiable promissory note to be one "for the payment of money to the payee therein named, or order or bearer, and expressed to be for value received." The petition, it is conceded, describes a note for the payment of money to Leete, the payee therein named, or order, but its sufficiency is questioned upon the ground that it contains no allegation that the note "was expressed to be for value received." Such an allegation has been held necessary in a number of decisions by this court, in which it is said, in substance, that the employment, in the note, of the words operative, under the statute, to make the note negotiable, must appear in the petition, to enable the court to see and pronounce the legal effect of the note, and whether or not the same is negotiable. *Jaccard v. Anderson*, 82 Mo. 188; *Simmons v. Belt*, 35 Mo. 461; *Lindsay v. Parsons*, 84 Mo. 422; *Townsend v. Heer Dry Goods Co.*, 85 Mo. 508.

Tested by the rule thus announced in the several cases which we have cited, and which have never been overruled or questioned, we think the petition in this case must also be held insufficient, upon the same principle and for the same reasons. The allegation, that "in due course of its said business, for value received, it [the maker of the note] made and executed its certain promissory note," etc., does not make it appear that the note was a negotiable promissory note, or one "expressed to be for value received," as the statute requires. The fact that value had been received, which is acknowledged, which is the averment aforesaid, does not show that the promissory note which was executed in consideration thereof was, under our statute, negotiable. Notes, both negotiable and non-negotiable, may be and generally are executed upon valuable consideration duly received, and an allegation of this sort affords no light as to which class of paper the note in question belongs.

We have not overlooked the provisions in the statutes cited, in substance that no variance between the allegation and the proof shall be deemed material, unless it has actually misled the adverse party, to his prejudice, in maintaining his action or defense upon the merits, and that the court shall disregard any error or defect in the pleadings which shall not affect the substantial rights of the adverse party.

The omissions, imperfections, defects, and variances contemplated in said sections, and in other sections in the same chapter, and other defects of like nature and import, are, it is true, cured by the verdict, and may be supplied by the trial or appellate court; but, as was said per *NAPTON, J.*, speaking for this court in *Andrews v. Lynch*, 27 Mo. 169: "The old rule of the English judges, that a verdict would supply whatever of necessity must have been proved to the jury, has never been held to extend to cases where the *gist* of the action is omitted. Nor have the various statutes of amendments and jeofails, enacted in several of our states, and embodying this principle, ever been construed to embrace a case where no cause of action is stated. Our statute upon the subject contains nothing new or additional to the old rule." See, also, *Weil v. Greene Co.*, 69 Mo. 281. This objection, if of the character we hold it to be, is not one of form, but goes to the substance of the action, and is good on motion in arrest of judgment, and may be made at any stage of the proceedings, and even in this court for the first time. The rule is that, wherever a general demurrer would be well taken, a motion in arrest is equally available; and, if the petition is bad on general demurrer thereto, the judgment, for the same reason, is equally bad on motion in arrest. *Grove v. City of Kansas*, 75 Mo. 675; *Weil v. Greene Co.*, 69 Mo. 281.

The record shows, however, that defendants made the objection in this case at the trial, and apprised plaintiff and the trial court, when the note was offered in evidence, of the said omission in the petition, which was the ground of objection to its admissibility in evidence, and plaintiff, at this time, if not before, could easily have amended his petition in that behalf; but he then chose to rely on his own judgment as to its sufficiency, and must now abide

the consequences. The same objection was taken by the instruction, in the nature of a demurrer to the evidence, asked by defendants Leete and Harrison, as well as said Harrison Wire Company, at the close of the evidence, and again in the motions for new trial and in arrest of judgment, and in such circumstances the plaintiff cannot claim to have been surprised or misled.

As the petition fails, which we think it manifestly does, to state any cause of action against Leete and Harrison as indorsers of a non-negotiable promissory note, and also fails to make it appear that the note on which they were sued as indorsers was negotiable under the statute, we must hold that, as against them, it omits altogether to state any cause of action. We are aware that this ruling may *appear* somewhat technical, but this apprehension is no sufficient reason for a plain departure from a well-established rule of pleading which has heretofore been approved by this court in the decisions cited, and which said decisions have not been overruled, modified, or called in question. If those are similar cases, might not the defendants rely at the trial upon our rulings therein, and contest the right of plaintiff to any judgment upon a petition with similar omissions, especially where they were in the progress of the trial *challenging* the petition upon this ground, which, we have seen, was done in this case? In our desire "to distinguish between form and substance," as required by section 3586, Rev. St. 1879, we should be equally careful "to afford known, fixed, and certain requisitions in place of the discretion of the court or judge thereof." Read the petition as we may, we are unable to find any statement therein that the note sued on was a negotiable promissory note, or was "expressed to be for value received," and this is an indispensable allegation in such actions, as we have repeatedly held.

It is contended for plaintiff that, as the answer was not verified by affidavit, the plaintiff was entitled to judgment upon the pleadings. While the legislature intended by section 3653, Rev. St., to afford a party, in the instances specified therein, an adjudication by confession, as it is called, we think that the adjudication by confession so conferred is expressly limited to the execution of the instrument. By failing to deny the execution by answer or replication verified by affidavit, the party admits the genuineness of the signatures, and also delivery of the instrument; the signing and delivery being included in the execution.

Limiting our remarks to the actual case before us, and assuming that the section applies to commercial paper, and to indorsements thereon, the confession adjudged, under the said statute, would be that the note described in the petition was genuine, and not forged, but executed as charged; that is, by the Harrison Wire Company as maker, and by said Leete and Harrison as indorsers thereof. But this, we apprehend, would not make a case authorizing a judgment for plaintiff as against said indorsers of the note in question, for their liability would still depend upon other contingencies, neither averred in the petition nor admitted, and which we have already referred to. Manifestly, the plaintiff would not be entitled to a judgment in his favor upon the pleadings, where his petition is fatally defective, and insufficient to support a judgment, for want of a statement of facts sufficient to constitute a cause of action.

There are one or two other questions urged by plaintiff; but, in the absence of a cross-appeal in his behalf, they are not, we think, properly before us for determination. *Amonett v. Montague*, 63 Mo. 204; *Bowie v. Kansas City*, 51 Mo. 458.

The views and conclusions hereinbefore expressed and stated lead to a reversal of the judgment, and remanding the cause for further proceedings in conformity hereto; and it is accordingly so ordered; in which Judges SHERWOOD and BRACE concur, and from which NORTON, C. J., and BLACK, J., dissent.

HICKMAN v. MISSOURI PAC. RY. CO.

(Supreme Court of Missouri. March 21, 1887.)

NEGLECT—CONTRIBUTORY NEGLIGENCE—EVIDENCE.

In an action by a woman in good health, 65 years old, and weighing 170 pounds, to recover damages for personal injuries occasioned by the starting of a train while she was in the act of alighting, the jury may take into consideration the "age, sex, and physical condition" of the plaintiff in determining whether she exercised ordinary care and diligence at the time of the accident.

Appeal from circuit court, city of St. Louis.

Boyle, Adams & McKeighan and *S. B. Jones*, for plaintiff, respondent. *T. J. Portis* and *Bennett Pike*, for appellant.

BRACE, J. This suit was instituted in the circuit court of the city of St. Louis for damages for personal injuries sustained by the plaintiff, Isabella Hickman, while alighting from one of appellant's passenger trains at Wilkerson, Missouri. The case was tried by a special jury summoned for that purpose, on application of the defendant, who found a verdict for plaintiff, and assessed the damages at \$5,500. From the judgment rendered thereon the defendant appeals. It is contended for the appellant that the court committed error in giving the second instruction asked for by the plaintiff, in refusing to give instruction numbered 4 asked by defendant, and in modifying said instruction, and giving it as modified to the jury, and that the verdict is excessive, and for these reasons a reversal of this cause is asked.

The second instruction for plaintiff is as follows: "The court instructs the jury that it was the duty of defendant's servants and employes, on the occasion in question, to stop the train long enough for plaintiff, by the exercise of ordinary care and diligence, considering her age, sex, and physical condition, to get off the train safely before it was started, or suffered to start. And if the jury believe from the evidence that the plaintiff, as soon as the train stopped, got up from her seat, and walked at once, and as fast as she reasonably could, out on the platform, and down the step on the car, without stopping on the way, then she did all the law required of her, so far as diligence on her part in getting off the train was concerned. And if, under such circumstances, the defendant's servants or employes started the train while she was proceeding to alight, still using due and reasonable haste in getting off the train, such starting of said train was an act of negligence on the part of defendant, and a breach of its duty to plaintiff as a passenger on its road." Instruction No. 4 for defendant, as modified by the court, and then given, is as follows: "If the jury find from the evidence that the train was stopped at Wilkerson station a sufficient length of time for the female plaintiff to conveniently alight, *considering her age and physical condition*, and, without any fault of defendant's servants in charge of said train, she failed to do so, and the conductor, not knowing and having no reason to suspect that plaintiff was attempting to alight, or was in the act of alighting, caused the train to start while she was so alighting, or attempting to alight, then defendant is not liable." The modification consisted in the insertion, after the word "alight," in the third line, of the words "*considering her age and physical condition*," in italics.

It is contended that the use of the words "*considering her age, sex, and physical condition*," in the second instruction given for plaintiff, implies that less than an ordinary degree of care and diligence was required of her in getting off the train. We do not think such an implication arises from a fair construction of the instruction. In the sentence in which that phrase is used the court was instructing the jury as to the duty of defendant to stop its train long enough for the plaintiff "to get off safely before it was started, or suffered to start." The qualification, if any, contained in the words, "*considering her*

age, sex, and physical condition," is applicable to the words immediately succeeding, rather than to the phrase "ordinary care and diligence," immediately preceding, those words. The use of the terms "ordinary care and diligence," in that sentence, is merely formal, and its meaning in the connection there used, if at all ambiguous by reason of imperfect punctuation, is clear and unmistakable, when read in the light of the remainder of the instruction, which immediately proceeds to the statement of what action on the part of plaintiff would bring her within the exercise of the ordinary care and diligence required of her, and which is fully up to the standard of the ordinary care and diligence that could be required of any person. But, conceding that the reading contended for by appellant is correct, yet nothing less than ordinary care and diligence is required of the plaintiff; but according to that reading, in determining whether or not such ordinary care and diligence were used by the defendant, the jury are to consider her age, sex, and physical condition. And why not? She was required to use only such ordinary care and diligence as a prudent person in her situation would use; and how could the jury determine whether she had acted with the ordinary care and diligence with which a prudent person would have acted in her situation, unless they considered that situation, her environments, and how a prudent mind would guide the action of such a body as she possessed? And how could they do this without considering that body, its sex, its age, and its physical condition? It was perhaps superfluous to make the suggestion to the jury, but it was certainly not erroneous.

Nor do we find any error in the first or second instruction given for the plaintiff, or in the modification made by the court of defendant's fourth instruction, in respect of the declaration contained in each of them, that the jury, in determining the question whether defendant's train was stopped at plaintiff's destination a reasonable time for the plaintiff to safely or conveniently get off the train, they should take into consideration her age, sex, and physical condition. The evidence tended to show that Mrs. Hickman was, at the time of the accident, about 65 years of age, weighed about 170 pounds, was in good health, and able to walk. She belonged to that class of fleshy old ladies, many of whom are travelers, and necessarily so, who can and do move with reasonable celerity, but not so quickly as many who are younger, stronger, and more active. She was received as a passenger on defendant's train; and, when the train arrived at her place of destination, was entitled to a reasonable time in which to get off, and it was the duty of the defendant to stop its train for that length of time. What would be a reasonable length of time for a light, young, active man, might and ordinarily would not be a sufficient length of time for a heavy old woman to get safely off a train. The jury were called upon to determine whether the defendant's train stopped a sufficient length of time for the plaintiff to get off. How could they determine that question without considering what kind of a passenger she was,—her age, sex, and physical condition? And how could the court have erred in directing them to consider what they must have in any event considered if they came to a correct conclusion in the premises, and without the consideration of which they could not have arrived at such a conclusion?

The instruction given by the court on its own motion, on the measure of damages, is unexceptionable. The injury received by the plaintiff, the evidence tended to prove, was a painful, serious, and permanent one, and we find nothing in the case to indicate that the verdict of the jury was the result of bias or prejudice. The judgment of the circuit court is affirmed.

(All concur, except NORRIS, C. J., absent.)

ROWDEN and others v. BROWN and others.

(Supreme Court of Missouri. March 21, 1887.)

JUDGMENT—COLLATERAL ATTACK—ORDERS OF PROBATE COURTS.

In Missouri, the proceedings of probate courts in matters within their jurisdiction will be presumed to be regular, and cannot be collaterally attacked; and, where the files and papers belonging to an estate have been lost, it will be presumed that the appointment of an administrator *de bonis non*, the order of sale of real estate, and everything connected therewith, were regularly made and in proper form.

Appeal from circuit court, Bates county.

Ejectment. Both parties claimed title through John M. Gray, deceased,—defendants, who were in possession, through a sale made by an administrator *de bonis non*, the record of whose appointment was lost; and plaintiffs under the public administrator. The circuit court decided in favor of defendants, and plaintiffs appeal.

Wm. Page, for appellants. De Armond & Smith, for respondents.

SHERWOOD, J. Both parties claim under one John M. Gray. The main point in the case is the validity of the administration sale upon which the defendants rely. It does not clearly appear whether White, the public administrator, was ordered, as such public administrator, to take charge of the estate of Gray (which had not been fully administered) in vacation or in term time, nor is it material to know. The files and papers pertaining to Gray's estate being lost, etc., it will be presumed that the appointment of Holloway, as administrator *de bonis non*, was regularly made, and the order of sale, and everything connected therewith, was as it should have been. The same liberal intendments attend the acts and doings of probate courts in regard to all matters within their jurisdiction, and as to which that jurisdiction has attached, as attend the acts and doings of courts of general jurisdiction. *Brooks v. Duckworth*, 59 Mo. 49; *Johnson v. Beazley*, 65 Mo. 250. And the proceedings of probate courts are equally impregnable to collateral attacks as the proceedings of any other courts whatsoever. This view is fully sustained by the cases cited, and by numerous others in this court. To the same effect is *McNitt v. Turner*, 16 Wall. 353. And the jurisdiction of the probate court could of course not be defeated by the fact that the administratrix, Mrs. Gray, had sufficient funds in her hands belonging to the estate to have satisfied any demand against the estate. And the same line of remark applies to the entry, made years after the sale of the land, discharging White, as public administrator, from further charge of the estate of Gray. This order contains the names of several other estates, and that of Gray's may have been inserted through inadvertence; but whether this was the case or not makes no matter. The rights of the purchasers at the administrator's sale could not be in any manner affected by any subsequent occurrence.

Looking at the question in this way, it becomes unnecessary to discuss the declarations at law. Therefore judgment affirmed.

(All concur. NORTON, C. J., absent.)

SMITH v. WABASH, ST. L. & P. RY. CO.

(Supreme Court of Missouri. March 21, 1887.)

1. MASTER AND SERVANT—NEGIGENCE OF VICE-PRINCIPAL.

A train dispatcher, having control of the movements of trains upon a railroad, is, in the performance of his duties as such, a representative of the company, and for an accident occurring through his negligence to another employe subordinate to him, and subject to his orders, the company will be liable.

2. NEGLIGENCE—CONTRIBUTORY.

In such case it is not negligence upon the part of the employe to act, in an emergency, upon the verbal order of the train dispatcher, although a rule of the road required that the specific order should be in writing.

SKEEWOOD, J., dissents.

Appeal from circuit court, Livingston county.

L. H. Waters, for plaintiff and respondent. *W. H. Blodgett*, for appellant.

NORTON, C. J. This is an action to recover damages for the killing of plaintiff's husband, alleged to have been occasioned by the negligence of defendant, in which she recovered judgment for \$5,000, from which the defendant has appealed, and, among others, assigns as error the action of the court in refusing to instruct that, under the pleadings and evidence, plaintiff was not entitled to recover. A proper disposition of this question necessitates a review of the evidence, which shows that freight train No. 84 arrived from the west on the morning of the fifteenth December, 1881, at Stanberry, a station on the line of defendant's road, and the end of a division of said road extending from Stanberry to Omaha; that upon its arrival it was discovered that the caboose belonging to it had become detached, and was left standing on the track four or five miles west of Stanberry; that at the time of the arrival of train 84 another freight train, No. 85, with engine No. 112 attached to it, was standing on the track already made up, and ready to start, going west. The conductor of this train, James F. McCarty, testified that his engine was No. 112; that Mike Bahn was his engineer, and deceased his fireman; that his train was to go out; that he was standing by the train dispatcher's window when train 84 came in, and Luke Ferriter, train dispatcher, said to me: "*Jim, you will have to take your engine and go after that caboose, I guess, as it will save time;*" that he asked Ferriter about orders, and Ferriter said he couldn't give him orders, as there was no operator at Conception; that there was nothing coming east behind 84, and that he would be perfectly safe in going. Witness then said: "*I told him I would go down and see Mike; that, if Mike would go, I would go after the caboose. I went down there, and saw Mike, and we concluded to go after the caboose, and we started off after it promptly, without going back to the dispatcher's office;*" that they found the caboose between three and four miles west of Stanberry, coupled on to it and started back, and had gone perhaps a mile when they collided with the switch engine.

Mr. Bondurant, who at the time of the accident was yard-master at Stanberry, testified as follows: That train 85 was made up, and on the track ready to go west when train 84 whistled for Stanberry; that, when 84 arrived, he discovered there was no caboose on the train; that, as the yard was blocked, he told the engineer of train 84 to go to the round-house, and that he would go after the caboose, the engineer having said he did not think it was a great way back; that he went up to see the train dispatcher, Mr. Ferriter, and the latter asked him if No. 85 had gone, and he answered "No;" that they could not go until Burns arrived; he had charge of the train that came in without the caboose. He then said to him: "Ferriter, hadn't we better go up and get the caboose, as it was lost up the road two or three miles?" that Ferriter asked him if 112 had gone, and he answered "No;" that he did not ask him if they had gone after the caboose, and he understood him to have reference to 112 with train 85; that Ferriter then told him he had better go and get the caboose with the switch-engine. He then asked Ferriter if he would need orders, and he said, "No," it was not necessary to have any; that he would protect him while he was gone, and would let nothing out till he got back. He then went down, got on the switch-engine, and started with three men on the engine besides himself. They met 112 about five miles west of Stanberry, backing up with the caboose. The two engines col-

lided, and plaintiff's husband was killed. That he did not notice what engine was standing in the yard when he left.

It was argued that the rules and regulations for the movement of trains and engines in force at the time of the accident, and printed on time-table 49, were known and understood by the conductor and engineer in charge of engine 112, by the yard-master in charge of the switch-engine, and by the train dispatcher. Plaintiff also put in evidence the following rules printed on said time-table 49:

"Rule 62. The superintendent and appointed train dispatchers are the only persons authorized to move trains by telegraph.

"Rule 68. No wood, construction, or extra train or engine must be run upon the road without written orders or instructions from persons authorized to move trains.

"Rule 64. All telegraphic orders for the movement of trains will be addressed to conductors and engineers. The operator receiving such an order will read it aloud to the conductor and engineer, and receive their understanding in writing; will repeat it back to the dispatcher precisely as sent. If correctly repeated, the dispatcher will return the signal 'O. K.' which must be acknowledged by the operator by a like signal, followed by his initial and office call. The operator will indorse the dispatcher's O. K. on the order, and deliver it to the conductor and engineer to whom it is addressed. In no case will an operator repeat an order until he has first obtained in writing the understanding and signature of both conductor and engineer.

"Rule 65. Should the line from any cause fail to work before the party has received the O. K., he will not deliver such order."

Defendant, on his behalf, put in evidence the following rules printed on time-table 49, and not offered by plaintiff:

"Rule 18. Always take the safe side in cases of the least uncertainty.

"Rule 14. Trains are to be run under the direction of the conductor, except when his directions conflict with rules, or involve any risk or hazard, in either of which cases all participants will be held alike accountable."

"Rule 66. The greatest care and watchfulness must be exercised in sending and receiving orders in regard to running trains. Operators will not trust the delivering of train orders to other parties, but will deliver them in person."

"Rule 68. All orders and messages relating to the movement of trains must be written in full, and no abbreviation used except the telegraph signals '9,' (repeat back,) and '13,' (I understand that I am to ———.)"

The defendant also introduced as witnesses on its behalf J. W. Blanchard, formerly superintendent of the Council Bluffs and Omaha Division of defendant's road; W. J. Durbin, train-master, and for many years a train dispatcher for defendant; Mr. Beggs, a conductor, and Mr. McConnel, a locomotive engineer, both of whom were in defendant's employ at the time of and before the accident. The evidence of these witnesses tended to show that, under the rules as they were understood and acted on by the employees on that division, an engine sent out on the line beyond the switch limits of a station after a caboose would be an extra engine, and only authorized to go on a written order; that the running of irregular or extra trains or engines was done only on written orders issued by the train dispatcher; that time-table 49 was prepared by Thomas McKinock, general superintendent of defendant's road, and issued to the division superintendents, and distributed by them to the employees on their respective divisions; that the engines in question, in their movement after said caboose, were "extra engines," and that under the rules it required that orders for the movement of said engines should be in writing; that the observance of said rule would tend to prevent collisions, and its non-observance would be likely to result in collision; that it was the duty of the employees in charge of the engines in question to refuse to go out upon the road

without orders in writing, and that the train dispatcher had no authority to direct them to go except by order in writing, and signing the name or initials of the division superintendent thereto; that, upon receiving the order in writing, (if one had been given in this case,) it would have been the duty of the persons in charge of engine 112 to have gone to the registry book at Stanberry, and registered his engine out, and when he returned to register it in; that the train dispatcher issues his orders in three copies on manifold paper, one of which is delivered to the conductor, one to the engineer, and one he retains, and the order is recorded in a book; that had the train dispatcher given a written order to the engineer and conductor of engine 112, when the yard-master asked for orders to go with the switch-engine, the train dispatcher would not have given him an order until the order to the engineer and conductor of engine 112 had been canceled; but that, had he made a mistake and done so, the yard-master, when he came to register out the switch-engine, would have discovered that engine 112 was out on the road, and could not have gone until that engine was registered in; that the accident in question resulted from the non-observance of the rules; and that had the rules, as they were understood and acted upon by all the employes on that division, been observed, the accident could not have occurred.

On cross-examination, Mr. Blanchard, division superintendent, testified that Ferriter, the train dispatcher, had power under the rules to control the movement of trains and engines; and that, while he (Blanchard) had the same authority to move trains that the dispatcher had, he never assumed that authority, but loaded it onto the train dispatcher, and that the latter exercised the entire authority; that the engineer of engine 112, attached to freight train 84, could and should have gone back, without any orders, for the caboose, if it could have gotten out of the yards, even if the caboose had been left as far back as 20 miles. On cross-examination, Mr. Durbin testified that when the yard-master found that the caboose had been left back on the road, and that engine 112 could not get out to go after it, it was his duty to inform the train dispatcher of the fact, and to ask for orders to go after it with the switch-engine, and that it was the duty of the train dispatcher to give the orders; that the train dispatcher should have kept the switch-engine from going if he knew the first engine had gone; and Blanchard testified that the train dispatcher, without much effort, could have ascertained whether the engine had gone. The train-master further testified, among other things, that the first fault was the train dispatcher's in giving a verbal order, and the other fault was of the engineer in obeying it.

It is insisted by counsel that the facts in evidence, which are substantially as above set forth, show that the death of plaintiff's husband was occasioned by the negligence of his fellow-servants, and that, therefore, the court erred in overruling the demurrer to the evidence. If the train dispatcher, yard-master, engineer, and fireman of engine 112, were fellow-servants, then error was committed by the court in the above respect; but if the train dispatcher was not a fellow-servant, but the representative of the company in regard to the movement of trains on the division referred to in the evidence, and his negligence was the proximate cause of the injury, the demurrer was properly overruled. It clearly appears from the evidence that the train dispatcher at Stanberry had the sole and exclusive control in directing the movement of trains on the division of defendant's road extending from Stanberry to Omaha, and that the conductors and engineers were subject to them when issued.

The authorities bearing upon the question as to whether or not a train dispatcher, invested with such control, is a fellow-servant with the conductor and engineer and others engaged in actually operating and moving trains, are conflicting and irreconcilable. The rule laid down in Massachusetts, and cases cited from other states, where it is held that all who are engaged in a common employment, working to accomplish a common result, without re-

gard to rank, are to be regarded as fellow-servants, supports defendant's contention. While this court has held that, where one servant is injured by the negligence of a fellow-servant, no action therefor can be maintained against the master, only in exceptional cases, (such as, when the servant employed was incompetent, which was either known or might with ordinary care have been known by the master,) we have never gone so far as to adopt a rule by which to determine who are fellow-servants so broad as that adopted in Massachusetts, nor are we disposed to do so now. The tendency of recent decisions is to narrow and not broaden the rule, notably so in the case of *Railroad Co. v. Ross*, 112 U. S. 377, 5 Sup. Ct. Rep. 184, where it is said: "There is a clear distinction to be made, in relation to their common principal, between the servants of a corporation exercising no supervision over others engaged with them in the same employment, and agents of a corporation clothed with the control and management of a distinct department, in which their duty is entirely that of direction and superintendence. In *Sheehan v. Railway Co.*, 91 N. Y. 332, and *Railroad Co. v. McCollen*, 84 Ill. 109, the superintendent and assistant superintendent, acting as train dispatchers, were held to be vice-principals. In the case last cited it is said that, as between the conductor and company, the assistant superintendent, to whose orders the trains are all subject, is the representative of the corporation, and that the rule applies as well to all orders issued by his assistants as in his name."

That a train dispatcher is to be regarded as the representative of the company is, in effect, held in the following cases: *Booth v. Railway Co.*, 73 N. Y. 38; *Railway Co. v. Henderson*, 37 Ohio St. 552; *Washburn v. Railroad Co.*, 3 Head, 638; *Darrigan v. Railroad Co.*, 24 Amer. Law Reg. 453. In the case last cited it is said: "It is immaterial that these men are hired and paid by a common employer, and that their employment is designed to accomplish one common result. That argument, if pressed to its logical conclusion, would obliterate all distinctions among those engaged in railroad business, from the president down to the humblest servant, and would practically exempt the company from all duty and all liability to those in its service." It is further said that "cases are constantly arising, especially in the operation of railroads, which no general rule can provide for, in which the master must be regarded as constantly present, in which some one must be invested with a discretion, and a right to speak and command in his name and by his authority. Such a right carries with it the corresponding duty of obedience; some one must hear and obey. It must also devise some suitable and safe method by which to run special and irregular trains, and regular trains when off their regular time. Emergencies will arise which no system of rules can anticipate and provide for, in which the company must act promptly and efficiently. In this case the scheme devised was to have these trains controlled by one who knew the position and movement of every train on the road liable to be affected by them,—a train dispatcher acting in the name and by the authority of the superintendent. Is there not a wide difference between the duty of such an agent, and the duty of a locomotive engineer? The duty of the former pertains to management and direction; that of the latter to obedience."

What is here said applies to the facts of the case before us, which shows that, when freight train 84 arrived at Stanberry from the west, freight train 85 stood upon the track ready to go out west, the direction from which 84 had just come, but could not go out because 84 had left its caboose back some four or five miles on the track between Stanberry and Conception, a station on the road. The evidence is undisputed that the engineer of the engine which pulled 84 into the yard had the right, and it was his duty, to take his engine, and, without orders either verbal or written, to go back if for the distance of 20 miles, and bring in the caboose; but, owing to the crowded condition of the yard, he could not get his engine out, and he was ordered by the yard-

master to take it to the round-house. In this condition of things, the train dispatcher directed McCarty, conductor, to take engine No. 112, which was hitched to freight train 85, and bring in the caboose; saying he could not give him written orders because there was no operator at Conception, but that he would be perfectly safe in going, as there was no train coming east; whereupon he was informed by McCarty that he would see his engineer, and if he consented they would go. He did go, and from the very fact of his not returning to the train dispatcher that officer could have drawn no other inference than that he had gone, and this inference could have been reduced to a certainty had he looked to ascertain the fact as to whether or not he had gone; but instead of this, with full knowledge of the fact that McCarty left telling him that he would go if his engineer would, with an assurance from his dispatcher that it would be perfectly safe for him to go, he directed the yard-master to take his switch-engine, and bring in the caboose, promising to protect him while he was gone, without informing him that he had previously directed McCarty to go with engine 112, and without taking any steps to ascertain whether he had gone, which fact he could have ascertained by taking a few steps and simply looking; and it was this negligence that cost the fireman on engine 112 his life.

But it is earnestly insisted that, inasmuch as rule 68 forbade an extra engine from going out without written orders, McCarty was negligent in not refusing to go without them. If the train dispatcher was the representative of the company in ordering the movement of trains, as we hold he was, then, under the emergency and condition of things existing when he determined that he could not give written orders, it was the determination of the company; and when he gave the orders verbally, as he did, to meet the emergency, it was the company speaking. If the engineer who pulled train 84 into Stanberry had informed the train dispatcher that his caboose had been left behind, and that he could not get out of the yard with his engine to go after it, and had procured the use of engine 112, attached to train 85, for the purpose of going, and had gone after it, and had the train dispatcher afterwards instructed the yard-master to take his engine and go, and the accident occurred as it did, could there be any question as to the liability of the company? We think not.

Upon the point under discussion, the case of *Moore v. Wabash, St. L. & P. Ry. Co.*, 85 Mo. 588, has a direct bearing. In that case it appeared that the company had established a rule requiring all car repairers, when engaged in repairing cars, to set out red flags on each side of the place where they were at work as signals of warning to approaching trains. Notwithstanding this rule, the foreman of car repairs directed the plaintiff, without any flags being set out as required by said rule, to repair the draw-head of a car, promising to protect him while so engaged, and an engine ran against the car, severely injuring him. The company was held liable, on the ground that the foreman was the *alter ego* of the company, and his promise of protection was binding, although the rule provided to secure the safety of the men had not been observed, but dispensed with.

It is next objected that the court erred in the second and third instructions given for plaintiff, in that the jury were told that if they found from the evidence that Ferriter was train dispatcher, and, under the rules and regulations of defendant, he had control of the movement of trains and extra engines; and if, under said rules and regulations, he had control of the two engines in question so far as running them on the road was concerned; and if, under said rules and regulations, and by reason of them, said employes were subject to the orders and instructions of said train dispatcher in relation to running of said engines,—then said train dispatcher was not a fellow-servant of the engineer. The specific objection made to these instructions is that it was the duty of the court to construe the rules and regulations read in evi-

dence, and that it was error to leave the construction of them to the jury. This position is well taken, and error was committed in the respect above noted; but the error was one in favor of defendant and against the plaintiff, inasmuch as the rules admitted of but one construction as to the fact that the train dispatcher had control of the movement of trains and engines, and control of the engines in question, as to running them on the road, and subjecting the employes to his orders and instructions; and, had the court construed the rules, it could only have told the jury that under them the train dispatcher had such control, and that the employes were subject to his orders.

It is also insisted that the court erred in the instruction given in relation to damages, in this: that the jury were told that they might take into consideration the mitigating and aggravating circumstances, without pointing out to them what circumstances were aggravating and what mitigating. While it is held, in the case of *Rains v. Railroad Co.*, 71 Mo. 169, that the court in its instruction should point out such circumstances, it is also said in the case of *Nagel v. Railroad Co.*, 75 Mo. 653, that where there are no mitigating circumstances the defendant cannot complain of such an instruction because of its generality. In this case we do not perceive a single mitigating circumstance, but, on the contrary, the grossest negligence of the train dispatcher in sending out the second engine under the circumstances disclosed by the evidence.

It is also insisted that, under the facts found, plaintiff was only entitled to nominal damages. The evidence is that deceased was the head of a family, 39 years of age, able to perform the duties of fireman, and was so engaged when killed, and was always at work. These facts formed a basis on which the jury were authorized to find more than nominal damages.

As to the claim made that the verdict for \$5,000 was excessive, it may be said that it is sufficiently answered by the action of plaintiff in entering a *remittitur* in this court for the sum of \$1,500.

It is alleged in the petition that the train dispatcher gave an order which, under the rules and regulations of the company, the men were bound to obey, and it is contended that this allegation was not proved, inasmuch as the order given was a verbal and not a written order. The company, through its train dispatcher, determined that under the existing circumstances a written order could not be given, and, having thus determined, gave a verbal order, which, emanating from the company through its representative, the train dispatcher, was obligatory.

Inasmuch as the entry of a *remittitur* in this court by plaintiff of the sum of \$1,500 is to that extent an admission that the point made by defendant that the judgment for \$5,000 is excessive, is well taken, on the authority of the case of *Miller v. Hardin*, 64 Mo. 544, the judgment of the circuit court is in all respects affirmed, except as to said sum of \$1,500, which is remitted and to be deducted from the said sum of \$5,000; and plaintiff and appellee is required to pay all costs of this appeal, which are adjudged by this court against her.

All concur, except SHERWOOD, J., who dissents.

JACOBS v. MOSELEY and others.

(Supreme Court of Missouri. March 21, 1887.)

1. BOUNDARIES—SUPPOSED LINE.

Where two adjoining proprietors of land are divided by a fence which they suppose to be the true line, each claiming only to the true line, they are not bound by the supposed line, but must conform to the true line, when ascertained.

2. FRAUDS, STATUTE OF—BOUNDARY LINES—AGREEMENT—SETTLING.

Where there is a dispute as to the true division line, or the line is uncertain, and both proprietors are ignorant as to its true location, and they agree on a permanent

boundary line, and take possession accordingly, the agreement is binding on them, and on those claiming under them, and such an agreement is not within the statute of frauds.

3. EJECTMENT—EVIDENCE—PLEADING—GENERAL DENIAL.

Such an agreement may be put in evidence in an action of ejectment, as a defense under the general denial. It need not be specially pleaded.

4. BOUNDARIES—AGREEMENT SETTLING—EVIDENCE OF.

An agreement fixing a boundary line need not be shown by direct evidence. The agreement may be inferred from the acts, conduct, and especially from the long acquiescence, of the parties.

5. ESTOPPEL—IN PARI—OPERATION.

An estoppel *in pari* operates upon existing rights only. But where plaintiff had been in possession of the land seven or eight years, under an agreement for it with his father, and while in possession agreed with an adjoining owner as to the boundary line, *held*, that he had sufficient interest to estop him from afterwards repudiating the agreement when he became the owner of the land.

6. BOUNDARIES—GOVERNMENT MONUMENTS.

So long as the monuments erected by the government surveyors can be identified, or the places where they were planted can be known, they must govern in making boundaries. Subsequent surveys may aid in finding such monuments, but the latter must prevail in determining courses and distances.

Appeal from circuit court, Boone county.

W. Gordon, for plaintiff and appellant. *C. B. Sebastian*, for defendants and respondents.

BLACK, J. This was an action of ejectment for 6.18 acres of land. The contest arose from a dispute as to the dividing line between the S. E. and the S. W. quarters of section 31, township 49, range 11, in Boone county. Plaintiff acquired the S. E. $\frac{1}{4}$ by a deed from his father dated in 1876. He testified that he had lived on the land since 1863; that his father then gave it to him; and that the deed was made in pursuance to that agreement. A Mr. Dinwiddie owned the other quarter, and in 1877 sold the same to William Moseley, who died in 1882, and the defendants are his widow and heirs.

The plaintiff, in 1867, while in the possession of his farm under the agreement with his father, built a rail fence along what he assumed to be the line. Subsequently Dinwiddie planted a hedge in lieu of the north half of the fence, and that and the south half of the rail fence continued to define the possession of the respective parties down to the commencement of this suit.

Dinwiddie testified as follows: "In 1871 I saw W. H. Jacobs, and told him I wanted to set out a hedge, and he said, 'all right;' that I could move my fence over so as to set the hedge on the line, and have room to cultivate it. I moved my fence, and put out the hedge about one foot west of the line on my land. There is a large rock on the corner of my land. It was there when I first knew the land, and is still there. It was always known as the corner stone. There was another corner stone at the south end of the fence near Mr. Moseley's gate-post. The fence was run on the line between these two corner stones, and, when I planted my hedge, to be sure that I put it on my line, I put it about a foot west of the corner stones. I grew my hedge into a fence. Mr. Jacobs saw me cultivating and growing, and never made any objections, or told me it was not on the line."

The plaintiff testified that in 1880 he and William Moseley, the deceased, had the line surveyed by Mr. Wright; that this survey placed the hedge and rail fence on him; that the corners placed by Wright were removed by some one, and he had the line resurveyed by Wright and three other persons, all county surveyors of different counties. These surveyors all concur in saying that by their survey defendants are in possession of 6.18 acres belonging to plaintiff's quarter sections.

Jacob H. Moseley, a son of the deceased, says that before the Wright survey, and in 1878, Mr. Quinn surveyed the same lands for him and a neighbor on the south of the land in question; that Quinn fixed the south corner here in

question one foot west of a rock, which had stood as a corner mark as far back as he could remember, and that this corner, fixed by Quinn, was in a line of the continuation of the hedge, that this threw the rail fence about five feet on the plaintiff. Surveys made by Shields as far back as 1836, were put in evidence. They showed that he identified these rocks spoken of by Dinwiddie and Moseley, as half section government monuments.

The case was tried by the court without a jury, and was made to turn upon two instructions. That for the plaintiff is, in substance, if Dinwiddie and plaintiff agreed upon a line in 1871 as the true line, and the former was induced to plant his hedge near such agreed line, still, if plaintiff had no title to the land occupied by him, he is not estopped from claiming the land in dispute. The other declaration of law given for defendants is that if, prior to 1879, a boundary line was established by the mutual agreement between the plaintiff and persons under whom the defendants claim, and that the parties to the agreement, or those claiming under them, respectively, held possession up to the agreed line, then plaintiff cannot dispute its correctness.

It is the well-settled law in this state that, where two adjoining proprietors are divided by a fence which they suppose to be the true line, each claiming only to the true line, they are not bound by the supposed line, but must conform to the true line when ascertained. *Tamm v. Kellogg*, 49 Mo. 118; *Thomas v. Babb*, 45 Mo. 384. Where there is a dispute as to the true division line between adjoining proprietors, or the line is uncertain, and they are both ignorant as to the true location, and they fix and agree upon a permanent boundary line, and take possession accordingly, the agreement is binding on them, and those claiming under them. Such an agreement is not within the statute of frauds. *Taylor v. Zepp*, 14 Mo. 482; *Blair v. Smith*, 16 Mo. 273; *Turner v. Baker*, 64 Mo. 218; *Acton v. Dooley*, 74 Mo. 63; Browne, Frauds, § 75. We entertain no doubt but such an agreement may be put in evidence in an action of ejectment, as a defense under the general denial. It need not be specially pleaded.

By referring to the defendants' declarations of law, it will be seen that it predicates a defense upon an agreement made prior to 1879. This excludes any considerations of the Quinn and Wright survey, as alleged agreements connected with them, for they were both made subsequent to that date. The agreement then relied upon by the defendants must be one between plaintiff and Dinwiddie, and there is no evidence of any agreement between them, lest it arose at the time the hedge was planted, in 1871. The evidence of Dinwiddie, which is relied upon as proof of the agreement, shows that he planted the hedge with reference to what he supposed to be the government monuments,—the true line,—and not with reference to any adjusted line. There was then no question made as to the location of the true line. An agreement fixing a boundary line need not be shown by direct evidence. The agreement may be inferred from the acts, conduct, and especially from the long acquiescence, of the parties. But here the evidence all tends to show that no agreement was made between the plaintiff and Dinwiddie with respect to the location of any line between them. There is no evidence to take the case out of the general rule before stated, and none to bring it within the doctrine of agreed boundary lines. The defendants' instructions should have been refused.

It may be here stated that the instruction given at the instance of the plaintiff is also bad. It asserts the proposition that plaintiff would not be bound by an agreement, had one been made and acted upon, because he was not the owner of the land. It may be conceded that an estoppel *in pais* only operates upon existing rights; but plaintiff had been in the possession of the land for seven or eight years under an agreement for it with his father, and that was a sufficient interest to make such an agreement binding on him. Cases like that of *Donaldson v. Hibner*, 55 Mo. 492, are unlike this one. There a

party sought to be estopped, by his acts at an execution sale, had no interest in the property, possessory or otherwise.

As this case must go back for retrial, we may add that there is abundant evidence that the stone on the north end of the hedge, and the one near the south end of the rail fence, spoken of by Dinwiddle and Jacob H. Moseley, are the monuments fixed as the half section corners by the government surveyor. If this be true, then these monuments must control, no matter what more recent surveys by courses and distances may disclose. So long as the monument placed upon the earth's surface by the government surveyors can be identified, or the places where they were planted are known, there are no lost corners. Modern surveys may aid in finding the monuments, but, if they can be ascertained, the discrepancies as to distances must yield to the monuments. *Knight v. Elliott*, 57 Mo. 325. Though the instructions were erroneous, we might well affirm the judgment, because for the right party, but for the fact that the rail fence appears to be some five feet east of the south corner-stone, and therefore not on the line, but on the plaintiff's land. The judgment is therefore reversed, and the cause remanded.

(All concur.)

SABINE & E. T. RY. CO. v. HADNOT.

(*Supreme Court of Texas. March 15, 1887.*)

1. SURFACE WATER—OBSTRUCTION OF DRAINAGE—PETITION.

In an action against a railroad company under Rev. St. Tex. art. 4171, to recover damages for overflowing lands, a petition need not allege negligence or want of skill in the construction of its railway in those very words. It is sufficient if it avers that the effect of the construction of the road was that its grade obstructed the drainage of the surface water over certain sections of land, (including plaintiff's,) so as to cause it to stand from one to six weeks longer than it would have otherwise done under similar circumstances.¹

2. SAME—ALLEGATIONS OF DAMAGE.

Where, in the petition in such a case, the value of the crops at the time of their destruction is averred in detail, it is sufficient in that regard, on general demurrer, although some of the allegations of damage should properly have been stricken out.

3. SAME—RAILROADS—CONSTRUCTION OF CULVERTS.

In an action against a railroad company to recover for injuries to crops caused by the construction of insufficient culverts, whereby the natural drainage of a flood was impeded, *held*, that the company was not liable if the overflow was of such extraordinary character that ordinary prudence would not have provided against it in the construction of the culverts, but that if the flood, though extraordinary, might reasonably have been anticipated, the company was liable.

4. APPEAL—DAMAGES—ASSIGNMENT OF ERROR.

In the absence of a distinct assignment of error on appeal, the question whether a remitter of damages by appellee could properly have been made, will not be reviewed on appeal.

Appeal from district court, Jefferson county.

O'Brien & John, for appellant. *Tom J. Russell*, for appellee.

GAINES, J. The first assignment of error, to the effect that the court erred in overruling defendant's general demurrer to plaintiff's petition, is not well taken. It was not necessary that the petition should allege negligence or want of skill on part of the defendant company in the construction of its railway in these very words. It is averred that the effect of the construction of defendant's road was that its grade obstructed the drainage of the surface water over certain sections of land, subject to overflow, (including plaintiff's,) so as to cause it to stand from one to six weeks longer than it would have otherwise done under similar circumstances. If this was a fact, then the

¹ See *Sowers v. Lowe*, (Pa.) 9 Atl. Rep. 44, and note.

defendant company did not comply with the statute, which provides that "in no case shall any railroad company construct a road-bed without first constructing the necessary culverts or sluices, as the natural lay of the land requires, for the necessary drainage thereof." Rev. St. art. 4171. Therefore the necessary deduction from the averments of the petition is that the company did not exercise the proper degree of care and skill in the construction of its road-bed. Some of the allegations of damages contained in the petition should have been stricken out, if a special demurrer had been interposed. But the value of the crops at the time of their alleged destruction is averred in detail, and this is sufficient in that regard to save the pleading upon general demurrer.

The other assignments of error we need not consider in detail. They call in question the sufficiency of the evidence to sustain the verdict in the following particulars: It is claimed (1) that the evidence does not show that the losses of plaintiff were the proximate result of the railroad embankment; (2) that the evidence showed that the road-bed was carefully and skillfully constructed; and (3) that the overflow was of such an extraordinary character that defendant was not liable, although but for the embankment the damage would not have occurred.

But, in the first place, there was the evidence of more than one witness going to show that, before the railroad was built, the water on the west side had always run off in five or six days, but that on both of the occasions in question the water stood on that side of its track for four or five weeks, and on the same times went down on the east side of the track in a much shorter time. The floods of May and June, 1884, and of January and February, 1885, immediately caused the destruction of the crops for which the suit was brought. In the second place, we think the jury were warranted in finding from the testimony that the railroad embankment caused the water to remain over the land west of it a much longer time than it had ever remained before. This showed that the road was not built as the law required, and was in itself sufficient evidence of negligent and faulty construction. Under the testimony adduced as to the effect of the embankment upon the water, they were authorized to disregard the testimony of the engineer that they had constructed the road in a skillful manner. If they believe plaintiff's witnesses, they did not err in permitting the facts sworn to by them to prevail over the opinion of the engineers.

The question of defendant's exemption from liability, by reason of the extraordinary character of the overflow, we need not here discuss. A similar question was considered in the opinion in the case of the *Gulf, C. & S. F. Ry. Co. v. Pomeroy*, 8 S. W. Rep. 722, (this day delivered,) and we think the conclusion there reached decisive of the point now before us. The evidence in the case tended to show that a large scope of country near the town of Sabine Pass, adjoining which plaintiff's land was situated, was subject to overflow by water coming from the north and west. There was evidence going to show that similar floods had occurred not many years before the railroad was built, and the fact that the two overflows in question occurred in less than nine months of each other tends very strongly to the conclusion that they were not so extraordinary and unusual that they might not reasonably have been expected to occur. *Gulf, C. & S. F. Ry. Co. v. Holliday*, 65 Tex. 512.

There is a proposition in the brief of appellant setting up that the damages are excessive. This is nowhere specifically assigned as error. The damages found by the jury were clearly excessive, but the excess has been remitted. In the absence of a distinct assignment upon the point, we do not feel called upon to consider whether this is a case in which a remitter was proper in order to correct the vice of an excessive verdict.

There being no error in the judgment, it is affirmed.

VICTORIA Co. and others v. VICTORIA BRIDGE Co.

(Supreme Court of Texas. March 22, 1887.)

1. BRIDGES—BRIDGE COMPANY—CHARTER PRIVILEGES.

The Texas act of April 23, 1874, § 79, which provides that, whenever any persons shall file with the secretary of state articles of incorporation for the purpose of erecting and maintaining a *bridge* or ferry, it shall not be lawful for any other *toll bridge* or toll ferry to be established on the same stream within three miles above or below such bridge or ferry, does not apply to or prohibit the establishment of a *free* bridge within the limit named.

2. SAME—GRANT FROM COUNTY COURT—LICENSE—CONTRACT.

The incorporators, having established their bridge, subsequently applied for and obtained from the county court a grant of the right to use the site and approaches from the public road for a term of 10 years. *Held*, that this was a mere license, and not a contract between the county and bridge company, which would not prevent the county from afterwards establishing a free bridge at the same point, with the same right of approach from the public road.

Appeal from district court, Victoria county.

Stayton & Kleberg and *R. B. Peticolas*, for appellants. *Glass & Callender*, for appellee.

GAINES, J. This suit was instituted by the appellee to restrain appellants from opening for travel a free bridge on the Guadalupe river, near a toll bridge owned and controlled by the former. During the progress of the cause a temporary injunction was granted, which was made perpetual on final hearing.

In the year of 1875, certain persons being then the owners of the toll bridge above named, filed with the secretary of state articles of incorporation as a bridge company, for the purpose of keeping and maintaining a toll bridge at the point on the river above named, where their bridge was already situated, and thereby became a body corporate, invested with the rights, privileges, and franchises granted to bridge companies so incorporated by section 79 of the act of April 23, 1874. This section reads as follows: "Whenever any person or persons shall file with the secretary of state any article of association for the erection and maintenance of a bridge or ferry, it shall not be lawful for any other toll bridge or toll ferry to be established on the same stream, within the limits specified in said article: provided, that said limits shall not extend more than three miles above and three miles below said bridge or ferry; and provided, further, that this section shall not be so construed as to prohibit bridges and ferries at the crossing of any road on such stream, within such limits, declared either before or after the erection of such bridge or ferry to be a public road by the county court of the county in which such crossing is situated."

At the time appellee obtained its charter, the site of the bridge was within the jurisdiction of the town of Victoria. Subsequent to this, however, in March, 1879, an act of the legislature was passed which so reduced the limits of the town that, as appellee claims, the site of the bridge was left without the bound of its jurisdiction. Appellee's bridge being situated on a public road of the county, on the twenty-third day of May, 1884, it applied to the commissioners' court of Victoria county for a grant of the use of its site for the term of ten years; and the court on the same day made the following order: "And now come on to be heard the application of the Victoria Bridge Company, praying for a grant of the use of the present site of their iron bridge, with the approaches thereto, for the term of ten years from this date, for the purpose of maintaining their said bridge thereon, and with authority to take tolls as authorized by their charter, and under the regulation of this court, as provided by law, and said application being considered by the court, it is ordered that the same be granted to the extent of the jurisdiction of the court in the premises."

The first question presented is, did the law under which the bridge company was incorporated give it such an exclusive right to maintain a bridge at the place of its site, and within the limits of three miles above and below it on the river, as to take away the right of the county to establish a free bridge within the limits named. Free bridges are not expressly excluded by the language of the section, which has been quoted. But it is maintained, in support of the affirmative of the question, that the object of prohibiting the erection of bridges near that of the toll bridge of an incorporated company was to protect the company in the enjoyments of the profits of its enterprise; and that, if the legislature meant to protect them against another toll bridge which would merely divide and lessen its income, it must necessarily have intended to protect it against a free bridge, which would destroy its profits altogether. But, in our opinion, the argument is not sound. It must be borne in mind that the franchise proffered by the legislature to all persons who see proper to accept it is a voluntary grant, and that it was competent for the law-making power to annex such conditions to the grant as it saw fit. On the other hand, if the conditions were unreasonable, or the value of the franchise liable to be destroyed because the erection of free bridges was not prohibited, it operated to the injury of no one, for no one was bound to accept the grant. It may be argued that no prudent man would hazard the expenditure requisite to such an enterprise if he construed the law to mean that free bridges were not excluded. But it is to be remembered, that the legislature may have well considered that its first duty was to the public at large, and may therefore have considerably declined to grant any franchise that would take away the right of the people to the enjoyment of free transit across the streams of the country, when the income of their respective counties was sufficient to justify the expense of providing them. It is a general rule in construing charters that, if the intention of the legislature cannot be ascertained from the language construed in the light of surrounding circumstances, the doubt will always be resolved in favor of the state and the public. *Charles River Bridge v. Warren Bridge*, 11 Pet. 420; *Hudson v. Cuero, L. & E. Co.*, 47 Tex. 56; *Binghamton Bridge Case*, 3 Wall. 74.

But we think the language of the statute under consideration is plain, and resort to this rule is not necessary in order to interpret it. In saying that "it shall not be lawful for any other toll bridge or toll ferry to be established," it is clear that the legislature did not mean to prohibit free bridges and free ferries, because, if this had been the intention, it could have been very clearly expressed by the mere omission of the word "toll" before the words "bridge" and "ferry." The argument for the other construction amounts to this: that, because free bridges are much more detrimental to the interest of a toll bridge corporation than a toll bridge, we strike out a qualifying word in the statute so as to give it a meaning different from the plain import of its language as written. This violates the fundamental rules of the interpretation of statutes, and reverses the maxim that the mention of one thing is the exclusion of the other.

But it is also argued that the use of the words "bridges and ferries," without the qualifying word "toll" in the second proviso of the section, indicates that free bridges and ferries were meant to be excluded by the former clause in which the words "toll bridge" and "toll ferry" are used. But the meaning of the proviso is clear. It might have been sufficient to have said in the proviso that toll bridges, etc., might be erected at crossings on public roads, there being no exclusion as to free bridges; but in this case the qualifying words were not necessary, because no bridge was to be excluded at the crossings named. If the words "toll bridges" and "toll ferries" had been used in the proviso, then the argument would probably have been urged that, since only toll bridges, etc., were allowed at these crossings, free bridges were to be altogether excluded. The construction of the statute insisted upon on behalf

of appellee is not supported, therefore, by the language of this proviso. The whole argument ignores the fact that in making the law the legislature may reasonably be presumed to have had in view the interest of the public, and not that of the corporation. We think, therefore, that the company's charter did not prohibit the county of Victoria from erecting and maintaining a free bridge on the river within three miles of the toll bridge of appellee.

But it is also contended that the action of the commissioners' court of Victoria county in granting appellee the use of its site for 10 years is a contract, and that the establishment of a free bridge within a few yards of the toll bridge, with approaches to the same road, is an impairment of the obligation of that contract, and cannot be permitted. If appellee had had no bridge at the site named, and the commissioners' court had contracted with it for the erection and maintenance of a toll bridge at that point for a term of 10 years, it would have been a very serious question whether that court could have erected a free bridge sufficiently near the other to divert the travel from it. But such is not the case. Appellee already had a toll bridge which it had been operating under a charter granted by the state. The public road at that point had become subject to the control of the commissioners' court, and, in order to obtain the right to use the site, appellee made application to the court for the privilege, and it was granted. It seems this is a very different thing from a contract on the part of the court for the erection of a toll bridge. In the latter case, in consideration of the expense of erecting and maintaining bridges, the court grants the right to take tolls for a certain number of years. But, in the case before us, a company already having a bridge, and taking tolls, applies and obtains the privilege of permitting it to remain in the same place for a limited period of time. The one has the elements of a contract, but can the latter be deemed anything more than a mere license? Let us suppose that the company had proposed to the commissioners' court to enter into a contract under article 4432 of the Revised Statutes, proposing to construct a toll bridge, and to enter into bond as required by article 4433. The court might well have refused, upon the ground that they deemed it to the interest of the public that a free bridge should be erected at the same crossing, before the term proposed in the contract should expire. On the other hand, they might readily grant a license to use the site for a toll bridge already existing, for the reason that such license would not take away their right to erect a free bridge when they deemed it proper to do so. It would seem that the company did not consider that it was making a contract with the county authorized by article 4432 of the Revised Statutes, because it nowhere appears that it gave the bond required by the next succeeding article. Article 4433 provides that "the commissioners' court, before granting a license to any person to build a toll bridge, shall take bond," etc. In the absence of such bond, we must hold that, if the license actually granted be good for any purpose, it is lacking in the essential elements of such a contract as the court was authorized to make under the articles of the statutes just referred to; and that it did not deprive the county of the right to erect a free bridge for the convenience of the public, when it saw proper to exercise that power. If the county had the right to erect the bridge, the bridge company must be held to have acquired its privileges with a full knowledge of this right, and cannot claim that its property is being damaged for public use by the establishment of the free bridge. The determination of the questions we have passed upon is decisive of the case, as against the appellee. The court below should have dissolved the injunction and dismissed the bill, and because it did not do this the judgment will be reversed, and rendered for appellant.

CITY OF BRENHAM v. BRENHAM WATER CO.

(Supreme Court of Texas. March 25, 1887.)

1. MUNICIPAL CORPORATION—CONTRACTS—WATER COMPANY—EXCLUSIVE PRIVILEGE.

A city ordinance granted to a water company "the right and privilege, for the term of 25 years from the adoption of this ordinance, of supplying the city of B., and the inhabitants thereof, with water for domestic and other purposes, and for the extinguishment of fires." By the ordinance the city also agreed to pay the company a large sum per annum, during the term of 25 years, for the supply of hydrants. *Held*, this is a grant of an *exclusive* privilege to the water company for the period named.¹

2. SAME.

The charter of the city provided that it "shall be capable of contracting and being contracted with," and gave it power to provide the city with water for the convenience of the inhabitants, and the extinguishment of fires; while the law under which the water company was organized provided that it should have full power to furnish water to any city where it was located, for public or private buildings, or for other purposes, and to lay pipes through the streets with the consent of the city. A general law also authorized any city in which a water company was organized to contract with it for supplying the city with water. *Held* that, while these several laws, taken together, undoubtedly authorized the city to make some contract for supplying itself with water, yet they did not confer on the city *express* power to make a contract granting the water company the exclusive right to supply the city and inhabitants with water for the period of 25 years, at a fixed rate *per annum*; and, as no such power was necessary or essential to the proper exercise of the powers expressly granted, it could not be implied, and this contract must be considered as unauthorized by the legislature, and invalid.¹

3. SAME.

Power given to a municipal corporation to contract in relation to a given subject-matter does not carry, by implication, the power to contract, even with reference to that, so as to embarrass and interfere with its future control over the matter, as the public interests may require.

4. CONSTITUTIONAL LAW—MONOPOLY—GRANT OF—TEXAS CONSTITUTION.

A grant which gives to one or an association of persons an exclusive right to buy, sell, make, or use a given thing or commodity, or to pursue a given employment, creates a monopoly. The exclusive right need not continue indefinitely, so as to amount to a perpetuity. It is sufficient that it is an exclusive privilege for a period of time of the character forbidden. So, in this case, the ordinance granting the exclusive right to sell water to a community, for public and private uses, affects all the inhabitants in their common rights directly, and in their individual rights indirectly, and is in conflict with that clause of the Texas constitution which provides that perpetuities and monopolies are contrary to the genius of a free government, and shall never be allowed.¹

Appeal from district court, Washington county.

Tarver & Bryan and *J. T. Swearingen*, for appellant. *Garrett, Searcy & Bryan* and *Bassett, Muse & Muse*, for appellee.

STAYTON, J. On August 18, 1884, the city of Brenham passed an ordinance, which provided that an association of persons, then unincorporated, known as "Brenham Water Company," should have the right to establish,

¹The grant by a city council of the exclusive right of selling to the city all the water required by it for sewerage and fire purposes for the period of 20 years, at a minimum rate fixed in the contract, is a monopoly; and this, though the grant does not prevent other people from selling water to private citizens. *Davenport v. Kleinschmidt*, (Mont.) 13 Pac. Rep. 249. See, also, *Omaha Horse Ry. Co. v. Cable Tramway Co.*, 30 Fed. Rep. 324; *Saginaw G. L. Co. v. City of Saginaw*, 28 Fed. Rep. 529; *People v. Marx*, (N. Y.) 2 N. E. Rep. 84, and note; *City of Louisville v. Weible*, (Ky.) 1 S. W. Rep. 605.

A city council has no authority to grant to any person a monopoly, even where no express prohibition is found in the charter or other acts of the legislature. *Davenport v. Kleinschmidt*, (Mont.) 13 Pac. Rep. 249, and note.

construct, and operate a system of water-works in or adjacent to the city, and for this purpose to use all the streets, alleys, lanes, public grounds, and all places under the control of the city, so far as might be necessary for the proper conduct of the business, "and for supplying said city, and the inhabitants thereof, with fresh water for domestic, manufacturing, fire, and other purposes." The length of mains and pipes to be first established was fixed at not less than four miles, to be located as might be agreed between the company and the city, which were required to be extended as the city might order to be done. The seventh section of the ordinance determined the capacity the water-works were required to have, and the eighth section gave the city the right to use water for public purposes other than the extinguishment of fires, which the city was to receive in full payment for all municipal taxes during the full term for which the contract was to run. The ninth section reserved to the city the right to purchase the water-works after the expiration of 10 years, at such price as might be agreed upon by persons to be selected as therein provided, whose appraisement was to be binding upon both parties. Section 1 was: "That there is hereby given and granted to Brenham Water Company the right and privilege, for the term of twenty-five years from the date of the adoption of this ordinance, of supplying the city of Brenham, and the inhabitants thereof, with water for domestic or other uses, and for the extinguishment of fires." The fifth section is as follows: "The said city of Brenham hereby agrees to rent, and does rent, of the said Brenham Water Company, 35 double-nozzle fire hydrants, located, by authority of said city, upon the mains and pipes within said city, for the extinguishment of fires, at a rental of \$3,000 per annum, payable quarterly on the first day of January, April, July, and October in each year. The said rental shall commence when the city is notified that the said hydrants are ready for use, and shall continue during the full term specified in this ordinance; and for the purpose of providing for the payment of all hydrant rental becoming due, under the provisions of this contract, the city council shall levy, collect, and appropriate annually a sufficient sum of money to cover the amount becoming due on this contract." The sixth section provided that "the said Brenham Water Company shall make all extensions of mains and pipes whenever the said city council shall order the same to be made, and shall erect not less than at the rate of ten double-nozzle fire hydrants to the mile on such extensions, for which hydrants the said city of Brenham shall pay a rental of \$60 each per annum, payable as provided in section 5." The thirteenth section fixed the water rate which might be charged to inhabitants in most of the matters and business that could be enumerated, but as to some enumerated, and those not enumerated, the charge was left to be fixed by contract to be made with the superintendent, and all rates were made payable quarterly in advance at the office of the corporation. The fourteenth section provides that "this ordinance shall be a contract by and between the city of Brenham and the Brenham Water Company, their successors and assigns, and shall be binding on both parties thereto, provided said company shall file with the city clerk its acceptance of the same in writing within five days after the passage of the same." The water company's acceptance was filed as required by the ordinance.

Before the first of June, 1885, the persons composing the Brenham Water Company incorporated under the same name, under the general incorporation act, and on that day the city was notified that the works were ready for use; but it was found that the water supply was not sufficient; wherefore the water company asked the acceptance of the works by the city, agreeing to give an additional supply of water equal to that they were then able to furnish, and to increase it as the consumption demanded it; to keep on hand such fuel as would enable it at all times to speedily put the pumps in motion in case of fire; to keep and maintain a telephone; to pump the stand-pipes full every day, and to bank the fires under the boilers; to allow the fire de-

partment to fill the fire cisterns from any of the hydrants; and "to adopt and enforce strict rules and regulations for the faithful carrying out of the purposes for which it is intended, and to use every diligence to give the city of Brenham good and efficient fire service." The city, on the same day, accepted the water-works under the terms of the agreements then tendered; and, in its ordinance so accepting, it provided "that no payment shall be made on said contract if the said company does not comply with its agreement hereinbefore recited, but, on compliance therewith, the payments shall be made, commencing on the first day of June, 1885." The ordinances did not give to the city the power to regulate and control the water-works, and to make them effective in case the water company failed to do so.

This action was brought to recover the price stipulated for the use of hydrants for the time intervening June 1, 1885, and January 1, 1886. The ordinance was made a part of the petition.

The city filed defenses, thus summarized, in the brief of its counsel, correctly:

"(1) A general demurrer.

"(2) That it appeared from the petition that the contract sued upon created a monopoly and perpetuity in plaintiff.

"(3) By special exception that no authority to make said contract was therein alleged.

"(4) That it appeared from said petition that the city council had rented the hydrants for a period of twenty-five years, at the yearly rental of three thousand dollars, and no authority was alleged in the council to bind the city for such a period of time.

"(5) A general denial.

"(6 and 7) That said contract was inoperative, against public policy, and void, because—*First*, the city of Brenham, having less than ten thousand inhabitants, was prohibited by the constitution and laws of the state from levying for city purposes more than twenty-five cents on the one hundred dollars valuation, on the property subject to taxation, and at the date of said contract the current expenses of the city, including salaries of officers and other reasonable and necessary expenses, annually incurred, exceeded the revenue derived from said tax; that there was no excess in any fund which could be appropriated to the payment of the rent of said hydrant, and the council, having no means to pay said rent, and having exhausted the limit of taxation allowed by law, were not authorized to contract said debt; that at the date of the contract the entire available current revenue of the city, out of which the expenses incurred by said contract could be paid, amounted to the sum of \$8,763.31, an itemized statement of which is given, while the current expenses amounted to the sum of \$12,942.14, an itemized statement of which is given; that these expenses, exceeding all the available revenues of the city, rendered the contract inoperative, illegal, and void.

"(8 and 9) That the contract was an attempt on the part of the council to surrender their legislative discretion, and barter away the power conferred upon it by law, and was contrary to public policy.

"(10) That the contract, under the pretense of obtaining water for the city, was in truth and in fact a donation.

"(11) That the price stipulated was so extortionate, unreasonable, and oppressive as to render said ordinance void.

"(12) That said contract exempted the property of plaintiff from the payment of city taxes during the term of twenty-five years, and was in violation of law which prohibits the council from appropriating the school tax and other special taxes to any fund other than that for which it was levied, and was therefore illegal.

"(13) The defendant specially denied that plaintiff complied with its undertakings, in consideration of which the promises of the defendant were made,

particularly in reference to the quantity or supply of water to be obtained, and quality of the pipes and mains furnished by the company.

"(14) That for these reasons, among others, the council, on the tenth day of July, 1885, adopted "an ordinance rescinding the contract with the Brenham Water Company, made August 18, 1884, and the supplemental contract made June 1, 1885, and repealing certain sections of the said ordinance entitled 'An ordinance to provide a system of water-works for the city of Brenham,' etc. The sections of said ordinance so repealed were all sections which required the water company to furnish water to the city for any purpose, or authorized the payment of plaintiff therefor in the amount claimed in the suit; that the sections in the ordinance excepted in said repealing ordinance were the sections which gave the plaintiff the right and privilege of supplying water, and the provisions therein for the enjoyment and protection thereof; that this ordinance of July 10th is a bar to plaintiff's action.

"(15) That, at the date of the contract, there was no such corporate body in existence as the Brenham Water Company; that the pretended existence of such a contract at the date of said contract was false and fraudulent.

"(16) That the said company, through its agents, falsely represented to and assured the council, as an inducement to the contract, that the system of water-works would secure a general reduction in premiums paid for insurance, and that the amount saved in this way would be greater than the amount expended for water, and that, instead of such reduction, the rates had been increased.

"(17) That the supplementary contract of June 1st was made by the council while acting under a mistake of existing facts, and was obtained through the false representations of W. C. Conner, an agent of plaintiff; that the council was not afforded any opportunity of inspecting the mains and pipes then under ground, and inaccessible, and in the possession of plaintiff, and the defects were of such a character as to render it impossible to discover them by any means available to the council, and that Conner represented that they were sufficient in every respect for the purposes designated, and that the council was misled by the fraudulent defects in said mains and pipes; that, by reason of his false statements and misrepresentations, the alleged ordinance of acceptance was fraudulent."

The court sustained demurrers to so much of the answer as alleged that the contract created a debt in excess of the sum the city was authorized to raise by taxation, and to so much as set up the ordinance of July 10, 1885, rescinding the contract on which this action is based, and overruled the defendant's demurrers to plaintiff's pleadings. The evidence introduced under the thirteenth, sixteenth, and seventeenth paragraphs of the defendant's answer was conflicting. There was a verdict and judgment for the plaintiff.

The first assignment of error is that "the court erred in overruling defendant's demurrer alleging, as objections to plaintiff's original and supplemental petitions—*First*, that the contract sued upon created a monopoly and perpetuity; *second*, that no authority was shown in the city council making the contract to bind the city for a period of twenty-five years, and the attempt to do so was invalid, because the council could not to that extent surrender its legislative discretion and barter away the authority reposed in it by law; *third*, because the contract was an attempt upon the part of the council to limit the legislative authority of their successors, and embarrass them in the exercise of their exclusive discretion."

The city of Brenham was incorporated under a special law approved February 4, 1873, and the first section of its charter declares that it shall "be capable of contracting and being contracted with." Section 5 of article 24 of the charter gives the city power "to provide the city with water; to make, regulate, and establish wells, pumps, and cisterns, hydrants, and reservoirs, in the streets or elsewhere, within said city, or beyond the limits thereof, for the

extinguishment of fires, and the convenience of the inhabitants, and to prevent the unnecessary waste of water." These are the only parts of the charter which have any bearing on the questions raised by the assignments.

The law under which the Brenham Water Company was incorporated provides that "any gas or water corporation shall have full power to manufacture, and to sell and to furnish, such quantities of water or gas as may be required by the city, town, or village where located, for public or private buildings, or for other purposes; and such corporation shall have power to lay pipes, mains, and conductors for conducting gas or water through the streets, alleys, lanes, and squares in such city, town, or village, with the consent of the municipal authorities thereof, and under such regulations as they may prescribe." Rev. St. art. 629. "The municipal authorities of any city, town, or village, in which any gas-light or water corporation shall exist, are hereby authorized to contract with any such corporation for the lighting or supplying with water the streets, alleys, lots, squares, and public places in any such city, town, or village." Rev. St. art. 630. All these laws may be looked to in determining the power of the city to make the contract involved in this case, though, did it depend solely on the ordinance of August 18, 1884, and its acceptance, articles 629 and 630 of the Revised Statutes would not, in terms, be applicable.

Taking all the laws into consideration, we cannot doubt the power of the city to make some contract through which the city might be furnished with water. It becomes necessary, for the proper determination of this case, to ascertain the character of the contract on which the rights of the parties depend. The subject-matter of the contract is one over which the city had control solely under the power confided to it as a municipal government, to be exercised for the public good, and not under any private corporate right or proprietorship. The first section of the ordinance professes to give and to grant a right and a privilege to the water company to supply the city and its inhabitants with water for the period of 25 years. Was it intended to make this right and privilege exclusive for that period of time? This must be ascertained from the language of the ordinance, surroundings of the parties, and purpose sought to be accomplished. The ordinance, in terms, professes to give and to grant a right to do certain things, and therefore to receive certain benefits, for a quarter of a century; *i. e.*, to confer a claim to do certain things, and to receive a fixed compensation, which may be enforced for that period. It not only professes, in general terms, to confer such a right, but as if to emphasize it, and to fully illustrate the character of right intended to be granted, it terms it a "privilege." The word "privilege," as used in the ordinance, is evidently not used in the technical sense in which it is used in the civil law, or even under the common law, when used in the sense of "priority," but was intended to be given its ordinary signification,—meaning a right peculiar to the person on whom conferred, not to be exercised by another or others. This right is to supply the city and its inhabitants with water for their varied uses, for 25 years, at fixed prices in enumerated cases, and at such prices as the water company and inhabitants may agree upon in other cases. The word "supplying" must be considered in its connection, with a view to ascertain whether it was used in its primary sense, or in one more restricted; and, so considered, we can have no doubt that it was used in its primary sense, intending thereby to give the water company the right and privilege to furnish to the city and its inhabitants what water might be needed or necessary to be furnished through such a system. In the ordinance under consideration, it can mean no less than to furnish all the water the city and its inhabitants may need to have furnished under the power given to the city, through its charter, and this for the period of 25 years. It would do violence to the context to give to the word any other meaning.

If nothing more appeared than we have considered, to give character to the contract, and to illustrate the nature of the right intended to be secured

through it, it seems to us that there is no escape from the conclusion that the parties contracted, and intended to contract, that the right of the water company should be exclusive. The fifth and sixth sections of the ordinance, however, if there were doubt, it seems to us would remove it. The water company obligated itself to erect and maintain a given number of fire hydrants on the mains, which it absolutely agreed to put down, and for the use of these the city agreed to pay the sum of \$3,000 per year for the period named. It further obligated itself to extend its mains, if requested to do so by the city, and upon each mile of such extension to erect not less than 10 fire hydrants, for each one of which the city promised to pay a rental of \$60 per annum, as provided in the fifth section. Was the city, in this and in another part of the ordinance to which we have referred, agreeing to receive, and the company to furnish, the entire quantity of water to be used for fire and other enumerated public purposes during the 25 years? The contract, in terms, obligated the city to pay for this for the full period, whether it used the water or not, and thus made the only right valuable to the water company in so far exclusive.

If the city refused to take the water, and obtained it elsewhere, if the contract was valid, and the parties are to be supposed to have so considered it, then the city would but assume a double burden, which it cannot be conceived that the city ever contemplated. The language of the contract, the surroundings of the parties, and their evident purpose, forbid the belief that they either intended to make the right and privileges of the water company other than an exclusive right to furnish and be paid for all the water the city and its inhabitants might need to have furnished through a system of water-works for the full period of 25 years. Does the charter of the city of Brenham, or that of the water company, confer upon the city the power to make such a contract? Both charters may be considered together. The charter of the city doubtless gave it power to provide the city with water, and, under this, it may be held that it had the power to make a contract to receive and pay for water to be furnished by some other corporation or person. The charter of the water company expressly conferred upon it power to contract with the city to supply it with water for public purposes. Its charter, however, is under the general law, and the express power given to such corporations was evidently given to enable such of them as might be located in cities or towns having no such powers as had the city of Brenham to contract with them. The summary of powers which a municipal corporation has and may exercise, as given by Mr. Dillon, was recognized as correct in the case of *Willtams v. Davidson*, 43 Tex. 33. "*A municipal corporation possesses and can exercise the following powers, and no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the declared objects and purposes of the corporation,—not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of the power is resolved by the courts against the corporation, and the power is denied.*" Dill. Mun. Corp. 89.

No express power is conferred upon the city, through either or both of the charters, to make a contract through which the water company could become entitled to the use of the streets, and to have the exclusive right to furnish the city and its inhabitants with water at a fixed rate for 25 years; and we do not see that power to make such a contract was necessary or essential to the proper exercise of the power expressly given. Under charters containing grants of power less full and express than are contained in the charter of the city of Brenham, it has been held that power existed to erect and operate water-works under the control and ownership of the municipality when it deemed it necessary to the public good. The legislature had given power to the city of Brenham to erect, control, and regulate water-works, and this it may exercise, if it has or may have the pecuniary ability, unless constrained by the

contract under consideration. The legislature has also given power to every city within which one or more private corporations may have water-works to contract with one or all of them, and the further power to permit the use of its streets and other public grounds for the purposes of such works contemplated by the statute, by as many water companies as may desire to do so. Rev. St. arts. 629, 630, §138.

It is now universally conceded that "powers are conferred on municipal corporations for public purposes; and, as their powers cannot be delegated, so they cannot be bargained or bartered away. Such corporations may make authorized contracts, but they have no power, as a party, to make contracts or pass by-laws which shall cede away, control, or embarrass their legislative or governmental powers, or which shall disable them from performing their public duties." Dill. Mun. Corp. 97. Whether and how a municipal government will exercise a discretionary power conferred upon it must necessarily depend upon the determination of that question by it, in the exercise of whatever legislative power has been conferred upon it. To secure the means to carry out such legislative determination, the making of one or many contracts may become necessary. The validity of every contract a municipal corporation may assume to make must, at last, depend upon the validity of the law or municipal ordinance under which it is made. If the legislature had expressly authorized the making of the contract under consideration, it would doubtless be binding, unless there be some constitutional objection to such a law,—a matter which will be considered hereafter,—and the ordinance could not be held to operate, considered with its acceptance as a contract, as a surrender of any power the legislature intended the city government to exercise at all times. The question would then have been determined by a power superior to that of the municipality,—a power from which it derives all the power it has, and even its existence as a corporation.

The city having been given such power as we have stated, it must be understood that it was intended, not only that it might use it, but that it should use it, if deemed necessary, for the public welfare, so long as the power is possessed by it, *i. e.*, until taken away by the legislature. Will not the contract under consideration, if valid, have the effect, not only to embarrass the city government in the exercise of the power conferred upon it, but to withdraw from it the right to provide, in any other authorized way, water for public purposes and the use of its inhabitants, which was the sole purpose for which the power to erect, maintain, and regulate water-works was given to it? It seems so to us; for, as we have before said, the contract, in effect, assumes to give an exclusive right,—assumes to surrender to a private corporation, for the period of 25 years, the power which the legislature conferred on the municipal government. The power given to a municipal corporation to contract in relation to a given subject-matter does not carry the implication that it may contract, even with reference to that, so as to render it unable in the future so to control any municipal matter, over which it is given power to legislate, as may be deemed best. If the contract relied on is valid, neither the repeal of the charter of the city, nor any other act of the legislature, can abrogate it. If it is invalid, the city council had the right to declare it null, and to refuse to comply with it.

In the case of *Gas-Light Co. v. Middletown*, 59 N. Y. 231, the town authorities were empowered to cause the streets to be lighted with gas; and were required, when they deemed it necessary to do so, to contract with the gas company to furnish and lay down gas-pipes, erect lamp-posts, and other necessary things, and to furnish gas. Under these facts the authorities contracted with the gas company to furnish gas and light certain streets for the term of five years. Subsequently the law which conferred authority on the town to make the contract was repealed, and an action was brought to recover for gas furnished after the repeal, and it was held that the contract was in-

valid on the ground that such a contract could not deprive the legislature of its power to repeal a law affecting a municipal corporation. It was said: "If the board of town auditors could deprive the legislature of this power for five years, by entering into a contract with plaintiff for that time, it might for 100 years, by contracting for that period. I think it entirely clear that no such power was conferred by the act on the town auditors."

A contract made with a municipal corporation is no more beyond its control, if its effect be to withdraw from or embarrass the municipality in the exercise of any legislative power conferred upon it, than is such a contract beyond the reach of the legislature that created the municipal corporation. It is solely the want of power to make the contract which authorizes either body to disregard it.

In the case of *State v. Gas-Light Co.*, 18 Ohio St. 291, it appeared that the gas company had a charter which empowered it, within the city of Cincinnati, to do all the acts which gas companies, incorporated under the general laws of this state, are authorized to do, including the right to sell gas to the city and its inhabitants. The city of Cincinnati was also authorized, by its charter, to contract with gas companies for lighting its streets, and to levy taxes to meet the expenses. So standing the charters, with the consent of the city, the gas company acquired all the rights which the city had contracted to permit an individual to enjoy. That contract embraced substantially the same rights and privileges as the contract before us professes to give to the plaintiff, and these were to be enjoyed for 25 years. The contract was held to be invalid. Waiving a consideration whether the legislature of the state might have granted such rights and privileges, the court said: "Assuming that such a power may be exercised directly, we are not disposed to doubt that it may also be exercised indirectly, through the agency of a municipal corporation, clearly invested, for police purposes, with the necessary authority. But we have referred to these authorities as our justification for saying that when a franchise so far in restraint of trade, and so pregnant with public mischief and private hardship, is drawn in question, and it is claimed to be derived through a municipal ordinance or contract, the power of the municipal authorities to pass the ordinance or enter into the contract must be free from doubt. It must be found on the statute book in express terms, or arise from the terms of the statute by implication so direct and necessary as to render it equally clear."

In the case of *Garrison v. City of Chicago*, 7 Biss. 486, it appeared that a gas company, having corporate powers as broad as any the plaintiff can claim under its charter, contracted with the city of Chicago to supply it with gas for the period of 10 years. The power of the city to buy gas, under its charter, was as full as is the power of the city of Brenham to contract for a water supply, and it was held that the city had no power to contract for so long a time. In disposing of the case it was said: "The officers of the city—the members of the council—are trustees of the public. There can be no doubt that the right to regulate the lighting of the streets, and to furnish means for the same by taxation, is in its nature legislative power. It concerns the whole public of the city. The effect of the contract in question by the city authorities in October, 1869, if valid, was to bind their successors for 10 years as to these matters of legislation. If it be conceded that the power existed, as claimed, then it practically follows that, at the end of the term, in 1879, a contract may be made by their successors without limit, and which may bind the public indefinitely. I am unwilling to sanction a principle which, in a case like this, would lead to such results. The safer rule is to hold the officers of a municipality to a rigid accountability in the discharge of their trust. In all cases of contract to run for years, the authority to make them should be clear; because they involve pecuniary liability, and it is a tax upon future property owners of the city."

The principles asserted in the case of *Canal Co. v. St. Louis*, 2 Dill. 84, lead to the same result.

In some of these cases there seems to have been no power given to the municipal corporations to do, through works to be created and controlled by themselves, the things for which they contracted with others. If so, the more potent is their illustration of the principle involved. The city of Brenham was not in that situation.

In the case of *City of Indianapolis v. Gas-Light Co.*, 66 Ind. 400, it appeared that the gas company, by its charter, was empowered to manufacture gas to be used for the express purpose of lighting the city of Indianapolis. One section of its charter declared that "said company shall have the privilege of supplying the city of Indianapolis and its inhabitants with gas, for the purpose of affording light, for the term of twenty years." Another, "that nothing in this act shall be so construed as to grant to said Gas-Light & Coke Company the exclusive privilege of furnishing said city with gas, for the purposes within named." It was further provided that "the said city of Indianapolis, in its corporate capacity, shall have power to contract with said company to furnish gas for the purpose of lighting the streets, engine-houses, market-houses, or any public places or buildings." The gas company contracted to furnish the city with gas for the period of five years from a given date, and the city refused to pay for some received during the time embraced in the contract, and to recover the price of that the action was brought. It was held that the city was liable for gas furnished after it had elected to treat the contract as a nullity, and had given notice that it would not pay for gas furnished, and for lighting, cleaning, and repairing lamps on and after a day named. The provision in the charter that the act should not be construed to give an exclusive privilege to the gas company was evidently not intended as a legislative declaration that the city might not by contract grant an exclusive privilege, but simply to avoid a misconstruction of the charter itself, and to leave the city free to make such contracts as it deemed proper, within the powers granted. The privilege given to supply the city and its inhabitants with gas for the period of 20 years, coupled with an express power to the city to contract, might well evidence an intention on the part of the legislature to permit it to contract for a longer period than was embraced in the contract made. If the legislature so willed, and there was no constitutional objection to such legislation, such a contract would be valid. From the report of the case, it is doubtful, however, whether the legislation to which we have referred controlled the decision. The gas company was chartered in 1851; the contract sued on was made July 22, 1876; and at some time after the incorporation of the gas company, whether before or after the contract was made not appearing from the opinion, the city was incorporated under a general law, one section of which gave the city power "to construct and establish gas-works, or to regulate the establishment thereof by individuals or companies, or to regulate the lighting of streets, public grounds and buildings, and to provide, by ordinance, what part, if any, of the expenses of lighting any street or alley shall be paid by the owners of lots fronting thereon." The inference from the opinion is that the power of the city to make the contract was based on the power given to regulate the lighting of the streets. If so, then the decision does hold that the city had power to make the contract, extending over several years, under a grant of power of the most general kind.

This case was cited as an authority to sustain a contract for a supply of water for a city embracing a period of 20 years. *City of Valparaiso v. Gardner*, 7 Amer. & Eng. Corp. Cas. 629. The city of East St. Louis was given power to contract and be contracted with; to provide for lighting the streets and erection of lamp-posts; and to make such ordinances as might be necessary to carry into effect those and other powers granted. The East St. Louis Gas Company was given power by its charter to contract and be contracted

with; power to manufacture and sell gas for the purpose of lighting the town of East St. Louis and territory contiguous, the town and city of that name being the same. The gas company was also given the exclusive privilege of supplying the town and contiguous territory with gas for 80 years, charges not to exceed rates of another company, and 10 per cent. added. The city contracted for gas for the period of 80 years, and, after it had received gas for some time under the contract, it declined to receive more, holding the contract invalid for want of power to make it; whereupon an action was brought to recover the sum due under the contract for the period the city had received and not paid for gas furnished. Under this state of facts, the supreme court of Illinois held that the city was liable for gas furnished before it disaffirmed the contract. The ground on which the contract was claimed to be invalid was the want of power to make a contract to bind the city for so long a period. The court did not pass on the validity of the contract, nor is there any intimation in the opinion of either of the judges that the court would have declared the contract binding on the city; while in an elaborate opinion by one of the judges it was held that the contract was void, and that it was beyond the power of the legislature to authorize it.

In *Water-Works Co. v. Atlantic City*, 6 Atl. Rep. 24, it was held that a contract made by a city having power, under its charter, to provide a supply of water for the city, by which it agreed to receive water from a water company so long as the company complied with its obligation, was valid. From the report of the case, we cannot ascertain fully what the charter powers of either corporation were; but, to the objection that the city had no power to bind itself for an indefinite period, the court replied that the contract provided a means by which the city could terminate it at any time.

These are the leading cases bearing on the question before us, and we are of the opinion that the better reason is with those that hold that a municipal corporation has no power, under such laws as operate on the contract before us, to make such a contract. Municipal officers hold but for short terms, those of the city of Brenham for but one year, and the very purpose for which short terms of office and frequent elections are required is to leave the control of municipal affairs as near as may be in the hands of the people; to make the municipal administration reflect, as near as may be, the will of the public. The reasons but emphasize the necessity for denying to a city council, or other governing body, the power, by contract or otherwise, to disable or hinder from time to time the full and free exercise of any power, legislative in its character, which the legislature has deemed proper to confer upon such corporations. Cases will arise in which it becomes necessary to make investments for permanent improvements, and as to such things the acts of the governing body then acting must necessarily be given effect. The improvement in such cases becomes the property of the city, and its power over it continues, through which it may use, change, or so deal with it as may be deemed best.

We do not wish to be understood to hold that a municipal corporation has no power, in any event, to contract for such things as are consumed in their daily use, for a period longer than the official term of the officers who make the contract; but we do intend to be understood to hold that such corporations have no power to make contracts continuous in character, in reference to such things or any others, by which they will be, in effect, precluded from exercising from time to time any power, legislative in character, conferred upon them by law.

There is, however, another question involved in this case, which will be examined, reaching further than the one we have considered, and involving, not only the power of the municipal corporation to make the contract sued on, under the terms of the charters of both corporations, but involving the question of the power of the legislature, directly or indirectly, to confer upon the water company such rights and privileges as it claims under the contract

It is claimed that the contract creates a monopoly, and that this is in violation of the constitution, which declares that "perpetuities and monopolies are contrary to the genius of a free government, and shall never be allowed." If such is the effect of the contract, it is forbidden by the constitution, and no legislation can give validity to it. A grant which gives to one or an association of persons an exclusive right to buy, sell, make, or use a given thing or commodity, or to pursue a given employment, creates a monopoly. There are, however, certain classes of exclusive privileges which do not amount to monopolies, and a consideration of these, and the grounds on which they stand, is not now necessary.

The right to exercise the exclusive privilege need not extend to all places; it is enough that it is to operate in and to the hurt of one community. It need not continue indefinitely, so as to amount to a perpetuity; it is enough that it be an exclusive privilege, for a period of time, of the character forbidden. The more general is its application as to places and persons, and the longer it is to continue, the more hurtful it becomes. In the case before us, the contract, as we have seen, gives the exclusive right to sell to a community for public purposes for the period of 25 years, thus affecting all the inhabitants in their common right directly, and in their individual rights at least indirectly. This right to sell for public purposes carries with it, through the contract, the obligation to buy for public uses. It gives the exclusive right to sell to the inhabitants of the city for the same period, for all the private uses for which they may need water, in such ways, and to be so applied, as it can be only by a system of water-works; which is a denial, in effect, to the inhabitants of the right to buy for these private purposes from any other water company. Such an exclusive right prevents competition, and tends to high prices; all matters affecting which the contract before us surrenders the right further to regulate for a quarter of a century. It has been said, in cases to which we will hereafter refer, that there can be no monopoly in the use of a street to lay down gas or water mains or pipes, because it is not a matter of common right to use streets for such purpose. This may be admitted without affecting the question before us. When such use, however, is but a means to the exercise of an exclusive right to sell water, and to compel a city or its inhabitants to buy it, it will be found difficult to separate the means from the end intended to be accomplished. A system of water or gas works may be operated in a town or city as well by one individual as by a private corporation, if he have the ability. No corporate franchise is necessary to that purpose. It is an occupation in which any person may engage if he has the means, which may, and ordinarily will, involve the right to use streets and other public grounds.

Thus, means to accomplish the purpose can ordinarily be acquired only through provision given directly or indirectly by the state, but cases may arise in which no such consent would be necessary. Such a franchise, when granted, is one of the fullest character, and, from its nature, subject at all times to control.

Some conflict of authority exists as to whether such contracts as that under consideration create monopolies. The question has arisen in several cases in which gas and water companies asserted exclusive right to use streets for laying down mains and pipes, under charters granted, which, in terms, gave exclusive right. The question has most frequently arisen in cases between rival companies seeking to use streets, and in which no further right was directly involved.

In *Norwich Gas-Light Co. v. Norwich City Gas Co.*, 25 Conn. 19, it appeared that a gas company, holding a charter which in terms gave it the exclusive right to use streets for the purpose of laying down pipes, renting gas-posts, burners, and other things necessary to lighting the streets, alleys, lanes, public grounds, and other places, sought to restrain a rival gas company from using the streets for a like purpose; and it was held that the char-

ter created a monopoly which the court would not sustain, even in the absence of a constitutional provision forbidding monopolies. Such a claim asserted by a gas company holding under a contract with a municipal corporation, which assumed to give the company the exclusive right to use the streets for the purposes of its business, in another case was held to be a monopoly, and on that ground the claim held to be invalid. *State v. Cincinnati Gas-Light Co.*, 18 Ohio St. 298.

The case of *City of Memphis v. Memphis Water Co.*, 5 Heisk. 525, was very similar in its facts to the Connecticut case above noticed, and it was held that the exclusive right to use the streets of the city, given to the water company by its charter, did not create a monopoly. As this case fairly presents the theory on which such exclusive grants to use streets for gas and water purposes are maintained, we will quote a part of the opinion. The court said: "The question, then, is narrowed down to the inquiry, did the individuals composing the Memphis Water Company have the right, before their incorporation, in common with all others, to erect water-works in Memphis, to take up pavements, occupy the streets, and do such things as were necessary and proper in completing their water-works? It is clear that none had the right to do those things except the city of Memphis, by virtue of its corporate powers, and this right on the part of the city was exclusive until it was taken away by the legislature, and transferred to the Memphis Water Company. It is no more a monopoly, when conferred on the water company, than when it belonged to the city of Memphis. It was an exclusive privilege when exercised by the city. It is an exclusive privilege in the Memphis Water Company, but not a monopoly."

In *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650, 6 Sup. Ct. Rep. 252, it appeared that the plaintiff had a charter which gave it the exclusive right, for the period of 50 years, of making and supplying gas-light to the city of New Orleans by means of pipes or conduits laid in the streets, to such persons as might voluntarily choose to contract for it. The defendant was subsequently chartered under a general law authorizing the formation of corporations for certain purposes, among which was the construction and maintenance of works for supplying cities or towns with gas, and it had obtained provision from the common council of New Orleans to use its streets and other public ways and places to lay mains, pipes, and conduits. This it was proceeding to do when a suit was brought to restrain it, and it was held that the exclusive grant, in connection with the facts shown, constituted a contract which state legislation could not impair. In disposing of the case, it was said: "Legislation of that character is not liable to the objection that it is a mere monopoly, preventing citizens from engaging in an ordinary pursuit or business, open as of common right to all, upon terms of equality; for the right to dig up the streets and other public places of New Orleans, and place their pipes and mains for the distribution of gas for public and private use, is a franchise, the privilege of exercising which could only be granted by the state, or by the municipal government of that city, acting under legislative authority. * * *

To the same effect is the decision of the supreme court of Louisiana in *Crescent City Gas-Light Co. v. New Orleans Gas-Light Co.*, 27 La. Ann. 138, 147, in which it was said: "The right to operate gas-works, and to illuminate a city, is not an ancient or usual occupation of citizens generally. No one has the right to dig up the streets, and lay down gas-pipes, and carry on the business of lighting the streets and the houses of the city of New Orleans, without special authority from the sovereign. It is a franchise belonging to the state, and in the exercise of the police power, the state could carry on the business itself, or select one of several agents to do so."

Subsequently to the granting of the charter through which the plaintiff claimed, the constitution of the state of Louisiana was so changed, while

preserving rights, claims, and contracts then existing, as to provide that "the monopoly features in the charter of any corporation now existing in this state, save such as may be contained in the charter of railroad companies, are fully abrogated," and it was claimed that this could operate to divest the plaintiff's privilege. As to this the court, however, said: "The monopoly clause only evidences a purpose to reserve the policy, previously pursued, of granting to private corporations franchises accompanied by exclusive privileges as a means of accomplishing public objects. That change of policy, although manifested by constitutional enactments, cannot affect contracts which, when entered into, were within the power of the state to make." The inference from the language used is that, had the constitutional provision in regard to monopoly features in charters been in force when the plaintiff's charter was granted, its exclusive privilege, franchise, or whatever it may be termed, would have been inoperative.

In *New Orleans Water-Works Co. v. Rivers*, 115 U. S. 674,¹ a suit was brought by the company to restrain Rivers from laying pipes, mains, and conduits from the Mississippi river to the St. Charles Hotel; and the claim was based on the fact that the plaintiff had a charter which gave it the exclusive right to supply the city of New Orleans and its inhabitants with water from the Mississippi river, or other stream, by mains or conduits, with such right to lay them in the streets, public places, and lands of the city, which had been granted in consideration that it would furnish water to the city free of charge. The claim of the plaintiff was sustained, and the charter held to be a contract that could not be impaired by the constitutional provision afterwards adopted, to which reference is made in the preceding case. The same inferences may, however, be drawn from the opinion, as to what would have been the effect of the provision of the constitution repealing "the monopoly features in the charter of any corporation," had it been operative at the time the plaintiff's charter was granted.

In the case of *State v. Milwaukee Gas Co.*, 29 Wis. 460, it was conceded that the grant of an exclusive right to lay pipes, for the purpose of conducting gas, in the streets, avenues, and other public places of a city, coupled with the exclusive right to manufacture and sell gas to its inhabitants for 15 years, created a monopoly.

In the *Slaughter-House Cases*, 16 Wall. 61, 65, 102, 121, 128, it was conceded that the exclusive privilege in question, in these cases, was a monopoly; but in these, as in the case last above cited, it was held that, in the absence of some constitutional provision forbidding monopolies, the grant of these exclusive privileges was not invalid. Under an exclusive grant of privileges, similar to those in question in the *Slaughter-House Cases*, it was held in the case of *City of Chicago v. Rumpff*, 45 Ill. 97, that a monopoly was created. The court said: "Such action is oppressive, and creates a monopoly that never could have been contemplated by the general assembly. It impairs the rights of all other persons, and cuts them off from a share in not only a legal, but a necessary, business."

In the case of *State v. Gas Co.*, 34 Ohio St. 581, it was held that such an exclusive right as the contract in this case gives, created a monopoly.

It will not do to say that an exclusive right in a municipal corporation to operate water or gas works stands upon the same ground as does such exclusive right held by a private corporation or an individual. In the one case the right is, in effect, exercised by the people who are to be affected by it, and not for profit, but for the welfare and convenience of the public and the inhabitants of the corporation. The correction of abuses in its management, whereby oppression may be avoided, is in the hands of the people; while, on the other hand, such works are operated for private gain, with every incentive to op-

pression, without power, in those to be affected, to relieve themselves from it. In the one case the exclusive right may create a monopoly, and in the other not.

The exclusive rights given by the contract before us lead to the same results as a monopoly in any other matter; and whether a monopoly or not is best ascertained by the results which are brought about by a contract or law, and the exercise of rights the one or the other may profess to confer, we are of the opinion that the exercise of the exclusive rights conferred on the water company produce the same results as would the exercise of an exclusive right which would fall within the most exacting definition of a monopoly, and that the allowance or creation of such exclusive rights is contrary to the spirit of the constitution of this state.

There are many other questions in this case which, in view of the controlling character of those already considered, need not be examined.

If the appellee furnished water between the time the works were put in operation, under the ordinance passed June 1, 1885, and the tenth July of that year, when the city declined further to regard the contract as binding, for that the city ought to be held liable; but this is the extent of the right of the appellee to recover for water furnished the city.

The judgment will be reversed, and the cause remanded.

GULF, C. & S. F. RY. CO. v. MORRIS and others.

(*Supreme Court of Texas. March 25, 1887.*)

1. RAILROAD COMPANIES—DISSOLUTION—SALE OF ROAD.

Some of the stockholders of the G., C. & S. F. Ry. Co. bought up all of the stock and bonds of the C. & M. R. Co., and destroyed them. They did not, however, buy the road itself, but, taking themselves to be owners of the road from the purchase of the stock and bonds, they sold it to the G., C. & S. F. Ry. Co. A creditor of the C. & M. R. Co. having obtained judgment against the road, *held*, that he had the right to levy execution on the road and franchise; the purchase and destruction of the stock and bonds, and subsequent sale to the G., C. & S. F. R. Co., not constituting a dissolution of the C. & M. R. Co., so as to relieve it, as a corporation, from all its debts and obligations.

2. SAME—POWER TO PURCHASE.

Corporations organized for public purposes cannot, by contract of sale, lease, or otherwise, render themselves incapable of performing their duties to the public, or in any way absolve themselves from the obligation which forms the main consideration for giving them a corporate existence, unless this be done by consent of the state, given through the charter, or in some other manner.

3. SAME.

Under the general incorporation law of Texas, one railroad company has no power to buy another railroad, nor does that law authorize a railroad company to sell its road to another company, or to another person.

4. SAME—CHARTER—AMENDMENT.

Under Rev. St. Tex. art. 4118, regulating the general right to amend railroad charters, and providing that any railroad corporation may, by amendment to its charter, project and provide for the locating, constructing, owning, maintaining, and operating of a branch line to its original main line, while the right to construct, operate, and maintain is conferred, it does not confer the right to buy another railroad.

Appeal from district court, Montgomery county.

Ballinger, Mott & Terry, for appellant. *Hutcheson & Carrington* and *J. H. & W. F. McComb*, for appellees.

STAYTON, J. On April 14, 1882, the charter of the appellant was amended under the general law, and by that it was provided, in addition to powers otherwise given, that it should have power "also to construct, own, operate, equip, and maintain a branch of said railway, to be called the 'Eastern Branch' thereof, commencing at a point on its main line in Burleson county,

about two miles north of the Yegua; thence easterly, through the counties of Burleson, Brazos, Grimes, and Montgomery, to a point on the International & Great Northern Railway, within three miles of the Lemuel Smith 1,280-acre survey in Montgomery county, with the right to purchase the Central & Montgomery Railroad, and to own, operate, equip, and maintain the same, under this charter, as a part of said Eastern Branch." The Central & Montgomery Railroad Company then owned and was operating a railroad from the town of Montgomery, in Montgomery county, to Navasota, in Grimes county, about 28 miles in length, and running near to and nearly parallel with the proposed eastern extension of the appellant's road, and making connection with the Houston & Texas Central Railway at Navasota. A number of the stockholders of the Gulf, Colorado & Santa Fe Railroad, through one of their number and in his name, purchased all the stock and outstanding bonds of the Central & Montgomery Railroad, and destroyed the latter, intending to sell that road to the appellant. The stockholders, however, never bought the Central & Montgomery road, except as they might have acquired an interest in that road by the purchase of the shares of stock and bonds it had issued. The matter thus standing, the stockholder in whose name all of the purchased stock stood, for the benefit of himself and those interested with him, made to the executive committee of the appellant the following proposition:

"GALVESTON, TEXAS, June 12, 1882.

"*H. Rosenberg, Esq., Chairman Executive Committee G., C. & S. Fe Ry. Co.*—DEAR SIR: On the fifteenth day of June, 1881, your board of directors authorized a subscription of fifteen hundred dollars in stock, and three millions of bonds of your company at par, for the purpose of the further extension of your road. The subscription was taken by the stockholders of record on the first day of June, 1881; thereby giving to them the right of all stock and bonds to be issued by your company until said subscription is canceled. Ascertaining that your company had determined to extend a branch road into eastern Texas for the purpose of reaching the timber country, and believing it to be advisable to prevent the completion of a competing line of road already in existence by purchasing the same, I was authorized by the subscribers to your stock and bonds to make the purchase of the Central & Montgomery road, extending from Navasota to Montgomery, a distance of about twenty-eight miles, and I now offer the same to your company, including all its equipments, free from all debt, stock, bonds, and otherwise, for the following consideration:

"204 bonds of your company at par,	-	-	-	\$204,000 00
With coupons attached to July 1st,	-	-	-	7,140 00
Stock of your company,	-	-	-	238,500 00
And cash,	-	-	-	29,455 22
				<hr/>
				\$479,095 22

"Asking your immediate action upon this proposition, I remain,

"Very truly,

GEO. SEALY,

"For the Subscribers to the 1,500,000 Stock, 3,000,000 Bonds."

And on the same day the proposition was accepted in writing by H. Rosenberg, on behalf of the executive committee, as follows:

"In accordance with the resolution by the board of directors, May 8, 1882, directing me to purchase the Central & Montgomery road at a cost not exceeding twelve thousand dollars in bonds and eight thousand dollars in stock of this company per mile, and this proposition being within that limit, we hereby accept the proposition of George Sealey, and recommend the board of directors to approve of our action.

"For the Executive Committee, H. ROSENBERG, Chairman."

This action was reported to the board of directors at a regular meeting held by them on the same day, and was approved and adopted by the board as its

act; and all this was approved by the stockholders at a regular annual meeting held by them on October 3, 1882. The Gulf, Colorado & Santa Fe Railway Company took possession of the Central & Montgomery Railroad on June 15, 1882, and from that time continuously ran, operated, repaired, and maintained it at its own expense, as a part of its line under its amended charter, and thereafter the Central & Montgomery Railroad Company ceased to exercise control over the road, or to keep up its corporate organization, but its president made a report to the comptroller, as required by law, showing the condition of the company to the date last mentioned. No further facts tending to show that the Gulf, Colorado & Santa Fe Railway Company acquired title to the Central & Montgomery Railroad are shown, or claimed to have existed, except that the price named in the proposition to sell, before mentioned, was fully paid.

Morris & Crawford subsequently obtained a judgment against the Central & Montgomery Railroad Company, in district court for Montgomery county, which was affirmed on writ of error at the present term. 3 S. W. Rep. 457. The cause of action on which that judgment was obtained, accrued, in part, prior to June 12, 1882, and all grew out of the failure of the Central & Montgomery Railroad properly to transport freight. An execution, the first and only one, issued on the judgment in favor of Morris & Crawford on March 27, 1884, directed to the sheriff of Grimes county, which was levied on the road-bed, iron track, ties, switches, and right of way of the Central & Montgomery Railroad.

This action was brought by the Gulf, Colorado & Santa Fe Railroad Company to enjoin the sale of the Central & Montgomery Railroad under the judgment, execution, and levy in favor of Morris & Crawford. A writ of injunction was issued, but on final hearing it was dissolved, and a judgment giving 10 per cent. damages for delay was rendered against the plaintiff company.

The injunction was sought, and is now claimed, on the theory that the facts we have stated passed title, at least equitable, in the Central & Montgomery Railroad to the Gulf, Colorado & Santa Fe Railway Company, and that it thereby became not liable to sale for the debt due Morris & Crawford. It is not claimed that the Gulf, Colorado & Santa Fe Railway Company purchased the stock of the Central & Montgomery Railroad, nor could it well be so insisted under the facts. It is denied that the transaction operated a consolidation of the two railroads, and that they thereby became one under the charter of the Gulf, Colorado & Santa Fe Railway Company. It is also denied that the one was in any way merged in the other, and in all these propositions we concur with counsel for the appellant.

It is claimed, however, that the Central & Montgomery Railroad corporation was dissolved by the facts stated, and that the property which it owned before dissolution became the property of the appellant company. It is well settled that corporations organized for public purposes cannot, by contract of sale, lease, or otherwise, render themselves incapable of performing their duties to the public, or in any way absolve themselves from the obligation which forms the main consideration for giving them a corporate existence, unless this be done by consent of the state, given through the charter, or in some other manner. Hence any contract through which such a corporation seeks to accomplish such a result is void, unless it has legislative sanction. *Thomas v. Railroad Co.*, 101 U. S. 71; *Pierce*, R. R. 10; *Taylor Corp.* 305, 131, 132; *Mor. Corp.* 485, 490. Authorities bearing on the various phases of this question are cited in notes given by the elementary writers here mentioned. The stockholders of a strictly private corporation, acting in the mode prescribed by law for the transaction of its business, may dispose of its assets, and thereby become unable to carry on further the corporate business; for the public has no interest in the continuance of such a business.

Do the facts show that the Gulf, Colorado & Santa Fe Railroad Company

has become the owner of the property of the Central & Montgomery Railroad Company, which it may operate under the charter of the latter, and hold freed from the debts of that company?

The first question arising on this inquiry is, had the Gulf, Colorado & Santa Fe Railway Company any power to buy the property of the Central & Montgomery? This will depend upon whether the charter of the former gave it power to buy, or the charter of the latter gave it power to sell to the former. Both corporations were chartered under the general law regulating the incorporation of such companies, in so far as any question involved is concerned. Whatever powers that law authorizes to be conferred upon them through their charters, those they had, and they had no more and no less; this, of course, carrying such incidental powers, not enumerated, as were necessary to enable them to exercise properly the powers expressly granted. No part of the general law authorizes one railroad company to buy the railroad of another, nor does it authorize a railroad company to sell its road to another company, or to any person. The law authorizes railroad companies to loan money to construct, complete, improve, or operate their roads, and to give mortgages therefor. Rev. St. art. 4219. These mortgages may be foreclosed through the courts, or sales may be made under powers contained in such mortgages, and title to the property will pass. They may become indebted in the course of their business, and their property, including franchise, subjected to sale under judicial process to pay such indebtedness. But in such cases the corporation continues, and the purchasers become in effect mere stockholders; the corporation property so purchased, however, being relieved from liability for debts not creating a prior incumbrance on the property sold. These are the means through which the laws of this state authorize the sale of railroads. They do not contemplate that one railway company shall have the power voluntarily to buy from or sell to another. The purpose for which the incorporation of railroad companies is permitted, under the general incorporation act, determines largely the powers they may exercise. That act provides that "any number of persons, not less than ten, being subscribers to the stock of any contemplated railroad, may be formed into a corporation for the purpose of constructing, owning, maintaining, and operating such railroad, by complying with the requirements of this chapter." Rev. St. 4099. They are authorized to incorporate *for one purpose*,—to construct, to own, to maintain, and to operate *such railroad*, i. e., to own, maintain, and operate the road the company may construct under its charter. Incorporation is not authorized for several and distinct purposes; as to construct a road for some other corporation, to maintain a railroad owned by some other corporation, to operate a railroad owned by some other corporation, nor to become the owner by purchase of a railroad constructed and owned by some other corporation.

This is the only legitimate construction that can be placed on the language used in the statute. If, however, there could be doubt as to this, the matter is made too clear by subsequent provisions of the law. The law requires articles of incorporation to be adopted, signed, and filed in the office of the secretary of state, and these are required to give information on specified subjects, and, among others, to state the identical thing the contemplated corporation purposes to do. They must state "the places from and to which it is intended to construct the proposed railroad, and the intermediate counties through which it is proposed to construct the same." Rev. St. art. 4101. "When the articles of incorporation have been filed and recorded as herein provided, the persons named as corporators therein shall thereupon become and be deemed a body corporate, and be authorized to proceed to carry into effect the objects set forth in such articles, in accordance with the provisions of this title." Rev. St. art. 4105. Thus is the power which such corporations may have, when incorporated under the general law, declared.

It may be urged, however, that, if the power of the one corporation to buy the road of the other was not given under the original charters of either corporation, yet that such a power was acquired through the amendment to the charter of the Gulf, Colorado & Santa Fe Railroad Company, which provided, in effect, that it should have the "right to purchase the Central & Montgomery Railroad, and to own, operate, equip, and maintain the same, under this charter, as a part of said Eastern Branch." The law providing for the amendment of railroad charters nowhere intimates that such a corporation may acquire rights or powers, through an amendment, which it could not have acquired under its original incorporation. One of the leading purposes intended to be subserved through an amendment to a railroad charter, under the general law, was to enable them to change or extend the line of road to be constructed, and not to enable them to acquire powers of a character different to those they might acquire through the original act of incorporation. This is illustrated by article 4113, Rev. St., which is the only part of the law regulating amendments other than such as put restrictions on the right to amend, that indicates the character of amendments that may be made. It provides that "any railroad corporation may, by amendment to its charter, *project and provide for the locating, constructing, owning, maintaining, and operating a branch line* to its original trunk line of railroad from any point on said original, main, or trunk line to any other point in this state, by a branch line to the main line, making an angle with said main line of at least twenty-five degrees in the general course of said branch line, and also so projected that said branch line shall in no case be so located as to be or become such a line of railroad as that, if the same were owned by another corporation, the corporation owning the main line, or any one of the other branches thereof, would be forbidden by the constitution and laws, from consolidating therewith on account of the lines being parallel or competing lines." The succeeding article provides how much of a line authorized to be built by an amendment shall be completed and put in running order within given periods.

No one can acquire a power or right under a law which the law itself does not provide he may have by a compliance with it. The articles for incorporation, under the general law, are required to be passed upon by the attorney general before they can be filed and incorporation be accomplished, but the law does not confide to the attorney general or to the incorporators the power to determine for what purposes incorporation may be had, or what powers the corporation may acquire by the act of incorporation. That is determined by the law which permits the incorporation. The rule that a corporation has power to do only such acts as its charter, considered in relation to the general law, authorizes it to do, applies to every class of corporations. The powers need not all be express, for such will be implied as are necessary to enable the corporation to carry out the powers expressed or necessary to accomplish the general purposes for which the corporation is created. Power to buy a railroad cannot be implied from an express grant of power to construct, own, maintain, and operate a railroad to be constructed by the corporation to which these express powers are given, for they are not reasonably necessary to the accomplishment of the purposes contemplated. The one corporation having no power to purchase the railroad of the other, it must be held that the appellant company acquired no title to the property levied on, and it therefore becomes unnecessary to consider any equities that may grow out of the transaction between the parties to it.

The Central & Montgomery Railroad Company is an existing corporation, so far as appears from the record before us, and such person or persons as may hold its stock have it within their power to complete a reorganization. As held at the present term, in the case of *Central & M. Ry. Co. v. Morris*, 3 S. W. Rep. 457, that company and its property are liable for any matter of indebtedness incurred, in the management of whomsoever the railroad may

have been. The issuance of an execution first to a county other than that in which the judgment was rendered was an irregularity, but of this no one not having an interest in the property levied upon can take advantage. The injunction was therefore properly dissolved.

The statute permits the assessment of 10 per cent. damages, on the dissolution of an injunction, when it appears that the injunction was obtained for *delay only*. We are of the opinion that the facts of this case, considering the nature of the questions involved, do not show that such was the purpose for which the injunction was obtained. The judgment will therefore be reversed, and so reformed as to dissolve the injunction without giving damages. It is so ordered.

WHITE and others v. JONES.

(*Supreme Court of Texas. April 15, 1887.*)

1. EXECUTORS AND ADMINISTRATORS—SALE OF REALTY—RECITALS IN DEED.

Though the recitals in an administrator's deed are not ordinarily sufficient to show an order for the sale of the land of the estate; yet in a case where the records of the probate court and the papers in the proceedings were destroyed, the administrator was dead, and 25 years had elapsed since the sale, it was presumed that the orders were made as the administrator's deed set forth, from the failure of the heirs to set up their claim against the deed for so long a time.

2. SAME—LAPSE OF TIME—PAYMENT.

The purchaser at the sale having given his note, which the administrator returned on his inventory, and which was afterwards paid, after the lapse of 25 years, the records being destroyed, it will be presumed that the court and its officers did their duty.

3. SAME—PREMATURE SALE.

It appeared that the sale for partition was made within one year from the time of the appointment of the administrator, and at that time Pasch. Dig. Tex. art 1348, provided that partition should not be made till after the first term after the expiration of 12 months from the original grant of letters of administration. *Held*, that this limitation was for the protection of creditors; and, if the order was prematurely made, none but creditors could complain, and that, though the sale might have been set aside for the irregularity within a proper time, after the lapse of 25 years the presumption *omnia recte acta* applies.

Appeal from district court, Hill county.

B. D. Tarlton, for appellants. *Wm. L. Booth*, for appellee.

GAINES, J. This suit was brought by appellants to recover of appellee certain lots in the town of Hillsborough. Both parties claim under one James Day, deceased; the appellants as his heirs, and appellee under a sale made by James Wornell as the administrator of his estate. The question is as to the validity of this sale. Day died about the year 1859. The heirship of appellants was proved, and defendant introduced in evidence a deed from Wornell, as administrator, purporting to convey to one G. R. Williams the lots in controversy as the property of the estate. The deed recited that Wornell was appointed administrator of Day's estate in April, 1859, and set out *in hæc verba* what purported to be an order of the county court of Hill county, which showed that a division of part of the estate had been had, and that it appeared that these lots and certain personal property were incapable of equitable division, and ordered the administrator to sell the same on the first Tuesday of the next August. The deed further recites that the administrator gave the proper notice by posting, etc., and sold the lots on the first Tuesday in September following, and that one G. R. Williams became the purchaser. The deed also sets out an order confirming the sale, and directs the administrator to make title to Williams upon a compliance with the terms of the sale. It also appeared that Williams gave his note for the purchase money of the lots, with two sureties and a mortgage upon the property to secure the note. No order of court was produced, but it was admitted "that papers in the estate of Day

had been burned, as also the docket and minutes of the probate court of Hill county, for the period preceding the October term, 1860." J. M. Wornell, the administrator, died in the spring of 1864. Wornell was removed from the administration in November, 1860, and one Graves was appointed administrator *de bonis non*. Appellee introduced evidence to show that the note was paid to appellant B. F. White, by direction of the administrator *de bonis non*, in 1866. White testified that the note was never paid to him, but the court found in favor of appellee upon the issue, and the finding is sustained by the evidence. The heirs of the estate were appellant B. F. White's wife, who was also the mother of the other appellants, and his wife's sister. A witness testified that White, at the time of this payment, had a transfer to himself of the sister's interest. This was not contradicted by White. The latter's wife died about the time of this last transaction, but the evidence does not make it certain whether before or after the payment.

It was held by this court, in the case of *Terrell v. Martin*, 64 Tex. 124, that the recitals in an administrator's deed are not sufficient to show an order for the sale of the land of the estate. Of the correctness of that ruling as applied to the facts of that case there can be no doubt. The record of the proceedings of a court, if they be in existence, are necessarily the best and the only competent evidence of its orders. No reason was shown in that case why a copy of the minutes of the court could not be had, and hence the court in that case was right in holding that the recitals in the deed were not sufficient. Here, however, the entire records, including both the file-papers and the minutes relating to this estate, covering the time at which the orders in question were claimed to have been made, were destroyed. At the time of the trial of this case in the court below, 25 years had elapsed since the sale of the lots was made. The administrator who made it was proved to be dead. Under such circumstances it may be that it should be presumed that the orders were made as the administrator's deed set them forth, without other evidence tending to support that conclusion, save the failure of the heirs to set up their claim for so long a time. But it was also shown that the administrator *de bonis non* returned the purchase-money note upon his inventory, and the court finds, upon sufficient evidence, that the note was paid. In *Baker v. Coe*, 20 Tex. 430, this court held that, although the records of the court failed to show that everything had been done which was required by law in making sales of the property of deceased persons, yet the sale having been proved, and nothing shown to impeach its fairness, it would be presumed that the court and its officers did their duty, and the validity of the sale would be sustained. The lapse of time in that case was about 25 years, as in this. For a stronger reason, the same presumption must be indulged in the case before us, in which it was admitted that the records relating to the estate at the time of the transaction were entirely destroyed.

But, taking the recitals of the administrator's deed as true, it appears that the sale, which was for the purpose of partition, was ordered within less than one year from the time of the appointment of the administrator. It is therefore contended that the court had no power to make partition of the estate under the law as it then existed, (Pasch. Dig. art. 1348,) until "after the first term after the expiration of twelve months from the original grant of letters of administration," and that, therefore, the sale was void. But we think that when the county court acquired jurisdiction over the estate by the grant of administration, that it had the authority to order a partition of the property among the heirs; that the direction in the statute as to the term at which this should be done was intended solely for the protection of creditors; and that, if the order be prematurely made, none but creditors should be permitted to complain. It is but an irregularity for which the sale might have been set aside by a proper proceeding within proper time by any creditor whose rights may have been prejudiced by it. It may be that the recital in the deed

of the date of the grant of letters is a clerical mistake, 1858 being intended instead of 1859; but, however that may be, after the lapse of 25 years, which has occurred in this case, the presumption *omnia rite acta* must apply; and, the records having been destroyed by fire, every intendment must be presumed in favor of the validity of the proceedings. If the heirs made application for the partition, acquiesced in the sale, and received the purchase money for the lots, they, and those claiming under them, are certainly estopped from setting up title to the lots in controversy.

We are of the opinion, therefore, that the sale by Wornell, as administrator, to Williams, of the lots in controversy, was valid, and passed the title held by James Day at the time of his death. Appellants therefore have no title, and cannot recover in this suit, although appellee may not have acquired the title which was vested in Williams by the sale. For this reason the other questions raised in the brief of appellants' counsel are unimportant, and need not be determined.

We find no error in the judgment, and it is affirmed.

WILLIAMS and others v. MERCHANTS' NAT. BANK OF KANSAS CITY.

(*Supreme Court of Texas* April 12, 1887.)

1. NEGOTIABLE INSTRUMENTS—NOTES—AUTHORITY TO CONFESS JUDGMENT—INDORSERS.

On a promissory note, with the following clause: "In case of non-payment of the above note at maturity I hereby authorize any licensed attorney at law to appear for me in court, and to accept service, waive process, and confess judgment in favor of the legal holder of said note, against me, for the amount of said note, and interest, with ten per cent. attorney's fees additional."—judgment according to the terms of the note was taken against, not only the maker, but four subsequent indorsers. Held, that the indorsers by their indorsement simply guaranteed the performance of the obligations of the maker as set forth in the note. They did not authorize the taking of the same summary judgment against themselves, and therefore the court erred in allowing judgment to be rendered against them.

2. SAME—INDORSERS—PRESUMPTION.

In the absence of testimony as to the order of indorsement, those that follow or are below that of the payee are presumed to be subsequent.

Appeal from district court, Cooke county.

Davis & Garnett, for appellants. *Potter & Hughes*, for appellee.

WILLIE, C. J. This suit was brought upon the following instrument in writing:

"GAINESVILLE, TEXAS, September 1, 1888.

"Nine months after date, I promise to pay to the order of myself twelve thousand five hundred dollars, for value received, payable at the office of Gainesville National Bank, Gainesville, Texas, with interest from maturity until paid at the rate of 12 per cent. per annum. In case of non-payment of the above note at maturity, I hereby authorize any licensed attorney at law to appear for me in court, and to accept service, waive process, and confess judgment in favor of the legal holder of said note against me for the amount of said note, and interest, with ten per cent. attorney's fees additional."

This note was signed by "W. H. Williams," and indorsed: "W. H. WILLIAMS. H. E. WASHINGTON. JNO. H. STONE. G. W. BAREFOOT. T. J. HALL." It was further indorsed: "Pay Gainesville National Bank, or order, for collection, account of Merchants' National Bank, Kansas City, Mo. O. P. DICKINSON, Cashier."

The suit was filed April 20, 1885, by the appellee against the maker and all the indorsers of the note, and on the same day an attorney at law appeared for the defendants, under the authority supposed to have been given in the note, accepted service, waived process, and confessed judgment against all the defendants for the full amount then due upon said note, and 10 per cent.

attorney's fees additional, and judgment was rendered accordingly. A motion for a new trial made by the defendants was overruled, and they have brought the case by appeal to this court.

Upon the face of the note, no power is given to confess judgment against any one except the maker. We need not inquire as to whether this power would embrace others who signed the note before delivery, for the legal presumption is that the present indorsers did not so sign. Their names appear after that of the payee, and the presumption of the law is that they placed them there after the payee had indorsed, and that the note passed from the payee successively through the hands of the subsequent indorsers till it reached the holder. *Rickey v. Dameron*, 48 Mo. 61; *Roberts v. Masters*, 40 Ind. 463; *Clapp v. Rice*, 13 Gray, 403; 1 Daniel, Neg. Inst. 707 *et seq.*; *Blatchford v. Milliken*, 35 Ill. 434.

It is true that the petition alleged that these parties signed their names before delivery; but, such not being the presumption of law, parol proof was required to prove it. Such proof is not admissible in a proceeding like this to establish anything outside of what appears upon the instrument itself. The authority to confess extends only so far as to allow judgment according to the legal tenor and effect of the note; and the plaintiff cannot vary its obligation, or make parties liable to the summary judgment he is taking, who, according to the terms of the note itself, have not authorized him to take such judgment. This court held, in *Heidenheimer v. Blumenkron*, 56 Tex. 503, that parol evidence was inadmissible to show that parties who had indorsed a note under like circumstances with the present were responsible as original promisors; this, in a case where all parties were in court, and had appeared in the case. Much less can this be done when the parties sought to be charged have had no notice of the action, and no opportunity to controvert any such proof that might be offered against them. If this evidence was inadmissible, no failure of the parties defendant to appear in defense of the suit would raise a presumption that it had been introduced in support of the allegation in the petition. Moreover, this court has held, in effect, that proof that such indorsers signed before the delivery of the note, would not, in a case where their names appear, as do these, upon its back, make them anything else but ordinary indorsers, with all the rights and privileges belonging to that position. *Heidenheimer v. Blumenkron*, *supra*.

Treating these parties as ordinary indorsers it is very clear that they have not authorized a confession of judgment against themselves. The language of the power confines the waiver and confession to the maker, and it, as we have seen, must be strictly construed thus, in a summary proceeding like the present. The indorser undertakes that the maker shall perform any engagement contained in the note. He contracts that the maker shall pay principal, interest, and attorney's fees at the time and place stated in the note; but this agreement is coupled with a condition that the note shall be protested and notice given him, or that suit shall be brought against the maker within a prescribed time. The law dispenses with these conditions under certain circumstances, none of which are shown to exist in the present case; and the indorser can waive them, but he must do so expressly, and they cannot be waived for him by the maker. His obligation is that the maker shall perform the contract evidenced by the note. He gives his indorsee no right to take a judgment against him by confession, by merely becoming responsible for the default of another who has authorized the summary proceeding and judgment against himself. To hold this would be to hold the indorser bound in the same way as if he was a signer of the note; whereas we have seen that his rights and obligations are different from that of the maker in many important respects. We think the court erred in allowing judgment to be rendered against the parties who indorsed subsequent to the maker, and this necessarily reverses the judgment as to all the defendants.

As to the assignments of error that "the court erred in overruling defendants' motion to set aside the judgment by confession herein," it is not in compliance with the rule, the motion being based upon six different grounds, each of which involves a question different from the other.

The other points made in the appellants' brief are not likely to arise upon another trial, as the cause will doubtless be tried after actual service made upon the defendants.

The judgment is reversed, and the cause remanded.

SIMPSON and another v. SHACKELFORD and another.

(Supreme Court of Arkansas. April 9, 1887.)

SALE—CONDITIONAL—BONA FIDE PURCHASE.

The plaintiffs sold and delivered a corn-mill, on condition that title should remain in plaintiffs until it was paid for. The purchaser, having possession, and before he had paid for it, sold the mill to the defendants, who bought in good faith and for value, without notice of plaintiffs' rights. *Held*, that they acquired no title as against the plaintiffs.¹

Appeal from circuit court, Clark county.

Smoots, McRae & Hinton and *J. M. Rose*, for appellants. *Crawford & Crawford* and *Atkinson & Tompkins*, for appellees.

BATTLE, J. On the fifteenth of January, 1881, Simpson & Gault conditionally sold and delivered to B. F. Butcher a certain 26-inch pulley corn-mill for the sum of \$187, on a credit until the fifteenth of April following, and took from him an obligation in writing in the words and figures following, to-wit:

"PRESCOTT, ARKS., January 15, 1881.

"On or before the fifteenth day of April, 1881, for value received, the undersigned promises to pay to Simpson & Gault, or order, one hundred and eighty-seven dollars, with interest at ten per cent. per annum from date until paid, negotiable and payable at the Merchants' National Bank, Little Rock, Ark. It being for a 26-in. pulley corn-mill, manufactured by said Simpson & Gault, of Cincinnati, O., and this day delivered to the maker of this note, with the understanding and agreement by and between the maker of this note and Simpson & Gault that the title is and shall remain in said Simpson & Gault until said machine is paid for in full.

B. F. BUTCHER."

Butcher remained in possession of the mill until he sold to Shackelford & Bell, who, without any knowledge or notice that the title to it was in Simpson & Gault, purchased it of Butcher, about the first of November, 1881, and took possession. Simpson & Gault, having received only \$40.50 of the \$187 which Butcher agreed to pay, demanded the mill of Shackelford & Bell on the twenty-sixth of December, 1882, and they refusing to surrender it, brought this action against them for its possession.

In the trial the plaintiffs asked, and the court refused, to give to the jury the following instruction: "The plaintiffs ask the court to instruct the jury that, if they find from the evidence that B. F. Butcher executed the note copied in the complaint, with the reservation of title therein contained, they should find for the plaintiffs, whether Shackelford & Bell, the defendants, had notice of said reservation at the time they bought the mill from Butcher or not." And, at the instance of defendants, and over the objections of plaintiffs, it gave the following instruction: "If the jury find from the evidence that plaintiffs sold the property in controversy to one B. F. Butcher, and placed him in possession of it, and took his note whereby he made a promise to pay the purchase money absolutely and unconditionally, and that they contracted that the title should remain in plaintiffs till the purchase money was

¹See note at end of case.

paid in full, and that, after the debt became due, they permitted said Butcher to retain possession of said property for a considerable length of time, and that said Butcher sold said property to defendants, and that their purchase was without notice of said retention of title by plaintiffs, they will find for defendants." The jury returned a verdict in favor of defendants. The plaintiffs moved for a new trial, which was denied, and they appealed.

The transaction between Butcher and appellants was a conditional sale. No title to the mill passed to him. Appellees only acquired the conditional title of Butcher. The fact that Butcher was permitted to remain in possession until he sold, did not estop appellants from claiming and taking possession after appellees purchased. They did not have a right to rely upon Butcher's possession as conclusive evidence of his title, and to say they were thereby induced to purchase. His possession was only *prima facie* evidence of title, and they had no right to treat and act upon it as higher evidence. To protect themselves it was necessary for them to inquire and ascertain how Butcher held. When Butcher failed to pay the purchase money at the time he agreed to, appellants became entitled to the possession of the mill, even in the hands of a *bona fide* purchaser, and to sue for and recover it at any time during the period prescribed for the bringing of such suits by the statute of limitations. *McIntosh v. Hill*, 47 Ark. 363, 1 S. W. Rep. 680; *McRae v. Merrifield*, 48 Ark. —, 2 S. W. Rep. 780; *Sumner v. Woods*, 42 Amer. Rep. 104, and note; *Hegler v. Eddy*, 53 Cal. 597; *Hutchings v. Munger*, 41 N. Y. 155; *Deshon v. Bigelow*, 8 Gray, 159; *Ballard v. Burgett*, 40 N. Y. 814.

The judgment of the court below must be reversed, and a new trial granted.

NOTE.

SALE—CONDITIONAL SALE—VALIDITY. A conditional sale, reserving the title to the property in the seller until the payment of the purchase price, or the performance of some other condition, is valid, not only between the parties, but also as against third persons. *Harkness v. Russell*, 7 Sup. Ct. Rep. 51; *Arkansas, Kirby v. Tompkins*, 3 S. W. Rep. 363; *McRae v. Merrifield*, 2 S. W. Rep. 780; *McIntosh v. Hill*, 1 S. W. Rep. 680; *Blackwell v. Walker*, 5 Fed. Rep. 419. *Connecticut*, *Cooley v. Gillan*, 6 Atl. Rep. 180; *Florida*, *Campbell Printing-Press & Manuf'g Co. v. Walker*, 1 South. Rep. 69; *Indiana*, *Baals v. Stewart*, 9 N. E. Rep. 403; *Iowa*, *Thorpe v. Fowler*, 11 N. W. Rep. 8; *Warner v. Jameson*, 2 N. W. Rep. 961; *Kentucky*, *Hart v. Barney, etc.*, Manuf'g Co., 7 Fed. Rep. 543; *Massachusetts*, *Blanchard v. Cooke*, 11 N. E. Rep. 83; *Michigan*, *Marquette Manuf'g Co. v. Jeffery*, 13 N. W. Rep. 592; *Smith v. Lozo*, 8 N. W. Rep. 227; *Mississippi*, *Leflore v. Miller*, 1 South. Rep. 99; *Montana*, *Silver Bow M. & M. Co. v. Lowry*, 12 Pac. Rep. 652; *Heinbockel v. Zugbaum*, 5 Pac. Rep. 897; *New Jersey*, *Marvin Safe Co. v. Norton*, 7 Atl. Rep. 418; *The Marina*, 19 Fed. Rep. 760; *New Mexico*, *Redewill v. Gillen*, 12 Pac. Rep. 872; *Texas*, (though the rule has been changed by statute,) *Tufts v. Cleveland*, 3 S. W. Rep. 238; *Vermont*, *Dixon v. Blondin*, 5 Atl. Rep. 514.

Such sales are invalid as to *bona fide* purchasers in *Indiana*, when the vendor sells to the vendee for the purpose of a resale, as where a manufacturer sells to a retail dealer, *Winchester, etc.*, Co. v. Carman, 9 N. E. Rep. 707; in *Nebraska*, *Manning v. Cunningham*, 31 N. W. Rep. 833; as to *bona fide* purchasers and creditors, in *Pennsylvania*, *Wire Book, etc.*, Co. v. Crowell, 8 Atl. Rep. 22; *New Jersey*, *Marvin Safe Co. v. Norton*, 7 Atl. Rep. 418.

Such sales do not come within the provision of the laws for registration of chattel mortgages in *Arkansas*, *Blackwell v. Walker*, 5 Fed. Rep. 419; *Florida*, *Campbell Printing-Press & Manuf'g Co. v. Walker*, 1 South. Rep. 69; *Montana*, *Heinbockel v. Zugbaum*, 5 Pac. Rep. 897; but they are by statute made invalid unless registered, in *Iowa*, *Moline Plow Co. v. Braden*, 32 N. W. Rep. 247; *Warner v. Johnson*, 21 N. W. Rep. 483; *Warner v. Jameson*, 2 N. W. Rep. 951; *Budlong v. Cottrell*, 20 N. W. Rep. 187; *Kentucky*, *Hart v. Barney & Smith Manuf'g Co.*, 7 Fed. Rep. 543; *Minnesota*, *Dyer v. Thorstad*, 29 N. W. Rep. 345; but in this last case the sale, though unregistered, was held valid as against creditors levying with notice at the time of levy, *Id.*; *Missouri*, *Pelt v. Spencer*, 2 S. W. Rep. 434.

In *Mississippi* such sales are valid, without writing or record, unless the separation of title and possession continues three years, and except that property so sold to a trader is liable to his creditors, unless a sign be displayed showing its true ownership. *Paine v. Hall's Safe Lock Co.*, 1 South. Rep. 58.

NICHOLS v. SHEARON.

(Supreme Court of Arkansas. April 16, 1887.)

1. NEW TRIAL—APPLICATION FOR—FILING—ESTOPPEL.

In an action of ejectment, the jury found for plaintiff, and assessed the excess of rents and profits over taxes and improvements at \$167.50; and on the same day defendant filed a motion for a new trial, but withdrew it in consideration of a waiver by plaintiff of the damages assessed, and a judgment for mesne profits was entered. About 45 days later, defendant refiled their motion for a new trial. *Held* that, under Mansf. Dig. Ark. § 5158, requiring application for a new trial, except for newly-discovered evidence, to be filed within three days after verdict or decision, unless unavoidably prevented, the motion was not made in time; that defendant was estopped by the record, and his own agreement, there being no fraud on the part of plaintiff; and that the application should be denied.

2. EQUITY—REFORMATION OF DEED—DEFENSE IN EJECTMENT—PRACTICE.

In Arkansas, pending an action of ejectment, where the deed offered in evidence by defendant contains a misdescription of a part of the land, he cannot proceed by suit in equity against the plaintiff to have the deed reformed, but should have the issue thus raised as a defense to the ejectment suit transferred to the equity docket so that all matters in litigation could be settled in the one suit, and after rendition of judgment in the ejectment suit the bill should be dismissed under Mansf. Dig. Ark. § 4932, as such judgment could not be annulled or modified by a decree in equity.

3. HOMESTEAD—SALE BY ADMINISTRATOR—VALIDITY—SETTING ASIDE.

A homestead is exempt from sale for the payment of debts of a deceased person during the minority of his children; and when an administrator, with full knowledge of its character, procures a sale of such property by the probate court, buys the land from the purchaser at such sale, and makes valuable improvements on it, a court of equity may, after the majority of the children, set aside such sale and conveyance as void, subrogate the administrator to the rights of creditors whose claims he has paid, charge him with the rents and profits of the land from the time of sale, and allow him for the value of his improvements.

4. EXECUTORS AND ADMINISTRATORS—CLAIMS—PROOF—PAYMENT.

An administrator has no right to pay debts which his decedent owed to wards for whom he had been guardian in his life-time, without such debts being proved against the estate like other claims.

5. GUARDIAN AND WARD—ACCOUNTING—ALLOWANCE FOR MAINTENANCE.

In a suit in equity to set aside a probate sale of land and subsequent conveyance to the administrator, no allowance can be made for expenditures made by the administrator as guardian of the plaintiffs, while his wards, for their nurture and education, as that is a matter exclusively within the jurisdiction of the probate court and does not affect the merits of the controversy in the equity court.

Appeals from circuit court, Conway county.

Sam. W. Williams and *Sol. F. Clark*, for appellants. *Ratcliffe & Fletcher*, for appellees.

SMITH, J. William Carter Shearon died in the year 1863, leaving a widow and two young children. He was the owner of two parcels of land, each containing 160 acres, and upon one of which he resided with his family. He was also possessed of some personal property; but this was in part destroyed by the soldiery, the civil war being then flagrant, and the remainder was consumed in the sustenance of his surviving family. Administration of his estate was granted in October, 1865, to Samuel H. Nichols, his brother-in-law, and also a creditor. At January term, 1866, of Conway probate court, the administrator obtained an order for the sale of the real estate of his intestate for the payment of debts. The two tracts were sold *in solido* to A. P. Nichols, a brother of the administrator, for \$700. In course of a year or two, A. P. Nichols conveyed the homestead tract to Samuel H. Nichols, and the remaining tract to William L. Nichols, another brother. Out of this probate sale have grown three lawsuits, which we shall dispose of in one opinion.

1. Soon after Shearon's children became of age, they brought an action of ejectment for the last-mentioned tract, against the administrator and heirs of

William L. Nichols, claiming by inheritance from their father, who had died seized and in possession. The defendants set up the title derived from the administrator's sale, and evidenced by the conveyances of Samuel H. Nichols, as administrator, to A. P. Nichols, and of A. P. Nichols to William L. Nichols. The issue was submitted to a jury, who found for the plaintiffs, and assessed the excess of rents and profits over taxes and improvements at \$167.50. The defendants on the same day (March 7, 1885) filed a motion for a new trial, but withdrew it in consideration that the plaintiffs waived the damages assessed. And in pursuance of this agreement, no judgment for mesne profits was entered. On the twenty-second of April, being a day of the same term, the defendants refiled their motion for a new trial; but the court denied it. There was no error in this. April 22d must be considered as the true date of the motion. Section 5153 of Mansfield's Digest requires such an application, except it be for newly-discovered evidence, to be made within three days after the verdict or decision, unless unavoidably prevented. No showing is made why the motion was not made earlier. And, besides, the defendants had, for a consideration of which they received the benefit, abandoned in open court their right to insist on their motion. They are estopped by the record and by their own agreement to reopen the case; there being no effort to show that they were deceived or misled by any artifice.

2. In the evidence of title produced by the defendants in the ejectment suit, there was a misdescription of part of the land; it being described as in a different township from that in which it really lay. The error began in the administrator's petition for license to sell, and was continued in the order of sale and report thereof, and in the subsequent conveyances. While the ejectment cause was still pending and undetermined below, the heirs of William L. Nichols filed a bill on the chancery side of the same court, against the plaintiffs in the ejectment, seeking, among other things, to correct the mistake, and to reform the deeds. This bill was dismissed, after judgment had been rendered in the action at law. The bill was confessedly a mere mode of defense to the action of ejectment; its object being to control the proceedings in that case. But parties cannot litigate about the same subject-matter, both at law and in chancery, at one and the same time. The whole controversy must be brought out in one suit. A defendant must make all of his defenses, of whatsoever nature they may be, in the action in which he is sued. And if some of the issues raised are exclusively or more properly cognizable in another forum, he must move a transfer to the proper docket. This was the plain course for the heirs of William L. Nichols to pursue. And as the judgment against them in the ejectment could not be annulled or modified by any decree in the equity suit, except for a defense which had arisen or been discovered since its rendition, nothing remained except to dismiss the bill. *Mansf. Dig. § 4982; Reeve v. Jackson*, 46 Ark. 272.

3. About the same time that the action of ejectment was begun, the heirs of William Carter Shearon also filed a bill against Samuel H. Nichols, attacking his sale and conveyance of the other tract, which had belonged to their ancestor, and the subsequent reconveyance thereof by A. P. Nichols to the defendant. It was alleged that this tract, being the homestead of the deceased, was exempt from sale for the payment of his debts, during the minority of his children. And it was further alleged that the defendant had fraudulently procured the order for such sale, by deceiving the probate court as to the extent of the indebtedness of said estate; that he had fraudulently conducted said sale, by omitting to have the lands appraised, although he had reported to the court that the same had been duly appraised; and that he was in fact the purchaser at the sale, although the land was nominally stricken off to his brother, who paid nothing. The defendant filed an answer and cross-bill, denying the charges of fraud, and asserting that the proceedings for the sale of the land were in all respects regular and valid, and that he had no interest in his

brother's purchase, although he admitted having afterwards bought the land. He alleges he had placed extensive and beneficial improvements on the land, and that he had taken the plaintiffs, when they were small children, to his house, out of affection and charity, and without any expectation of remuneration; and that he had reared and educated them, at an expense of \$1,000 in excess of all that their labor had earned for him. And he prayed for compensation for his improvements, and reimbursement for his expenditures in behalf of the plaintiffs, if for any cause the sale of the land should be set aside. Proofs were taken, from which it appeared that the probate court had confirmed the administrator's sale; that the defendant had gone into possession in 1868 under his purchase from A. P. Nichols, and had since that time enjoyed the rents and profits; and that he had made costly improvements, which had enhanced the vendible value of the land not less than \$2,000, and perhaps as much as \$4,000. It was also shown that the mother of the plaintiffs, having remarried and being very poor, the defendant had, at her request, become their guardian, had brought them up, at considerable cost, as his own children, and had performed an excellent part towards them. The court decreed that the attempted sale of the homestead was void for want of jurisdiction in the probate court to order it, and, moreover, that it was the result of a fraudulent combination between the defendant and his two brothers. It therefore set aside the defendant's title deeds, but required no account of rents, balancing them against his improvements. It also found that the defendant, during his administration, had expended in payment of taxes, expenses of administration, and probated claims \$329.15 over and above what he had received from the personal assets of his intestate, and it charged this sum upon the land. Both parties have appealed.

The sale of the homestead was void. The defendant was aware of all the circumstances which gave the plaintiffs a homestead right in the premises. He must take notice of their right to receive the rents during their nonage, and that the land in the mean time is protected from sale for the ancestor's debts. *Booth v. Goodwin*, 29 Ark. 633; *Alzheimer v. Davis*, 37 Ark. 316; *McCloy v. Arnett*, 47 Ark. 445, 2 S. W. Rep. 71, and cases there cited; *Wehrle v. Wehrle*, 39 Ohio St. 365. Notwithstanding this right of homestead had terminated before the commencement of the suit, the plaintiffs having attained their majority, yet, there having been no lawful sale, the land had descended to them, subject to the payment of such debts as had been proven against their father's estate. These debts are provided for in the decree, by subrogating the administrator who had paid them to the equity of the creditors. It is true the administrator's settlements and the testimony taken show that he had paid several other debts which Shearon owed to wards for whom he had been guardian in his life-time. These payments were doubtless made in good faith; but the administrator had no right to pay them, as they were never proved up against the estate. The administrator seems to have acted upon the idea that the debts were incurred in a fiduciary capacity, and that this dispensed with the necessity of their being regularly probated. Shearon was a trustee for his wards as long as he lived. But, when he died, his indebtedness to the trust became a simple demand against his estate, which required to be sworn to, to be presented to the administrator within two years from the date of his letters, to be allowed, classified, and paid like any other debt he owed. *Hill v. State*, 23 Ark. 604; *Connolly v. Weatherly*, 33 Ark. 658; *Patterson v. McCann*, 39 Ark. 577; *Purcell v. Carter*, 45 Ark. 299; *Padgett v. State*, Id. 495.

We think, also, substantial justice has been done in setting off all improvements against all rents. No allowance can be made in this suit for the expenditures of the guardian in the nurture and education of his wards. That is a matter which belongs exclusively to the probate court, and does not affect the merits of the present controversy.

The judgment in the ejectment suit, the decree dismissing the bill filed by the heirs of William L. Nichols, and the decree in the case of Shearon's heirs against Samuel H. Nichols are, severally, in all things affirmed.

COCKE and others v. HATCHER and others.

(*Supreme Court of Tennessee. April 20, 1887.*)

1. MORTGAGE—CONSIDERATION—TO SECURE CREDIT—CONVERSION OF FUNDS—EQUITY.

A wife mortgaged her property for \$10,000, and gave the note and mortgage to her husband, C., for the purpose of enabling him to obtain credit for the firm to which he belonged. He so used them by obtaining a draft of \$10,000, payable in three months afterwards, and accepted by the duly-authorized agent of the mortgagee, which was deposited to the credit of C.'s firm in a bank. At the request of the agent, the president of the bank promised not to negotiate the draft; but the cashier did negotiate it, and the bank failed. The mortgagee was sued on the draft, and judgment was rendered against it. *Held*, that the wife's property was chargeable with the amount of the draft and interest, since, where one of two innocent parties must suffer for the wrongful act of a third, the loss must fall on the party whose acts brought about the loss.

2. SAME.

The arrangement having been made between the bank and the parties that \$2,900 of the \$10,000 were to be retained for the mortgagee to pay taxes on the property, and be paid the premium notes it took from the mortgagor, to the extent that the bank became trustee of the mortgagee, the mortgagor was relieved of liability to the mortgagee for the wrongful negotiation by the bank of the note.

3. SAME—DECREE—INTEREST.

The mortgagee having been compelled to pay a judgment on the draft rendered in New York, the rate of interest the mortgagee was entitled to be allowed was 7 per cent., the legal rate in New York from the time the draft was due till the date of judgment, and after that, 6 per cent., the legal rate of Tennessee.

Appeal from chancery court, Shelby county.

The facts found by the referee are as follows: In the summer of 1872 Thomas H. Cocke and J. S. Hatcher formed a partnership for the purpose of engaging in business in Memphis, Tennessee; Cocke to furnish \$10,000 to put into the business. May 27, 1871, he had, for the consideration of love and affection, conveyed to Dennis J. O'Reilly lots Nos. 27 and 28, in block 21, on the west side of Main street, between Union and Gayoso streets, in the city of Memphis, in trust for the benefit of his wife, Mary Jane Cocke, to her sole and separate use, with power to her of absolute conveyance, as if she were a *feme sole*. Cocke applied to the western department of defendant life assurance association, at Memphis, for a loan of \$10,000 to put into the firm of J. S. Hatcher & Co., and was told by B. N. Robertson, the general manager of the department, that they had no money, and would have none till October 15, 1872. It was important to the business of the partnership that they make their purchases earlier, and Hatcher and Cocke urged Robertson to accept a draft for \$10,000, drawn by Thomas H. Cocke in favor of the firm of J. S. Hatcher & Co., payable October 15, 1872. This Robertson consented to do if Thomas H. Cocke, Mary Jane Cocke, and Dennis J. O'Reilly would secure the said association by a mortgage or trust deed on the lots aforesaid. Mrs. Cocke and O'Reilly agreed, and the trust deed was executed and delivered June 29, 1872, securing the principal and interest of \$10,000 to the association, to become due in three years. The deed had to be sent to Louisville, Kentucky, for the signature of Dennis J. O'Reilly, and acknowledgment and probate by him; and on July 6, 1872, the draft was drawn by Thomas H. Cocke, and accepted by B. H. Robertson, general manager. As soon as the draft was accepted, J. S. Hatcher & Co. indorsed it to the City Bank of Memphis, where both Cocke and Hatcher & Co. did business, and delivered it to S. H. Tobey, president of the bank, and the amount was placed to the credit of J. S. Hatcher & Co., who subsequently drew on it \$500 to \$600. Tobey was treasurer of the department of the life assurance association in Mem-

phis, and he was also president of the Memphis City Bank. Robertson feared if the acceptance was negotiable that the association there might incur the censure of the principal association in St. Louis, and after the acceptance was written and signed, he requested S. H. Tobey not to negotiate the acceptance, and Tobey promised Robertson not to negotiate the draft. When the mortgage was executed and the note therein secured, the acceptance was delivered at the bank by Capt. Folkes, the attorney of the association, with C. B. Wellford, the secretary and the trustee in the deed. The draft was indorsed as follows: "Pay to the order of City Bank of Memphis. J. S. HATCHER & Co.,"—and was delivered to the City Bank as the bankers of J. S. Hatcher & Co. The bank failed July 31, 1872. Prior to that time, its cashier was in New York. The check was sent to him, and he transferred it to P. M. Myers & Co. for advances, and it finally got into the hands of Bailey Haskell, who sued the life association in New York, and recovered judgment, due notice being given to complainants in this suit. The association paid the judgment. The trustee being about to foreclose, complainants Mary Jane Cocke and D. J. O'Reilly filed this bill to enjoin the sale.

Answer and cross-bill were filed. The cross-bill asks a sale of the land, and the answer denies the equities of the bill. On the trial the chancellor held that the mortgaged property was liable only to the amount of the drafts accepted and paid by the City Bank. Both parties appealed. The referees held that the wife had the power to mortgage, that there was consideration for the deed and notes, and that a decree should be entered for the full amount of the debt, interest, and costs, and that the land should be sold to pay the same.

Harris & Turley, for appellants. *Wright & Folkes*, for respondents.

WALKER, Special Judge. The court is of opinion that the report of the commission of referees should be affirmed, with a modification. Without undertaking to review the facts, this conclusion is reached mainly upon these grounds:

1. That the notes and mortgage were executed and delivered to the life association for the purpose of establishing a credit with the City Bank in favor of Hatcher & Co. So far as concerns the mortgagor, the credit to be thus established and used was limited only by the amount of the mortgage note.

2. The manner of establishing this credit—*i. e.*, by obtaining and indorsing to the bank the acceptance of the life association, due October 15th thereafter—was known to and acquiesced in by Mrs. Cocke. But if the fact was otherwise, the same conclusion would be reached, upon the ground that the mortgage and notes were by her left under the power and control of her husband, for the express purpose of allowing him or Hatcher & Co. to use the same as a basis of credit, anterior to the fifteenth of October, and the *manner* of thus using the mortgage and note was left to Cocke or to Hatcher & Co. Mrs. Cocke must abide the consequences of their acts and conduct; and the case must be disposed of as if the mortgaged property belonged to Cocke himself.

3. The indorsement of the draft, whether a general indorsement or a special indorsement to the City Bank, is not deemed material, and the delivery thereof to the City Bank put an apparent absolute title in the bank, and enabled Tobey to commit the breach of trust out of which the whole difficulty of the case arises. The loss thus brought about must, except as stated directly, by borne by the mortgaged property, and the life association is entitled to the same extent to foreclose the mortgage.

But the conclusion already stated is reached, not upon the ground that the association is entitled to a strict recovery upon the note, but that, in settling the equities of the case arising out of Tobey's misappropriation of the draft, the loss should fall upon the party whose acts brought about the loss. The original plans of the parties were never carried out; and the court is called on,

rather to settle the equities between them, than to strictly enforce their original contract and intentions. The association is entitled to look to the mortgage solely to save it from loss, under all the facts of the case.

The report of the referees must therefore be modified in the two respects following, viz.: (1) The rate of interest allowed will be 7 per cent. per annum from October 18, 1872, to the date of the judgment in the New York court, October 13, 1874, and 6 per cent. thereafter. (2) At the time the acceptance was delivered to Tobey, the association took from him, as president of the City Bank, a receipt therefor, and in the receipt was embodied an agreement that he, (Tobey,) as such president, would, out of the proceeds of the draft, pay taxes on the mortgaged property to the amount of \$1,902.42, and the premium notes of Cooke and Hatcher, amounting to \$990.69, an aggregate of \$2,893.11.

It is clear that if, as was contemplated, the draft had remained in the hands of the bank to maturity, and at maturity had been paid to the bank, Cooke would have had no power, to the extent of the above-named sum, to check it out. In respect of that much of the fund, the bank or Tobey was either constituted a direct trustee for the association, or a trustee for the protection of the association in matters in which it was interested. The association reserved full control of that much of the fund, and, in adjusting the equities of the parties, the case must be disposed of as if the association had retained that much of the funds in its own hands. In fact the arrangement adopted was but a substitute for that, and was made by the association for its own protection.

The association must look to Tobey or the City Bank for the performance of that agreement; and, failing in that, it cannot fall back on the mortgaged property. A decree will be entered, fixing the amount due the association on the principles here stated, and decreeing a foreclosure of the mortgage by sale under the decree, and by the clerk of this court, unless the amount due, and costs as decreed against complainant, shall be paid into court within 90 days from the entry of decree.

The costs of the court below will be paid by complainants; those of this court (including costs of transcript) by the life association.

FOLKES, J., incompetent.

PLANTERS' INS. CO. v. WICKS and others.

(*Supreme Court of Tennessee.* April 20, 1887.)

1. INSURANCE—MUTUAL COMPANIES—REORGANIZATION—INDEMNIFYING BOND—CONSIDERATION.

An insurance company being in embarrassed circumstances, a plan of reorganization was determined upon, and a new company was formed, which agreed to lend defendants, who were stockholders in the old company, \$10,000 to pay off its debts; and thereupon the defendants executed a bond to indemnify the new company against loss on account of the liabilities of the old company, and bound themselves to pay off such losses to the extent of sums unpaid on their subscriptions to stock. The defendants now resist the enforcement of the bond, upon the ground that it was without consideration, and was not binding under the charter of the company. *Held*, (1) that there was sufficient consideration to support the bond, and (2) that, although the company was organized on the mutual plan, yet, section 10 of the charter providing that, for the better security of policy holders, the company may add thereto a guaranty or stock capital, not exceeding \$200,000, this bond is to be considered as a guaranty, under this section, for the payment of the debts and liabilities of the old company by the defendants, to the extent of amounts unpaid on their subscriptions to stock.

2. SAME—ACTION ON BOND—PARTIES.

As the intention of the parties to the bond was that the new corporation should pay off the debts of the old, with the right to reimbursement from the defendants, the right of action on the bond vested in the new corporation, and not in its stockholders.

3. ESTOPPEL—IN PAID—FAILURE TO SIGN BOND.

The defendants resist the enforcement of the bond, upon the ground, also, that it was understood at the time they signed that the bond was not to become operative unless all the stockholders of the old company should sign, which they failed to do. *Held* that, as the new company was organized and conducted business for years under the contract, and defendants' bond executed in pursuance thereof, and many persons were induced to subscribe to stock in the new company upon the faith thereof, all of which defendants knew, they cannot now be allowed to make such a defense, as it would, under the circumstances, be inequitable.

Appeal from chancery court, Shelby county.

Yopp, Harris & Turley, for appellant. *Wright & Folkes, J. M. Gregory, Estes & Ellett*, and *L. B. McFarland & Jordan*, for respondents.

LEHMAN, Special Judge. The controversy in this cause involves the liability of the defendants to the complainant, the Planters' Insurance Company, on a bond which is as follows, to-wit:

"Whereas, in pursuance of a resolution of the board of directors of the Planters' Insurance Company, passed at the office of the company on the fourteenth day of July, 1869, it was resolved 'that a committee of five be appointed, (two of whom shall be of the present stockholders of the company, and three of the recent subscribers to the stock of the company,) who shall investigate the present condition of the company, and determine the value of the stock therein, and the terms on which the new organization shall be made. Their report shall be handed to the secretary of the company as soon as practicable, and held by him for the information of the subscribers to the stock of the company, and shall be the basis of agreement between the old company and the new.' And whereas, in pursuance of said resolution, the following gentlemen were mutually chosen and appointed by the company, and the subscribers of new or additional stock to the same, a committee to carry out and effectuate the object and purposes of said resolutions, viz.: Henry M. Lowensteine, J. G. Lansdale, and B. K. Pullen, upon the part of the new subscribers of stock, and Wm. Richardson Hunt and D. H. Townsend, upon the part of the company. And the said committee, after a full investigation of the affairs of the company, and duly deliberating upon the subject embraced in said resolution, have made and returned their report, which is in the words following:

" 'The old stockholders shall give a bond to indemnify the new stockholders, on account of any loss that may accrue from the old business, on the following conditions: (1) That the new company shall purchase from the old company its charter, its office furniture, and its stock in the Southern Life Insurance Company, and shall assume the payment of its notes due for rent of office from and after the first day of August next; (2) that the new company loan money, not exceeding \$10,000, to the old company, at such times and in such sums as may be necessary to enable them to pay losses, etc., on acc. of the old business, at the ordinary rate of interest; (3) that the new company shall make such orders, etc., as shall be necessary to conduct and conclude the old business in the most advantageous manner; (4) the value of the charter to be left to arbitration.

HENRY M. LOWENSTEINE.

" 'WM. RICHARDSON HUNT.

" 'J. G. LANSDALE.

" 'BEN K. PULLEN.

" 'D. H. TOWNSEND.'

"And whereas we, the undersigned stockholders in the old company or present organization, being satisfied with the terms agreed upon by said committee, do hereby accept the same, and do by these presents severally bind and obligate ourselves to the new subscribers of the stock in the said company, and to the said company when reorganized, to protect and secure them and each of them harmless against any and all loss or damage which the said company may be liable for on account of the business done by the company prior to the first day of August, 1869; each of us pledging and obligating ourselves to pay

such loss or damage in proportion to the amounts unpaid upon our subscription of stock in said company, not to exceed the amounts so due by us respectively.

"In witness whereof we have hereto set our hands and affixed our seals this the twenty-first day of July, 1869.

"The above obligation is made and executed upon the following conditions, which are agreed to by the new subscribers to the stock of said company, viz.:

(1) The proceeds of the property and assets of the present company shall be exclusively applied to the payment of its liabilities; and the directors of the company under the new organization shall, on application of the signers of this bond, or a majority of them, or their representatives, adopt any and all regulations or orders, not inconsistent with the charter and present by-laws of the company, or its interests, which may be deemed necessary and proper for the management, control, and disposition of such assets and property to the best advantage. (2) Any assets, property, or effects remaining over on the business of the old company, after the payment of the debts, losses, and liabilities above specified, shall belong to and be paid over to the signers of this bond in proportion to the amount of stock that each of them, his or her representatives, may hold in the company as it now exists, and shall be subject exclusively to their control. (3) That the new company, when reorganized, shall loan to the signers of this bond, or appropriate at the request of a majority of them or their representatives, for the purpose of the present company, in such sums and at such times as may be necessary for paying off such liabilities, an amount of money, not to exceed in the aggregate the sum of \$10,000, for the loan of which the new company shall charge only the ordinary rate of interest.

"And that no misunderstanding may hereafter arise as to the meaning, purport, and intention of this bond and agreement, the original report of the committee embodied herein, is taken and made a part hereof.

"M. J. WICKS.

"W. F. TAYLOR.

"NEWTON, FORD & Co.

"JAS. S. WILKINS.

"J. F. FRANK & Co.

"J. F. DOWDY.

"G. V. RAMBANT.

"EDWARDS, PITTIGREW & Co.

"B. BAYLISS.

"GEO. DIXON.

"CHAS. KORTRECHT.

"HENRY CRAFT.

"D. H. TOWNSEND.

"MARTIN WALT.

"WM. RICHARDSON HUNT."

The chancellor adjudged the defendants liable on this bond, and ordered a reference to the master, to ascertain how much they should severally be adjudged to pay of the debts of what is called the old corporation, and which were satisfied by the so-called new company. From such decree the defendants prosecuted an appeal to this court, and the commission of referees' report in favor of the affirmance of the same.

The main ground of the exceptions to that report is to the effect that the bond, which is the basis of this action, was not binding on the defendants. In this connection it is urged—*First*, that such a contract was not binding under the charter of the plaintiff corporation; and, *second*, that no consideration passed to sustain the contract.

By section 10 of the charter it is provided "that, for the better security of policy holders, the said company may add thereto a guaranty or stock capital,

not exceeding two hundred thousand dollars." The corporation appears to be a mutual insurance company, and was thus authorized, in addition to its other resources, to establish by subscriptions a capital stock. It commenced operations in 1867, on a capital, as the record discloses, of about \$66,500. In 1869, it was found the company had lost money, and its credit was impaired, and it was deemed best to reorganize the company, procure additional stock subscriptions, with a guaranty for the payment of the existing debts and liabilities of the corporation by the old stockholders, so as to give entire immunity to the new stockholders from such debts. It is not probable that new subscriptions could have been obtained without such guaranty. Disinterested parties could hardly have been expected to invest their means in an insolvent institution, with almost the certainty of having a considerable part of their contributions swallowed up in the payment of corporate liabilities contracted without their participation. The truth is, the old stockholders were satisfied the corporation was crippled to such an extent as to require the winding up of its affairs, unless they procured the aid of large new stock subscriptions.

In this condition of affairs, the old stockholders resorted to the plan of reorganization set forth in the agreement of July, 1869. That benefits would probably accrue to them from this step cannot be questioned. The corporate assets were thereby put in the hands of the new organization for such prudent administration as would produce, in all probability, largely more than could have been realized therefrom in a forced and speedy liquidation. The old stockholders had then paid only 20 per cent. of their stock subscriptions, and they were liable to creditors for large sums, and consequently interested in realizing as much as possible out of the corporate assets. The corporation was authorized by the charter to fix its capital stock at the amount agreed upon under the arrangement of July, 1869. The assumption of the debts by the old stockholders was prejudicial to no one, unless to themselves, and contravened no public policy. We are of opinion that the arrangement of July, 1869, was not in violation of complainant's charter. The contention that the bond executed by the defendants has no consideration to support, cannot be maintained. We have already shown that it was, when made, expected to be beneficial and advantageous to the defendants, and we deem it unnecessary to discuss this question further.

The defendants insist that their undertaking by the terms of the bond was to the new stockholders, and thereupon contend that the right of action thereon existed exclusively in such stockholders, or, at least, in them and the corporation jointly. This position is erroneous. The intention of the parties to the bond was evidently that the corporation should pay the debts, with the right to reimbursement from the defendants.

Objection is made on behalf of the defendant George R. Phelan, administrator *de bonis non* of W. R. Hunt, deceased, that the cause was not properly revived against him. The bill was filed against William Joyner, as executor of said decedent. The death of William Joyner was suggested on December 23, 1878. *Scire facias* was issued against Phelan on February 6, 1880, and served, and the cause was revived as to him on November 24, 1880. The revival was properly allowed. *Erwin v. Foster*, 6 Lea, 187.

The defense is also made for all the defendants that the bond was not to be effective until it was signed by all of the defendants. This presents a question of fact which both the chancellor and the commission of referees, in their report, decided adversely to the defendants. The evidence in the record satisfies us that this was correct. The bond was executed in 1869, and the evidence on the subject, which came on their behalf from some of the defendants themselves, was taken in 1881, quite 12 years after the execution of the bond, and when they were resisting a recovery by the complainant in this suit. One of these witnesses admits that, during the first year immediately succeeding the reorganization of the corporation, he acted as a director in the com-

panty. It is hardly probable that he would have acted in that capacity without inquiring or being advised as to the adoption or abandonment of the plan on which the new stockholders made their subscriptions. We are satisfied this witness was mistaken in his statement that he was not to be liable unless all the old stockholders signed the bond.

The witness, Dr. D. T. Porter, who as a member of Newton, Ford & Co., was one of the parties to the bond, and testifies against his own interest, gives the most satisfactory explanation of this business. He says: "Learning that the company was then in a bad condition, we tried to sell our stock, and went so far as to offer to give a premium to any one who would take the stock off our hands, and relieve us from liability. Failing in this, it was to our interest to have the company reorganized. * * * The understanding was the bond was to be made a good bond for \$20,000." Further on he says: "The impression made on me was that the assets were worth more than the liabilities, and there would be a surplus for the old stockholders. Under that impression, some were allowed to surrender their stock, and not sign the bond." The whole evidence has made the impression on our minds that some of the signers of the bond expected all the old stockholders to join them as obligors thereon, but that the real inducement for their signatures was the benefit which they believed they would reap from the reorganization. Indeed, we doubt whether the defendants could have availed themselves of this defense if they had established the allegations upon which they based it. They were aware for a number of years of the operations of the corporation under the reorganization which was continued for their benefit, and that, on the faith thereof, many persons had been induced during that time to subscribe and pay for stock. Upon such a state of facts, we think it would be inequitable to uphold this defense.

The decree of the chancellor will be affirmed, and the report of the referees confirmed.

The defendants will pay the costs of this court and of the court below. The cause will be remanded for the execution of the order of reference made by the chancellor in his decree.

JOHNSON and others v. BARNES and others.

(Court of Appeals of Kentucky. April 21, 1887.)

LIMITATION OF ACTIONS—ACCRUAL OF ACTION—IMPLIED PROMISE.

A creditor levied his execution on the interest of his debtor in a tract of land held in trust for him and others. At the sale the creditor bought in the debtor's interest for \$200, and afterwards sold it to plaintiff, who brought a suit for partition. It was decided in that case that the debtor's share, being in trust, could not be sold, and the sale was accordingly set aside. Plaintiff thereupon brought this action against the debtor to recover upon an implied promise to repay the \$200 which had been paid for the land. *Held*, that the right of action did not accrue until the judgment was rendered in the former action setting aside the sale, and therefore this action, having been brought within five years thereafter, the statute of limitations was no bar to it.

Appeal from circuit court, Hardin county.

W. P. D. Bush and Bush & Robertson, for appellants. *Wilson & Hobson*, for appellees.

LEWIS, J. Previous to May, 1860, Elijah Barnes devised to Gideon Barnes in trust for J. B. Barnes, his wife and children, including J. W. Barnes, a tract of land in Hardin county. And J. W. Rogers, having obtained four judgments against J. B. and J. W. Barnes, caused an execution upon each to be issued and levied at that date upon their interests, being two-sevenths of the land; and in July, 1860, a sale thereof was made, when Murray & Reed, attorneys of the plaintiff in the executions, became the purchasers at the sum

of \$200, which, as appears from the sheriff's return, was applied to the satisfaction of two of the executions and in part of another. June 25, 1873, Murray & Reed, in writing, transferred their purchase to Rogers, and requested the sheriff to make to him a deed for two-sevenths of the land so purchased. July 1, 1873, Rogers made a similar transfer to J. T. Dixon, who, July 8th, transferred his right to appellant Johnson, and, January 1, 1874, the sheriff of Hardin executed to the latter a deed conveying the two-sevenths of the land. Appellant instituted this action January 14, 1874, against Gideon Barnes, the trustee, J. B. Barnes and his wife, J. W. Barnes, and the other joint owners of the tract of land, and in his petition he prayed for a judgment dividing it, and allotting to him two-sevenths thereof. But in September, 1874, judgment was rendered sustaining a general demurrer and dismissing the action, which was, however, in 1876 reversed by this court.

Upon the question as to whether the legal title passed by the sale under the executions and the conveyance of the undivided interests in the land by the sheriff, this court in that case was equally divided. But it was decided, without any dissent, "that the respective interests of J. B. and J. W. Barnes in the land are liable to the payment of the debts described in the petition, and that a court of equity may subject the same to the payment of the debts; and, as the parties are all before the court on this petition, and there is a prayer for general relief, the court below should have overruled the demurrer, and permitted the plaintiff to prepare his case for a sale of the land to pay the debts named."

Upon the return of the cause, appellant, August 1, 1879, filed an amended petition alleging that the debts set out in his original petition were due and unpaid; that he had a lien on two-sevenths of the land to secure the payment of his debt, and prayed judgment for a sale thereof to satisfy it. To that amended petition a demurrer was filed, which was overruled; but the court, February 12, 1880, sustained a motion to dismiss the action, and rendered judgment accordingly. An appeal being taken to the superior court, that judgment was, May 16, 1883, reversed, and the cause again remanded to the lower court. Upon the return of the case, appellant filed another amended petition, the administrator of J. W. Rogers, deceased, and J. T. Dixon being made parties plaintiff, in which it was alleged that Gideon Barnes, the trustee, had died, and no other person had been appointed in his place, and again prayed judgment for his debt, and a sale of two-sevenths of the land to satisfy it.

The defenses to the action, then for the first time made, are the statute of limitations of five and fifteen years, and that appellant abandoned this action and brought another in the same court for the same cause. And this action, being again submitted, was the third time dismissed by the lower court. From that judgment a second appeal was taken to the superior court, and, being reversed, the action is again before this court. Since the decision by this court in 1876 it has been held that in such cases the interests of the *cestui qui trust* in land is subject to sale under execution for the payment of his debts. But the judgment of the lower court having on that question been affirmed by this court, though by a divided court, such must be now considered the law of this case, and, as in effect then determined, the right of action by appellant is limited to his recovery of his debt and interest.

There appears to be some question made by counsel as to what debts were referred to in that opinion. What appellant acquired from Dixon, and he from Rogers, was the benefit of the purchase of the interests of two-sevenths of the land made for the latter by his attorneys, and the right to demand a deed therefor from the sheriff. He did not by the terms of his contract purchase any portion of the judgments of Rogers against J. B. and J. W. Barnes that remained unsatisfied after the sale of the land, nor could he acquire any interest in the other portion which had been satisfied and extinguished by that

sale. "The debts," therefore, referred to in the opinion of this court delivered in 1876, was the implied promise of the defendants in the execution to repay the \$200 bid for the land, and credited by the sheriff in the executions. And, that being so, the five-years statute of limitations must be held to apply.

The question then arises, when did appellant's cause of action for the recovery of his debt and the enforcement of his equitable lien upon the interests in the land of J. B. and J. W. Barnes accrue? The action for a division of the land was commenced within 15 years from the date of the execution sale in 1860, and, until that sale and the sheriff's deed were set aside by judgment of court, that was the only cause of action he had arising from the transfer to him of the benefit of Rogers' purchase. Though the sale was ultimately adjudged invalid, still J. B. and J. W. Barnes had the right to insist upon it; and, if an action had been brought in the first instance to recover back from them the \$200, they could have pleaded the execution sale and the return of the sheriff in bar of recovery. They had the election to abide by the sheriff's sale, or repudiate it. But appellant had no right to sue for the recovery of the purchase price while the execution sale and sheriff's deed were outstanding. In our opinion, therefore, appellant's right to sue for the \$200 and enforcement of his lien did not accrue until the judgment was rendered in this action setting aside the sheriff's sale and deed. And as he by amended petition prayed for that relief within five years thereafter, the plea of limitation cannot avail appellees.

It appears that after the judgment of the lower court dismissing the action was rendered, February 12, 1880, appellant instituted another action, seeking a division of the land, and, in case that could not be had, judgment for his debt, and a sale of the interests of J. B. and J. W. Barnes to satisfy it. But that action was dismissed on motion of appellant himself; and thereafter and in due time he prosecuted the appeal to the superior court from the judgment of February 12, 1880. We do not think the institution of that action can be considered such an abandonment of the original action as will make the plea of limitation available. Appellant had two years in which to prosecute his appeal, and never lost that right; and his original action was never at any time abandoned, suspended, or any rights acquired by it lost, or at all affected, by the institution of the other action. Wherefore the judgment is reversed, and cause remanded for further proceedings consistent with this opinion.

REYNOLDS v. WILLIAMS.

(Court of Appeals of Kentucky. May 3, 1887.)

1. HOMESTEAD—EXECUTION—PURCHASE MONEY.

Under Gen. St. Ky. c. 38, art. 13, § 9, the debtor has no right of homestead in land as against the vendor's claim for the purchase money; and, although the vendor upon the sale of the land waives his lien for the purchase money, he can, in a suit on the purchase-money note, levy his execution on the land.

2. SAME.

Under section 16, which provides that the homestead exemption shall not apply as against a debt or liability existing at the time of the purchase of the land, the vendor's claim for the purchase money is to be considered as existing prior to the accrual of the homestead right.

Appeal from circuit court, Logan county.

Browder & Edwards, for appellant. *S. A. Bass*, for appellee.

PRYOR, C. J. The appellant sold and conveyed to the appellee a certain tract of land, and took the notes of the latter for the purchase money. One of the notes, for \$185, due on the first of January, 1882, was executed by the vendee, Williams, to the appellant, with John R. May as surety, and is the subject of controversy in this action. An action ordinary was instituted upon

this note, and judgment obtained, upon which an execution was issued and levied on the land conveyed. The appellee claiming a homestead in the land, the sheriff refused to sell, and this action was brought in equity that the claim as to the homestead might be determined. No objection was made to the proceeding in the court below, and the only question raised is as to the right of homestead against the execution. The court below held that the appellee held the land as against the debt. That judgment was based on a clause contained in the deed with reference to this note to the effect that "*said note is not binding on the land.*"

It is evident that, as to this particular note, the lien on the land conveyed had been expressly waived, and we suppose for the reason that May had signed the note as the surety of Williams, the vendee, or had become jointly bound with him. The fact, however, that the lien had been waived, or that no lien had been retained, gave to the appellee no right to a homestead as against the purchase-money note for two reasons: *First.* The statute exempting a homestead expressly provides that the exemption does not exist as against the claim for the purchase money, and here it is admitted that the note was executed for the land to which the right of homestead is being asserted. It is not necessary that a lien shall be retained to entitle the vendor to subject the land, as against the claim of homestead. If the debt is for the purchase money, whether a lien is retained or not, the land may be sold under an ordinary execution, regardless of the homestead right, as such a right cannot prevail against the purchase-money note. In *Bradley v. Curtis*, 79 Ky. 327, it was said: "As long as the purchase money can be traced, no matter how often the evidence of the debt may be changed, the lien therefor cannot be defeated by a claim to a homestead." *Second.* The debt existed in fact before the appellee acquired a homestead. In *Purcell v. Dittman*, 81 Ky. 148, where the debt was contracted simultaneous with the purchase, the debt was treated as existing prior to the creation of the homestead right.

The judgment below is reversed, and the case remanded for proceedings consistent with this opinion.

MINOR v. GUTHRIE.

(Court of Appeals of Kentucky. May 3, 1887.)

1. WILLS—REVOCATION—PRESUMPTION.

The general rule is that if a will be traced to the hands of the testator, and cannot afterwards be found, it is to be presumed that it was destroyed by him *animo revocandi*.

2. EVIDENCE—SECONDARY—PROOF OF LOSS—WILL.

In a will contest, where the destruction of the will last executed has not been proved, nor its absence explained, evidence relative to its character and contents is not primary, but secondary, and inadmissible for the purpose of showing a revocation of a writing previously executed, and set up as the last will.

Appeal from circuit court, Marion county.

Thompson & McChord, for appellant. *Sam'l Arritt*, for appellee.

HOLT, J. The paper in contest was duly executed by Josephine F. Guthrie as her will on June 12, 1875. The appellant, Marion F. Minor, who is a grandchild of the deceased, contested its probate in the county court, but it was admitted to record; and this judgment was, upon appeal, affirmed by the circuit judge, who tried both the law and the facts of the case, and it is now here for consideration. The sole ground of contest is that the testator revoked the will by another one executed either in 1878 or 1879.

It appears by the testimony, which is brief, that at the time last named she executed another writing as her will, and which was left by her with the draughtsman. He proves its contents, and due execution as a will, and says that the last he knew of the paper the testatrix sent her son-in-law, as the lat-

ter said, and with whom she was then residing, for it, and that he gave it to him. The propounder of the paper in contest objected to all this testimony, and its competency is now in question. The loss of the writing last executed is in no way shown, or its absence explained. Indeed, no effort is made in this direction. This is perhaps attributable to the fact that, while the contestant receives but a trifling bequest under the will in contest, yet she was entirely cut off, as the oral testimony shows, by the latter paper.

The general rule is that if a will be traced to the hands of the maker, and cannot afterwards be found, it is to be presumed that it was destroyed by him *animus revocandi*. 1 Jarm. Wills, 119. The testimony does not, however, show clearly that the writing last executed came to the hands of the testatrix; but if it did, and the presumption therefrom arose that she destroyed it with the intention of revoking it, yet it, as the oral testimony shows, revoked all former wills, and its presumed destruction would not operate to revive the paper in contest. 1 Jarm. Wills, p. 125, note 1. This is also the statutory rule in this state. Gen. St. c. 118, § 11.

The evidence, however, was not competent or sufficient to establish a revocation of the paper in contest as a will. As already mentioned, the destruction of the paper last executed was not shown, nor its absence explained. Hence the testimony relative to its character and contents was not primary, but merely secondary, and was inadmissible for the purpose of showing a revocation of the writing in contest as a will. If the loss of the writing last executed had been proven, or the inability of the party to produce it been shown, then the secondary evidence would of course have been competent. The best evidence within the power of a party must, however, be produced; and the character or contents of a writing cannot be shown by oral testimony, unless the party shows that he cannot produce the writing, which is the best evidence of its character and contents. *Mercer's Adm'r v. Mackin*, 14 Bush, 484. This rule is especially applicable to, and should be strictly enforced in, the case of wills, as otherwise a wide door would be opened for fraud and perjury, although there is no ground to impute it to any witness in this particular case. The maker of the writing is dead, and cannot speak in the matter; and to allow the probate of a will to be thus defeated, would be likely to lead to much evil. Its probate has been carefully guarded by statute, because of the temptation to make or destroy wills for persons after their death.

The judgment of the lower court conformed to this view, and is affirmed.

LOFTIN v. STROW and others.

(Court of Appeals of Kentucky. April 14, 1887.)

1. MORTGAGE—FORECLOSURE—REINSTATEMENT OF ACTION.

A mortgagee, having instituted a foreclosure suit, obtained an order for the sale of the land, which he bought in himself, and took the commissioner's deed therefor. Four years afterwards the mortgagee filed an amended petition setting out that one L. was in possession of the land, claiming under a deed from the mortgagor made before the commissioner's sale, and that other parties were claiming liens on the land under the mortgagor. The mortgagee asked that the case be reinstated on the docket. *Held*, that the case ought to be reinstated, although it would have been more regular to have brought a new action.

2. SAME—EQUITY—JURISDICTION—CONFLICTING LIENS.

Held, also, that the amendment was not to be taken as being in effect an action of ejectment to recover the possession of the land, which would have been cognizable at law only, but as a proceeding to settle the rights under the conflicting liens, which was cognizable in equity.

Appeal from circuit court, Marshall county.

One Jones having mortgaged a tract of land to appellee T. I. Strow, the latter brought suit against Jones to foreclose the mortgage, and obtained an

order for the sale of the land, which he bought in himself, and received the commissioner's deed therefor. The case, being thus disposed of, was allowed to drop from the docket, but four years afterwards Strow made a motion to have it reinstated, and filed an amended petition stating that he had learned that Jones, after mortgaging the land to him, had sold it to appellant, J. K. Loftin, and had assigned the notes executed by Loftin for the purchase money to John K. Lindsey and wife, and that Loftin was in possession of the land. He accordingly made Loftin and the Lindseys defendants. Loftin opposed the motion to reinstate, on the ground (1) that too great a time had elapsed since the case had been dropped from the docket to entitle Strow to reinstate it; (2) that the cause of action, so far as it affected him, was an action of ejectment, and properly cognizable at law only; (3) that there was a misjoinder of parties, as he (Loftin) was not connected in any way with the Lindseys. But the motion to reinstate was granted, and upon the hearing the court ordered a resale of the property to satisfy Strow's mortgage. Loftin appeals.

J. M. Bigger and *J. W. Dicus*, for appellant. *Gilbert & Reed*, for appellees.

LEWIS, J. As appellant, Loftin, acquired possession of the land in controversy in virtue of his purchase from G. S. Jones, he is not in an attitude to enable him to deny the title; for the evidence does not satisfactorily show he ever renounced his claim under the deed from Jones to him; and, if he did, his adverse claim and possession has not been long enough to give him title to the land independent of the deed under which he entered. Under section 692, Civil Code, it was the duty of appellees to state in their petition the lien on the land held by Lindsey and wife, and also to make appellant Loftin, as well as them, parties to the action. But they allege in their amended petition that they did not do so because they had no knowledge of the purchase of the land by appellant, nor of the existence of the notes given by him to G. S. Jones, and assigned to Lindsey and wife. Though the proceedings in the original action, which resulted in the judgment in favor of appellees, for the sale of this land, the purchase by them, and order for a writ of possession, were regular and legal, yet, as appellant was no party to the action at the time, he was not affected or prejudiced thereby, and could not be deprived of the possession of the land under the writ ordered to be issued. For the same reason the lien of Lindsey and wife was not nor could be affected by any proceedings had in that action prior to the filing of the amended petition in 1884, when they and appellant were first made parties. But the lien of appellees on the land, as appears by this record, is superior to that of Lindsey and wife, and the subsequent purchase by appellant, Loftin, gives him no valid claim whatever until the debt of appellees is satisfied.

The only real question, then, presented by this appeal, is whether the proceeding under which Lindsey and wife and appellant, Loftin, were made parties to the original action, and brought before the court, is such as is authorized by the Civil Code. G. S. Jones, being a non-resident, has never been before the court by actual service of summons. But, if he had been, he could not have successfully resisted the original judgment by which he is bound, nor has he been prejudiced by reinstating the action on the docket, and therefore has no right to complain. While it would have, perhaps, been more regular for appellees to bring a new action, still, as appellant and Lindsey and wife were duly summoned, and every opportunity given to them to controvert the allegations made in the amended petitions, and to set up whatever lien the former had, or right or claim the latter held, we do not perceive how they, or either of them, have been prejudiced. Much less do we see how appellant was prejudiced by the judgment directing a resale of the land, for, whereas appellees had, under the former judgment, acquired title to the land, under the one appealed from the land is directed to be resold, appellees consenting

thereto, whereby appellant might properly get the benefit of the surplus after paying appellees' debt. We think, in view of the existence of the liens of Lindsey and wife, which, though subordinate to that of appellees, they still had the right to assert, and of the claim of appellant under his purchase, the action was cognizable by a court of equity. But, even if it had not been, appellant, having failed to move to transfer it to the ordinary docket, cannot now complain. Judgment affirmed.

CLUTTER and others v. CLUTTER.

(Court of Appeals of Kentucky. April 21, 1887.)

FRAUD—MISREPRESENTATIONS—RELATIONSHIP.

In an action to set aside a deed, on the ground of misrepresentation and fraud, the evidence showed that the plaintiff's father had purchased the land at a tax sale, and had disposed of the entire tract by will. The defendant represented to plaintiff that the land had been bought by his father in trust for himself and four others, of whom defendant was one, and that plaintiff was only entitled to one-fifth interest in the land. He procured the deed to the land within a few days after the plaintiff came of age, for a consideration of \$400, the lands being worth \$2,000 or \$2,500. It appeared that neither the defendant nor any of the other alleged beneficiaries had attempted to prove the trust during the father's life-time, and had, after his death, acquiesced in his title. The defendant was plaintiff's uncle, and had stood *in loco parentis* to the plaintiff for many years. Held that, in view of the relationship of the parties, the deed should be set aside.¹

Appeal from chancery court, Campbell county.

John S. Ducker, for appellant. *Ratliffe & Ahlering* and *J. C. Wright*, for appellee.

HOLT, J. J. W. C. Clutter died in 1854, the owner, among other real estate, of a lot in the city of Newport. It was sold on September 25, 1858, under a decree in a suit brought against his heirs by the executors of one Southgate, and purchased by George W. Clutter, who was a son and heir, and also the administrator, of J. W. C. Clutter, at the price of \$843.01. It is contended by the parties to this controversy, upon the one side, that he purchased it for himself, and upon the other, that he did so for the benefit of the estate he represented. The purchase was, however, in his individual name, and it was so conveyed to him by the commissioner. A short time before his death, in 1868, he willed it to his wife and his son, the appellee, W. H. Clutter. She died the following year, and in 1878 a suit was brought by the city of Newport against the appellee, W. H. Clutter, and his guardian, he being then an infant, to sell the lot for taxes due upon it; and on March 10, 1879, it was so sold for \$563.67, and purchased by the appellant, J. M. Clutter, one of the five heirs of J. W. C. Clutter. In this proceeding it was by mistake described as lot No. 44, when it was in fact No. 64. The judgment so named it, and by this mistaken number it was conveyed by the commissioner to the appellant, who, upon discovering the error, brought a suit on August 16, 1880, against the appellee, W. H. Clutter, to correct it and perfect his title. This

¹ The principle that, whenever the relations between parties are such that the donor or grantor appears to be subject to the control or influence of the donee or grantee, the burden is on the latter to show that the transaction was fair and honest, and was not procured by undue influence, applies especially to transactions between parents and children, when the child has recently come of age, or while it is under the constant and immediate influence of the parent, *Ashton v. Thompson*, (Minn.) 18 N. W. Rep. 918; *Noble's Adm'r v. Moses*, (Ala.) 1 South. Rep. 217; and to those between guardian and ward under like circumstances, *Carter v. Tice*, (Ill.) 11 N. E. Rep. 529; *Ashton v. Thompson*, *supra*; *Kraft's Guardian v. Koenig*, (Ky.) 88 W. Rep. 803; and generally, to all dealings between persons, one of whom stands *in loco parentis* to the other, *Davis v. Dean*, (Wis.) 28 N. W. Rep. 737.

As to undue influence, generally, see *Morton's Adm'r v. Morton*, (N. J.) 8 Atl. Rep. 807; *June v. Willis*, 30 Fed. Rep. 11, and note.

relief was, however, not granted; but a judgment rendered, giving the appellant a lien upon the lot for what he had paid for it under the sale for taxes, and interest upon this sum. Matters thus stood, when the appellee, on March 2, 1882, became of age; and two days thereafter he, for \$400, conveyed the lot to the appellant, who subsequently exchanged it with one Dye for other real estate lying in the same county.

On February 14, 1884, the appellee brought this action, claiming that the deed was procured from him by fraud and misrepresentation, and asking that the appellant be adjudged to hold its value, at the time of the conveyance and the rents received, in trust for him, with a lien on the Dye land to recover the payment of said value. The court below held that the appellee was entitled to recover; allowed \$3,500 as the value of the land, \$1,185.65 for rents, —amounting to \$4,685.65; deducted therefrom \$1,200 for improvements; \$684.86, being the amount of the appellant's judgment, based on his purchase at the sale for taxes; \$440.60, money paid appellee for the deed and interest thereon; \$325.19 for taxes paid by the appellant; and rendered judgment for the balance, to-wit, \$2,085.

The appellant not only complains of the account thus taken, but says that no judgment whatever should have been rendered against him. The appellee says that before and when he executed the deed to the appellant, the latter represented to him that he in fact and justly was the owner of but one-fifth of the lot, and that the court had fixed its value at \$2,000; that he relied upon this representation by his uncle, and therefore conveyed to him in consideration of \$400, when in truth the latter knew that the appellee was the sole owner of it. The appellant, in response to this, admits that he made such representation, save as to the court fixing the value of the lot, and says that it was true, because the father of the appellee had, as administrator of J. W. C. Clutter, and for the estate, bought the land and paid for it with its means. The truth of this is important, as bearing upon the question of adequacy of consideration. Upon the one side there is evidence to the effect that George W. Clutter said that he had bought the property for the estate; and there is testimony tending to show that he had in his hands as administrator ample means to pay for it. Upon the other hand, the report of the commissioner shows that he purchased it as an individual. It was so conveyed to him. He occupied it from the time of his purchase until his death, in 1868; and, in the last year of his life, willed it, with the knowledge and acquiescence of the heirs of J. W. C. Clutter, save J. M. Clutter, to his wife and the appellee, William H. Clutter. The appellant, J. M. Clutter, became of age a few days after the death of George W. Clutter, and was then informed of the devise, but yet never objected to it, or set up any claim to the property or any interest in it, until he purchased it at the tax sale in 1879.

During this period of 16 years the property was held and occupied by the widow of George W. Clutter until her death, and then by the guardian of the appellee. The decree under which the appellant purchased in the tax suit was against the appellee as the owner of the property. The suit brought by the former to correct his commissioner's deed was against the appellee, and it was not suggested in it that there were any equities against the title of the appellee, save the tax claim and the value of the improvements made by the appellant after he obtained possession in 1879. Indeed, the appellant testifies that he bought the property at the tax sale as that of W. H. Clutter, and that he thought no one else had any interest in it. This statement is somewhat singular when we consider his claim in the light in which he is asserting it. The appraisement and inventory of the personal estate of J. W. C. Clutter amounted to only \$391.55; and it is shown that a considerable portion of this was paid out by the administrator for burial expenses and otherwise.

It is said that the title to the lot was made to George W. Clutter individually for fear that it would be seized for other debts of J. W. C. Clutter; but

we are at a loss to see why this should have been so, because the estate appears to have been solvent, and the decedent the owner of considerable other real estate. Indeed, as a controlling circumstance in the case, it appears that in 1867 all of the heirs were of age, save the appellee; and they then brought an action, to which he was made a defendant, for, and procured a division of, the real estate of J. W. C. Clutter, and the lot which had been purchased by George W. Clutter was not named in it. Whether it was purchased for the estate or by George W. Clutter for himself was, however, a question of fact for the lower court; and it is enough for us to say that there is sufficient testimony to support the conclusion that the latter is true.

This being so, it follows that the consideration of \$400 was greatly inadequate. The testimony shows that when the appellant purchased it in 1879 it was worth from \$2,000 to \$2,500; and when sold to Dye it was worth \$3,500 to \$4,000, as the appellant had improved it. Suspicion is, therefore, cast upon the deed of March 4, 1882, by the inadequacy of price. It appears, however, that the appellant was the uncle of the appellee, who was an orphan. He had lived with his uncle from the time he was nine years old, and was yet living with him at the time of the transaction in question. Perhaps, and it is likely true, during this time the uncle had been kind to him in the way of supporting and educating him; but if such be the fact, it cannot control the question now presented.

The matter appears to have been hurried. The deed was made two days after the appellee became of age; and by the appellant's own testimony, and accepting his version as to the ownership of the property, it does not appear that he informed the appellee that he (the appellant) owned but one-fifth of it, and had by virtue of his tax purchase only a lien upon the lot for what he had paid for it. Upon the contrary, and when the appellee had at least the legal title to it, he told him that he (the appellee) owned in fact but one-fifth of it, and in this way obtained from him his legal title to the whole of it. He should have informed the appellee that he (the appellant) was entitled to but one-fifth of it. He says that he obtained the deed to avoid the expense of a further prosecution of his suit to correct his commissioner's deed, made to him in the tax suit. But it had already gone to judgment, and any further expense in it would have been inconsiderable.

The guardian of the appellee had died two years before he became of age. He was living with and under the care and control of his uncle. He was to him *in loco parentis*; and such a relation of trust and confidence existed as forbids a sanction of a transaction brought about by the appellant, and which is unfair and unconscientious as to the appellee. It is urged that the latter knew he had the legal title to the property; and, even if he had not known it, the means of ascertaining it was at hand, and if he had exercised the ordinary care which a prudent man should, he could have informed himself. It is true that ordinarily one cannot be heard to say that he acted upon the representation of another which he knew to be untrue, or the truth or falsity of which he could have known by the exercise of ordinary care, and as to which he could easily have informed himself, but neglected to do so. But this rule does not apply in a case like this. Such a relation existed between the parties that the creation of trust and confidence upon the part of the appellee in the representations of the appellant naturally followed. He had the right to rely on them without investigation and inquiry. It is true that fraud must be proven. It may, however, be gathered from circumstances. In this instance, the relations between the parties was such that the *onus* was upon the appellant to show the entire fairness of the transaction. This we think he has failed to do. Upon the contrary, it was an unconscionable bargain, which, if not brought about by the misrepresentation of the appellant as to the interest of the appellee in the property, was induced by the suppression of the truth by the appellant as to his own interest in it. Undue advantage was brought into play

by the one naturally controlling and influencing the other, and equity will not permit the retention of a benefit thus obtained.

The account between the parties was correctly made up. The evidence supports the value of the improvements as allowed, and the worth of the land as fixed by the lower court. The appellant admits in his answer that he had received "about \$1,200 in rents;" and he is not charged with this much. Besides, the evidence sustains the sum allowed.

The findings of the chancellor were upon questions of fact and legal issues, and, in our opinion, the results arrived at are supported by the evidence.

Judgment affirmed.

LINGENFELTER v. LOUISVILLE & N. R. Co.

(Court of Appeals of Kentucky. May 5, 1887.)

1. NONSUIT—CONFLICTING EVIDENCE.

Where an issue of fact is to be determined by a jury, and the evidence is conflicting, or conduces to make out plaintiff's cause of action, it is improper to direct a nonsuit.

2. NEGLIGENCE—PUNITIVE DAMAGES—WILLFUL NEGLIGENCE—EVIDENCE.

In an action against a railroad company to recover for its willful negligence causing the death of plaintiff's intestate, the evidence showed that the deceased was a watchman in the company's employ; that his duty was to look after the cars in the station yard; that the accident happened at night, when an engine was moving south at a speed but little faster than one walking, and deceased was walking north on the track towards the engine; that the engine bell was ringing, and its head-light burning; that the deceased must have seen the engine, and have known that it would run over him if he did not leave the track; that the engineer did not see deceased, though he might have done so had he been on the lookout, as deceased was carrying a lighted lantern at the time. *Held*, that the evidence was not sufficient to charge the railroad with willful negligence in causing the death of the deceased, and thereby make it liable, under the statute, to his widow, for punitive damages.

Appeal from court of common pleas, Jefferson county.

This is an action by a widow to recover from a railroad company punitive damages for the death of her husband, which she alleges was caused by the willful neglect of the railroad company. The action is brought under Gen. St. c. 57, § 3, which provides that if the life of any person is lost or destroyed by the willful neglect of another person or corporation, their agents or servants, then the widow, heir, or personal representative of the deceased shall have the right to sue and recover punitive damages of such person or corporation. Nonsuit. Judgment for defendant. Plaintiff appeals.

Young & Trabue, J. T. O'Neal, and S. F. J. Trabue, Jr., for appellant. Wm. Lindsay, for appellee.

PRYOR, C. J. The rule contended for by counsel for the appellant is undoubtedly correct. Where the issue of fact is to be determined by a jury, and the evidence is conflicting, or conduces to make out the plaintiff's cause of action, the trial judge should not direct a nonsuit. In this case the widow of the intestate alleged that the death of her husband, who was in the service of the company, was caused by the willful neglect of the employees of the company in charge of the train. The deceased had been in the employ of the company as watchman in its yard for a number of years, and at the time of his death was in a like character of employment, or required to see that the cars in the yard were in proper order, and, if not, to report their condition. The accident happened at night, when the engine was on a side track, moving south at a pace but little faster than one walking. The deceased, when killed, had his lantern, and was walking north, meeting the engine, on the same track, as it moved south. The engine moved at the rate of five miles an hour, with a bright head-light in front. The deceased seems to have

been a careful, prudent man generally; but in the present instance his death was caused by his own neglect, and not that of the employes of the railroad company.

Within the yard was a space between the tracks where the employes were in the habit of walking, but at the time the accident happened there was mud and water in this space, that no doubt caused the unfortunate man to go on the track. It seems, however, that it was not unusual for those in the employ of the company to use the tracks in the yard in passing; but it is argued that, if those in charge of the train had been looking out, they could have seen the unfortunate man, and avoided the danger. The bell rang as the engine moved, and with a bright head-light in front, and a lantern in the hand of the deceased at the time, there is but little doubt but that he could have been seen by those in charge of the engine. The fireman in fact saw the deceased the moment before he was struck, and cried out to stop the engine. It was then within a few feet of the deceased, and, although stopped, it was too late to save his life. It is evident, we think, that the engineer did not see the deceased, and equally apparant that he could have seen him if he had been looking down the track.

The deceased was certainly experienced with reference to the movement of the cars, and the danger in standing upon the track when the engine was moving towards him. There was no reason why the deceased did not see the danger as the engine approached. It was approaching slowly, not exceeding five miles an hour, and all he had to do was to step from the track. If the engineer had seen him when 50 yards off, and had known it was the night watchman, he had the right to believe that he would step aside and avoid danger. In fact, the engineer, if he had been watching, would doubtless have concluded there was no danger, as the employe would certainly leave the track, while the deceased must have known that the moving train would pass over him if he remained on the track. The company is charged with being guilty of willful neglect, that is, an entire indifference to the safety of those in its employ, when we think it is plain from the proof that the reckless indifference to personal safety was with the intestate, who with slight effort might have avoided all danger. If the engineer recognized the danger the man was in, he should, if in his power, have avoided injuring him, but this record presents no such case.

A nonsuit was properly ordered. Judgment affirmed.

HICKMAN'S ADM'R v. HICKMAN'S HEIRS.

(Court of Appeals of Kentucky. May 3, 1887.)

WILL—DEVISE—CONSTRUCTION—SUPPORT OF WIDOW—SALE OF REALTY.

A testator devised his land to his widow for life, remainder to a crippled daughter for her support, and at her death to his heirs. The income from the land proving insufficient for the support of the widow, her trustee incurred debts for her support. The crippled daughter being dead, suit was brought against the heirs to subject the land to the payment of these debts. *Held*, that the land could not be subjected, although the claims were confessedly meritorious.

Appeal from circuit court, Spencer county.

This was an action brought by G. H. Stone, as administrator of the will of G. T. Hickman, against the heirs of said Hickman. By his will, Hickman devised his real estate to his widow for life, with remainder to his daughter Emily, and after her death to his heirs. Stone was appointed trustee for the widow; and, the income of the real estate and proceeds of the sale of the personally proving insufficient to support her, he incurred debts for that purpose, and he now brings this suit against the heirs (the daughter Emily having previously died) to sell the land, and pay off these debts. Judgment for the heirs. Stone appeals.

Thos. J. Barker and G. G. Gilbert, for appellant. A. P. Harcourt, for appellees.

PRYOR, C. J. The will of the testator was properly construed by the court below, and no sale of the realty can be made for the payment of the debts due by the widow, or contracted by the appellant, as her trustee, for her support. If the testator had known that his crippled daughter would die before her mother, the provisions of the will might have been different; and, although the draughtsman of the instrument failed to express the meaning of the testator, still the chancellor is powerless to cure the defect when there is no ambiguity in the language used, or as to the meaning of the testator, as appears from the instrument itself. The testator uses this language: "I give and bequeath to my wife, Elizabeth, all of my real and personal property during her life, after the payment of debts. At the death of my wife, I give to my daughter, Emily, all of the landed estate to support her during life, and at her death I will that the remaining landed estate, if there be any, be equally divided among the heirs."

The daughter dying before her mother, left the mother entitled to a life-estate only, and at her death the land passed to the heirs or other children, free from any incumbrance the widow or her trustee might have created upon it. The land might have been sold, if necessary, for the support of the daughter, but not so as to the testator's widow; and, however meritorious the acts of the trustee may have been in providing for the widow beyond her income, he can look alone to the generosity of those holding the remainder for payment. Their moral obligation to indemnify the trustee cannot be enforced in a court of equity. Judgment affirmed.

HENDERSON v. CITY OF LOUISVILLE.

(Court of Appeals of Kentucky. April 16, 1887.)

CONTRACT—ACTION ON—AMOUNT OF RECOVERY—EVIDENCE.

A contractor was employed by a city to supply material and labor in making a railroad embankment, for which he was to be paid, not for the job, but for the contents of the embankment, at a certain rate per cubic yard. In an action by the contractor against the city to recover on the contract, he showed the quantity of dirt hauled and placed on the embankment, but the city claimed that much of the dirt slid off and was of no use. Held, that as this was matter of defense, and as the city engineer was present superintending the work, the city was bound to prove by reliable estimates how much dirt was lost in this way; otherwise the contractor was entitled to recover the full amount hauled.

Appeal from Louisville chancery court.

This action was brought by appellant, Sallie Y. Henderson, widow of Isham Henderson, deceased, to recover from appellee, the city of Louisville, the amount due said Henderson, deceased, for labor and material supplied in making a railroad embankment under a contract with the city to pay him at a certain price per cubic yard for such material. Petition dismissed, and plaintiff appeals.

Brown & Davis, for appellant. I. L. Burnett, for appellee.

PRYOR, C. J. This case is here on a second appeal, and this court invited to convert itself into a tribunal of original jurisdiction, with a view of giving to the appellant the damages she is entitled to recover. It has been already adjudged that the appellant was entitled to recover upon the testimony then in the record; but, as the question presented was purely one of fact, the right of recovery depending upon the construction of the contract, this court could do nothing more than to remand the case, that the court below might award the damages as the facts authorized. It necessarily follows, from the case as

now presented, that a recovery must be had, as the construction of the contract by this court upon the former appeal determined that question.

The original estimates between the city and the contractors, with reference to the fill or embankment, fixed the price, and also the size, depth, and dimensions of the work, as was then supposed would be required for the purposes contemplated, but the estimates could not be accurately made, and were only intended as a guide to the character and probable dimensions of the embankment about which the parties were contracting. Therefore it was provided, under the head of "General Specifications," "that the quantities of gradation exhibited to the contractor at the letting, are, from the necessity of the case, merely approximate. They only furnish general information, and in no way govern or affect the final estimate of the work, which will be made out upon its completion from exact measurement and established facts, not now in the possession of any one, nor possible to be obtained at this time of drawing up the specifications." No estimate could then be well made, except the price per cubic foot, etc. The embankment being constructed in the bed of Beargrass creek, the depth the contractors had to go in order to reach hardpan was much greater than contemplated by the mere theoretical estimates; and the deeper the contractors had to go the wider it made the base of the fill, the weight of the dirt pressing the soft mud out at the sides, and finding its way to the hard bottom. This was all determined when the case was before considered; but, the chancellor holding that the original dimensions and estimates governed, this court reversed the judgment, and said that the estimates should be made by ascertaining the quantity of dirt in the embankment. There was evidence showing that some of the dirt hauled slid out with the soft mud that was at the bottom of the creek, and formed no part of the embankment proper. As to that, this court held the contractors must lose, and not the city. The chancellor says that he is unable to determine how much of this dirt slid off, or how much was placed and remained in the embankment proper, and the engineers both for the city and the appellant are not disposed to make any statement about it that approximates accuracy. So the appellant has done the work, and is entitled to the money due by her contract, if there can be devised some means of her getting it. We think a slight effort will solve the problem.

When the case was here, it was said that inaccuracy in the measurement would result if the amount of dirt taken from the borrow-pits formed the basis of the estimate; and this we still think will be the result if there can be no estimate made as to the amount that passed off from the fill with the mud that was pressed out by the borrowed dirt. The contractors have shown how much dirt they hauled and placed in the embankment when constructing it, and it is claimed by the city that much of it was lost in the manner suggested. Now, this comes as a matter of defense; and, with the city engineer present and superintending the work, if he can form no estimate, the city ought to lose it, and not the contractor. If quantities of the material slid away, the superintending engineer must have some idea as to the quantity, as well as the quantity of dirt in the embankment proper. The case is left open for that purpose. If no other proof is taken or can be had that is more accurate, then the estimate of the borrowed dirt should be the criterion. When the case returns, the city may take proof on the subject; if none is taken, then the dirt taken from the borrow-pits must govern.

Counsel for the city insist that the judgment of the chancellor should be regarded as the verdict of a properly instructed jury, and therefore his judgment is final. Such a question might be raised if the chancellor had not adjudged that the appellant has elected to recover, and asks this court to pass on the facts. We cannot determine the extent of the recovery. The proof is before the chancellor, and he must determine the amount to which the plaintiff is entitled, and we would suggest, if he can arrive at no rational estimate,

that an issue out of chancery, directing the jury to determine the sole question as "*to how much dirt formed the embankment proper*," would enable the chancellor to determine this controversy, as the price is fixed by the contract.

Judgment reversed, and remanded for proceedings consistent with this opinion.

CHAPMAN v. HEADLEY'S EX'X.

(Court of Appeals of Kentucky. April 16, 1887.)

EXECUTORS AND ADMINISTRATORS—FOREIGN ADMINISTRATION—TITLE TO REALTY.

A personal representative, invested, by the provisions of his testator's will, with title to land in Kentucky, may maintain ejectment to recover such lands, although he may have been appointed in another state; it appearing in evidence that the will of the testator was admitted to probate in that state in the county of his residence, and there proved so as to pass the title to land in accordance with the laws of Kentucky.

Appeal from circuit court, Lawrence county.

This action was brought by appellee, F. J. Headley, as the executrix, appointed in another state, of the will of Samuel F. Headley, deceased. The object of the action was to recover of appellant, John R. Chapman, a tract of land which appellee alleged belonged to her testator. Chapman claimed that the land had been purchased by his mother with funds belonging to his father's estate, and that, therefore, a trust on the land resulted in his favor, and she should have held it for him, and had no right to dispose of it to the person from whom appellee's testator had bought it. Judgment for appellee. Chapman appeals.

Alexander Lockey, for appellant. *James McAuliffe*, for appellee.

PRYOR, C. J. We perceive no reason for disturbing the judgment of the court below. The appellee, who is the executrix of the last will of Headley, was invested, by the provisions of that instrument, with the title to his land both in and out of this state, was the proper party to institute the ejectment for the recovery of the land in controversy. It is alleged, and not denied, that the will of the testator was admitted to probate in the county and state of his residence, and proven so as to pass the title to real estate in accordance with the law of this state; and, being invested with the title under it, there is no obstacle to the recovery, unless the trust was established with notice of the character of the holding by Mrs. Chapman at the time she parted with the title.

It is attempted to be shown that the land which is the subject of this controversy was purchased by Mrs. Chapman with the proceeds of the estate belonging to her husband, David Chapman, and that she held it in trust for her children. There is some evidence showing that a small sum of money belonging to the estate of David Chapman was paid on this land when purchased by his widow, but the purchase was made in her own name, and the most of the purchase money paid by her vendees, from whom the present appellee derived title. Neither the trust, nor the notice of the trust, is sufficiently established to affect the rights of these purchasers, and in fact the entire proof shows that it was an after-thought on the part of those who sue making such a defense. The boundary of the land claimed is described in the petition, and the appellants admit they have it in possession, and claim to hold it as the heirs of David Chapman under the alleged trust that had no existence either in fact or in law. The land in contest is the land for which the recovery was had; and the provisions of the will being set out in the petition by which the executrix was invested with title, and standing undenied, the judgment should remain undisturbed, and particularly when no defense whatever has been interposed by the appellant. Judgment affirmed.

SEELEY v. MITCHELL's ASSIGNEE and others.*(Court of Appeals of Kentucky. April 23, 1887.)***1. PARTNERSHIP—FIRM PROPERTY—REAL ESTATE—MORTGAGE OF PARTNER'S SHARE.**

A partner cannot maintain an action to set aside a mortgage executed by his copartner on the latter's interest in the partnership real estate, and subject that interest to the payment of the partnership debts, unless he alleges and proves that the mortgagees had notice that the real estate was partnership property.

2. MORTGAGE—FORECLOSURE—LIENHOLDERS—INTERVENTION IN CONTEST.

A mortgagee having instituted a foreclosure suit, and obtained judgment for the sale of the mortgaged land, assigned the judgment to another, and the assignee set up his claim to the property by cross-petition in a separate action between other parties to which he was a defendant, and undertook to litigate it with them, they claiming liens on it adverse to him. *Held*, that he could not, while the latter suit was pending, proceed in the foreclosure suit, have the order of sale executed, buy in the property, take the commissioner's deed, and thereby perfect his title; his act in voluntarily introducing his claim into the latter suit, and litigating it with the lienholders, who were not parties to the foreclosure suit, being an abandonment of his right to pursue further the foreclosure suit.

Appeal from circuit court, Warren county.

This action was brought by appellee Mitchell upon a note and mortgage executed by D. B. Campbell on his one-half interest in a saw-mill. M. E. Whitehead was made a defendant as claiming under a mortgage executed by Campbell on the same property, and appellant, E. B. Seeley, was also made a defendant as the owner of the other one-half of the saw-mill. Seeley filed an answer in which he objected to a sale of the saw-mill property until the debts of the firm of Campbell & Seeley, composed of himself and D. B. Campbell, should have been paid. He also claimed a prior lien on a piece of property owned by Campbell, and known as "Kapley Knob," under and by virtue of a judgment obtained against said property by one Rodes, and assigned by Rodes to him. It appeared that this "knob" property was embraced in the mortgage to Mitchell, but that he had not described it in his petition, or asked that his lien on it be enforced. The court ordered a sale of Campbell's one-half interest in the mill property to pay the Whitehead and Mitchell mortgages; and, as to the Kapley-Knob tract, adjudged that Seeley had a superior lien on it, and ordered it sold to satisfy that lien first, and Mitchell's mortgage afterwards. Seeley appeals.

Wright & McElroy, for appellant. *Rodes & Settle* and *Edward W. Hines*, for appellees.

HOLT, J. We cannot review the accounts between the appellant, E. B. Seeley, and D. B. Campbell as partners, composing the firm of Campbell & Seeley, because Campbell is not a party to this appeal. They are not now involved.

The deed of Campbell to Seeley to an undivided one-half of the mill property was dated and acknowledged in February, 1881, and recorded on March 8, 1881. The mortgage to Mrs. Whitehead by Campbell upon the remaining half was executed on March 24, 1881, and that to Albert Mitchell on the succeeding day. The appellant, Seeley, now contends that for advancements made by him to the firm of Campbell & Seeley, and for its indebtedness to him and to its creditors, he has a lien superior to that of the mortgagees upon the half interest so mortgaged. It is not contended that the partnership existed prior to the time of the conveyance by Campbell to Seeley. It is not shown that any firm indebtedness was created, or any firm business transacted, prior to the time when the mortgages were executed, or that the mortgagees knew of the existence of the firm, even if it did exist at that time.

In Jones on Mortgages (volume 1, §§ 119, 120) it is said: "Land conveyed to members of a copartnership as tenants in common, but purchased with copartnership funds, and used for copartnership purposes, is treated in equity

as copartnership property. The creditors of the copartnership are, in such case, entitled to priority of payment out of it, in preference to the creditors of individual members of the firm. But if one member of the copartnership mortgages his apparent interest as tenant in common of such land for a consideration paid him at the time, as, for instance, for a loan of money, *the mortgagee having no notice of the character of the property in equity as copartnership property*, he is entitled to hold it under his mortgage. He may rely upon the legal effect of the conveyance to his mortgagor, and upon his apparent title upon record. * * * A mortgage made by a partner of his interest in partnership real estate, *to one who knows it to be such*, is not a mortgage of the party's undivided interest in such real estate, but of his interest in the portion mortgaged after the payment of the firm debts upon a settlement of the partnership accounts." Boone, Mortg. § 26, is to the same effect.

If a mortgagee takes a mortgage to secure an already existing debt, or with knowledge of facts which make the property in equity assets of a firm, then he cannot ask to stand in front of those who have a right to have it applied as partnership assets. He, however, holds as a purchaser; and, if he had no notice that it was partnership real estate, then there is no prevailing equity in favor of the partnership or its creditors. It might properly be held, perhaps, that the continued use of the property by the partnership is notice of its equitable right in it; but in the case now presented it does not appear that the mortgagees knew, when their mortgages were executed, that the firm of Campbell & Seeley was using the property, or even that such a firm existed.

This is not all, however. It is not averred in the pleadings that it was then in existence. The appellant, Seeley, a defendant below, in his amended answer says: "After his purchase of an undivided half interest in the four acres of ground and appurtenances known as the 'D. B. Campbell Mill Property,' this defendant and D. B. Campbell conducted and ran said mill in partnership, under the firm name of Campbell & Seeley, and bought timber, sawed it up into lumber, and conducted the general business of a saw-mill." This is the extent of his averment upon this point. He says that the partnership was formed *after* the purchase of the half interest in the property. But whether immediately, or how soon after, is not stated. In view of the rule that the statement must be regarded most strongly against the pleader, we cannot construe this as amounting to an averment that the partnership was formed prior to the execution of the mortgages, which were executed soon after the conveyance by Campbell to Seeley; and there is neither averment nor any evidence showing that the property had been devoted to partnership use prior to the execution of the mortgages, or that the mortgagees so knew, or were even aware that such a firm as Campbell & Seeley existed. Neither the deed from Campbell to Seeley, nor the mortgage to Mrs. Whitehead, gave such notice. The latter merely recited that the property was "owned by Campbell & Seeley." The judgment giving the mortgagees priority as to the mill property is correct.

One other question remains to be considered. The mortgage to Mitchell also embraced a tract of land known as "Kapley Knob." In his petition, however, he did not describe it, or ask that his lien be enforced against it. The answer of Seeley, however, and which was a cross-petition against Campbell, set up a mortgage lien of \$1,500 on the "knob" in his favor, elder to that of Mitchell. It subsequently appeared, however, that it was settled. It also averred that one Rodes had a mortgage lien upon the "knob," then in the form of a judgment; and that "said Rodes has assigned and transferred said lien, or will assign and transfer said lien judgment, to this defendant;" and claimed that it was superior to the mortgage liens of Mitchell and Mrs. Whitehead, and asked its enforcement, and the sale of the "knob" to pay it. This pleading was filed on June 19, 1882. Subsequently the Mitchell lien was set up as to the "knob," and its enforcement asked, subject, however, to the lien

of Seeley for the Rodes judgment. He, however, in response to it, claimed the property absolutely by reason of the following facts: The Rodes judgment was rendered on February 12, 1878. A supplemental judgment, directing the execution of the first one, was entered on October 29, 1880. Seeley appears to have purchased it prior to the filing of his answer, on June 19, 1882, in this suit, but it was not assigned to him until August 1, 1882. Neither Mitchell nor the party to whom he has assigned his debt were parties to the Rodes judgment. After Seeley had thus set up his lien for it in this suit, and asked a sale of the property to pay it, and while it was pending, and on August 28, 1882, he had the "knob" land sold, purchased it, had the sale confirmed, and a deed made to himself. He therefore now claims it absolutely, and resists a sale of it in this action.

It is true that the Mitchell mortgage was executed after the rendition of the Rodes judgment, and it is therefore said that there was a *lis pendens* when Mitchell obtained it. The Rodes judgment was, however, allowed to lie for nearly five years without any step being taken to enforce it; and, when it was done, the owner of it was asserting it in another suit, with another lien creditor, as the superior lien, and asking in that suit that the property be sold to pay it. This he had voluntarily done, because, when he set up the lien, the other lien creditor was not asserting his lien as against this property. The question of priority of lien had, however, been raised by Seeley himself, and was pending before the sale of the property under the Rodes judgment. It is true that the assignee of Mitchell did not become the owner of the Mitchell debt until after the purchase of the land by the appellant, but he stepped into the shoes of his assignor. The parties had a right to believe that the question of lien would be settled in this suit. The appellant, Seeley, had asked this very thing. To say now that he is entitled in equity to hold the property as the owner by virtue of his purchase under the Rodes judgment would allow him to profit by his own conduct, which was at least misleading to the other party. The latter had a right to believe, from the conduct of the appellant, that he had abandoned the enforcement of the Rodes judgment, save in this action. The supplemental judgment in the *Rodes Case* was entered prior to the assertion by Seeley of his lien in this suit; and the conduct of the latter in thus asserting it deprives him of the right to say that the other lienholder acquired his claim while there was a *lis pendens*, and must be held, as to such other party, to have been an abandonment of the right to enforce the Rodes judgment, save in this action, and by a further order of a court.

The lower court correctly held that the appellant was not the owner of the property, and properly ordered its sale to satisfy the liens, giving the appellant the priority. Judgment affirmed.

TURNER v. ROGERS.

(Supreme Court of Arkansas. April 9, 1887.)

EQUITY—JURISDICTION—EXECUTORS AND ADMINISTRATORS.

A judgment creditor of a decedent's estate who seeks to subject to the payment of his claim land belonging to the decedent, which has been sold upon execution against the decedent's husband, (the husband having a life-estate therein, and having bought up the interest of the only surviving heir,) and which is occupied adversely by the husband's judgment creditor under said sale, cannot have relief in equity, as, in such case, the probate court has ample power in the premises.

Appeal from circuit court, White county. In chancery.

The complaint alleges that in 1857 the plaintiff, T. J. Rogers, instituted suit in the White circuit court against Mary J. Watkins, formerly Mary J. Walker, and her then husband, Thomas Watkins, for a debt due from her to Rogers for \$358.10, before her marriage to Watkins, and recovered judgment against them, which was appealed to the supreme court, and was there reversed, and remanded; that, pending said appeal, the said Mary J. died intestate, and Rogers amended his pleading, and renewed the suit against John G. Holland, appointed administrator *ad litem* for that purpose, and on the third day of November, 1869, he took a nonsuit; that on the twentieth of January, 1870, the said John G. Holland, being appointed regular administrator on the estate of the deceased, the plaintiff presented said claim to him for allowance, for the sum of \$637.57, and the same was allowed and classed by the probate court; that the administrator appealed this judgment to the circuit court, and judgment was there rendered against him for the sum of \$350, from which he appealed to the supreme court, and that court reversed the judgment at its November term, 1878, after finding that the plaintiff, Rogers, was entitled to \$100; that, upon the return of the case to the circuit court, the parties accepted the finding of the supreme court, and allowed judgment to be rendered against said administrator for the sum of \$262, on the twenty-fourth day of January, 1884, with 6 per cent. interest from that date, and costs, etc.; that on the eleventh day of March, 1870, the administrator, Holland, for want of personal assets to pay decedent's debts, filed in the probate court an inventory of the lands of the deceased, describing them, (here the complaint describes the lands and the titles;) that, at the death of said Mary J., said lands descended to Emily P. Quarles, and a minor heir by her husband, Thomas Watkins, who soon afterwards died an infant, and the lands remained in the possession of Watkins, who continued to hold them by the curtesy, and in 1867 purchased Mrs. Quarles' interest, and received her deed of them; that in 1872 said lands were sold under execution against Watkins, and were afterwards redeemed by defendant, Turner, who was a judgment creditor, who still remains the owner of and in possession of them; that Turner purchased with full notice of plaintiff's claim against the lands, and of the litigation with the deceased in her life-time, and her administrator since her death; that there is no personal property, and never was, in the hands of the administrator to pay the deceased's debts; and the lands are in the adverse possession of Turner, and cannot be sold to advantage by the probate court. Prayer that the lands be sold for payment of said debt.

The defendant demurred to the bill, which was overruled. Defendant then answered, and upon final hearing plaintiff had judgment, and defendant appealed.

J. W. House and J. M. Moore, for appellant. W. R. Goody, for appellee.

COCKRILL, C. J. The demurrer to the bill raises the question of the jurisdiction of a court of equity to enforce the collection of a claim probated against the estate of a deceased debtor, and which is still in course of administration, out of lands belonging to the estate. The jurisdiction of courts of equity. 4s.w.no.4—13

uity in probate matters is more restricted in this state than it was under the English rule, before the establishment of our probate system, and it is less liberal than is now exercised by many of the states. See 3 Pom. Eq. § 1154 *et seq.* With us the probate court has exclusive jurisdiction in the matter of the administration of the estates of decedents, (article 7, § 34, Const. 1874;) and it has been frequently determined by this court that equity has no power to lift the administration out of the probate court for the purpose of proceeding with it. *Reinhardt v. Gartrell*, 33 Ark. 727; *West v. Waddill*, Id. 575; *Mock v. Pleasants*, 34 Ark. 63; *Shegogg v. Perkins*, Id. 117; *Flush v. Gresham*, 36 Ark. 529; *Hankins v. Layne*, 3 S. W. Rep. 821. The equitable jurisdiction over the subject with us is not concurrent,—it is rather auxiliary or ancillary and corrective,—and can be exercised only when the relief afforded by the probate court is imperfect or inadequate, or where its proceedings have miscarried through fraud, accident, or mistake. There must be some special ground of exclusive equitable cognizance to warrant the interference of equity with the course of an administration. "Courts of probate are not courts of chancery," as was said in *Jones v. Graham*, 36 Ark. 335, 405, and they are not provided with the machinery to adjust the complicated matters with which equity deals. *Hall v. Brewer*, 40 Ark. 423. But they have power for all the ordinary purposes of administration, and the jurisdiction of equity exists only in matters which lie outside of or beyond their reach. Thus they have no power to foreclose a mortgage on a decedent's lands, or to uncover assets to facilitate a sale where the debtor has fraudulently disposed of property in his life-time. The powers of equity may be invoked for these purposes. *Jackson v. McNabb*, 39 Ark. 111; *Simms v. Richardson*, 32 Ark. 297.

The right of the creditor to proceed in equity against the heir who has received his ancestor's estate, for satisfaction of a claim which has accrued after the time limited for authenticating it, or after the close of the administration, (see cases cited in *Hall v. Brewer, supra*.) or even where the administration is closed without paying a probated claim, (*Wilson v. Harris*, 13 Ark. 559,) is a further illustration of the inadequacy of the remedy afforded by the probate court. And in *Hall v. Brewer, supra*, where a creditor who had been deferred by litigation, and succeeded in having his claim allowed by the probate court only after the other debts had been paid, the estate otherwise fully administered, the personalty exhausted, and the lands surrendered to the devisees, was allowed to resort to equity to enforce his allowance against the lands of which his debtor died seized. But in that case the devisees had conveyed portions of the lands to various parties, and the jurisdiction of equity rests upon the ground that the probate court is not provided with the machinery to adjust the complicated questions of priorities and the rights to contribution and marshaling of assets that arose between the several claimants. These constituted a distinct ground of exclusive equitable cognizance. But there is nothing of the sort in this case. The real estate in question, upon the death of Mrs. Watkins, descended to her heirs, subject to the husband's estate by curtesy, and the charge for the payment of the debt which the appellee established at law against her administrator. The bare fact that the life-tenant has acquired the reversion by purchase from the surviving heir, and disposed of the entire estate, does not oust the probate court, of its power to sell, (*Howell v. Duke*, 40 Ark. 102; *Garabaldi v. Jones*, 2 S. W. Rep. 844,) or afford any reason for the interposition of equity. Turner, by the allegations of the bill, stands simply in the shoes of Watkins, the husband of the deceased debtor, and holds his life-state, with whatever other estate he may have owned. The probate court has ample power to order the administrator to sell whatever interest in the land held by him was subject to the payment of Mrs. Watkins' debts in the hands of her husband, and the creditor must resort to that tribunal for his remedy. To permit equity to interfere for the purpose of selling the lands, without some special

reason, would be to allow it to exercise concurrent jurisdiction with the probate court in the administration of the estate. But that is not permissible under our system. This view "undoubtedly conforms to the prevailing rule," says Mr. Pomeroy, (3 Eq. § 1154, p. 107, note,) "in the great majority of states where power to sell land under the direction and control of the probate court is given to an administrator." *Rogers v. Kennard*, 54 Tex. 80; *Davenport v. Ogg*, 15 Kan. 363.

It is a matter of regret that this litigation cannot be ended here. It is 30 years since the appellee first brought suit to collect the demand which he is now seeking to enforce, and it has twice before been before this court, (*Watkins v. Rogers*, 21 Ark. 298; *Holland v. Rogers*, 33 Ark. 251;) but the power vested by the constitution exclusively in the probate court cannot be borrowed by another tribunal for the purpose of expediting his cause.

The decree must be reversed, and the cause remanded, with instructions to sustain the demurrer to the bill, and it is so ordered.

ROBINSON v. BENTON Co.

(*Supreme Court of Arkansas. April 9, 1887.*)

1. MUNICIPAL CORPORATIONS—POWERS OF MAYOR—AFFIDAVIT.

The power to take general affidavits vested in justices of the peace by the Arkansas statutes (Mansf. Dig. § 2918) may be exercised by the mayors of incorporated towns within the limits of their corporations, by virtue of the statute (Id. § 797) which confers upon such mayors "all the powers and jurisdiction of a justice of the peace in all matters, civil and criminal, arising under the laws of the state, to all intents and purposes." Such mayor may consequently take an affidavit, to be used in prosecuting an appeal from a judgment of the county court to the circuit court.

2. SAME—JUSTICE OF PEACE.

The said statute (Mansf. Dig. § 797) does not merely confer upon such mayors judicial power, and carry into effect section 43 of article 7 of the constitution of 1874, which declares that "corporation courts for towns and cities may be invested with jurisdiction concurrent with justices of the peace in civil and criminal matters," but goes further, and grants the general as well as the judicial power of a justice.

Appeal from circuit court, Benton county.

E. P. Watson, for appellant. *E. S. McDaniel*, for appellee.

COCKRILL, C. J. The parties concur in the opinion that the only question presented by the record in this case is this: Has the mayor of a town authority to take an affidavit to be used in prosecuting an appeal from a judgment of the county court to the circuit court? Robinson's affidavit for appeal from a judgment of the county court was made before a mayor of a town, the circuit court dismissed the appeal, and he has prosecuted an appeal from the judgment of dismissal. The statute regulating appeals from judgments of the county court requires an affidavit to be made by the party aggrieved, but does not specify before whom it shall be made. Mansf. Dig. § 1436, Section 2918, Id., names the officers before whom affidavits generally may be made in the state. The mayor of a town or city is not mentioned among them. Justices of the peace, however, are specified; and section 797, under the head of incorporated towns, which was enacted subsequent to the last-mentioned section, declares that "the mayor of the corporation shall be a conservator of the peace throughout its limits, and shall have within the same all the powers and jurisdiction of a justice of the peace in all matters, civil or criminal, arising under the laws of the state, to all intents and purposes whatever."

It is argued that this section confers judicial power alone, or such as is necessary to make jurisdiction effectual, and was enacted merely to carry into effect section 43 of article 7 of the constitution of 1874, which declares that

"corporation courts for towns and cities may be invested with jurisdiction concurrent with justices of the peace in civil and criminal matters." The argument is not without force, but the statute seems to be broader than the provision of the constitution. The jurisdiction mentioned in the constitution means the authority to hear and determine causes, and the statute would have been as broad as the constitution if it had only conferred upon mayors who preside over corporation courts the jurisdiction exercised by justices of the peace. But the legislature appears to have intended to go further, for "all the power and jurisdiction of justices of the peace, to all intents and purposes whatever," is granted. As justices of the peace have power to take affidavits, not only in the exercise of their judicial functions, but generally, we think the act quoted confers the like power upon the mayors of towns.

Let the judgment be reversed, and the cause remanded.

HARRIS v. PHILLIPS, Sheriff.

(*Supreme Court of Arkansas. April 9, 1887.*)

EXECUTION—LIEN—PARTNERSHIP.

Under Mansf. Dig. Ark. § 3018, providing, with reference to partnership property levied on upon an execution against an individual partner, that "the execution creditor shall have a lien upon the property levied on such as is given by law to executions in the hands of the officer," the lien of such an execution will not attach until actual seizure of the property, although ordinarily, under Arkansas law, (Mansf. Dig. § 2991,) an execution is a lien upon personal property from the time it is delivered to the officer.

Appeal from circuit court, Nevada county.

Atkinson & Tompkins, for appellant. *Smoots, McRae & Hinton*, for appellee.

SMITH, J. A judgment creditor of J. C. Byrd sued out an execution, which came to the hands of the sheriff on the twenty-fourth of August, 1885. The writ was levied, September 22d, on a lot of lumber which belonged to J. C. Byrd & Co., a saw-mill firm composed of the judgment debtor and one Cayton. But, on the day before such levy, the firm had sold the lumber to Harris, one of their employees, in payment of wages due him. Harris accordingly brought replevin against the sheriff. The view taken by the circuit judge, as disclosed by his charge and his refusal of requests to charge, was that the execution was a lien on Byrd's share of the partnership effects from the time of its receipt by the sheriff; and the verdict and judgment were for the defendant. A motion for a new trial, which alleges, among other grounds, misdirection of the jury, was denied.

An execution is a lien on the personal property of the defendant therein from the time the writ is delivered to the officer to be executed. Mansf. Dig. § 2991. But a partner has not, like a co-tenant, an aliquot share of any specific chattels of the firm. His interest is subject to the paramount claims of creditors of the firm, and is nothing more than the right to share in any surplus that may remain after the partnership has been wound up. Consequently he has no such beneficial interest in the chattels of the firm as will be bound by the general lien of an execution against him individually. Nevertheless his interest in partnership property may be levied upon and sold for his separate debt. Section 3014 *et seq.* Mansf. Dig., is a distinct recognition of the right of the individual creditor to subject the joint property to the satisfaction of his debt. And this right existed at common law, independently of the statute; for otherwise a debtor might screen all of his property from his creditors by simply entering into a partnership. But section 3018 provides that the execution creditor shall have a lien upon the property levied upon

such as is given by law to executions in the hands of the officer. This implies that there is no lien in such cases until actual seizure.

Reversed, and remanded for a new trial.

CROCKER v. STATE.

(*Supreme Court of Arkansas. April 9, 1887.*)

INTOXICATING LIQUORS—LANDLORD AND TENANT—PERMITTING SALE.

Under the Arkansas statutes, (Mansf. Dig. § 1926,) which make it a misdemeanor for any person owning, using, or controlling a house or tenement to sell or give away, or allow to be sold or given away, any ardent or vinous spirits, a landlord who leases a house to a tenant for a lawful purpose is not bound to interfere, and invoke the law, when he subsequently finds that such tenant is using the premises for the sale of liquor.

Appeal from circuit court, White county.

J. W. House, for appellant. *Dan W. Jones*, Atty. Gen., for appellee.

SMITH, J. The indictment charges, in one count, that the defendant, being the owner of a house in the town of Russell, did allow one Jones clandestinely to sell ardent spirits therein. A second count alleged that he allowed Jones to keep such spirits for clandestine sale in said house.

The indictment is based on section 1926, Mansf. Dig., which provides as follows: "Any person owning or using or controlling any house or tenement of any kind, who shall sell or give away, or cause or allow to be sold or given away, or keep or allow to be kept for sale, or to be given away, any alcohol, ardent or vinous spirits, or malt liquors, or any compound or tincture commonly called 'bitters' or 'tonics,' whether the same be sold or given away openly or secretly by such device as is known as 'the blind tiger,' or by any other name, or any other device, shall be deemed guilty of a misdemeanor."

The testimony was that Crocker had, in March or April, 1885, let to Jones a storehouse at \$10 a month for the remainder of that year; that Jones represented that he wished to open a family grocery, and run a billiard table; that Jones very soon thereafter began to sell whisky, in some cases openly, but in others by clandestine means, the device being for the customer to go behind the counter, get a bottle of whisky, and deposit the price thereof in a drawer; that Crocker promoted and assisted in such sales, by informing thirsty persons that liquor was to be had at Jones'; and that Jones was shortly afterwards arrested for keeping a "blind tiger."

The court refused the defendant's prayer for directions to the effect that Crocker could not be convicted without proof that he knew, at the time of leasing, that Jones was going to engage in the clandestine sale of intoxicating liquors. And, it charged, in effect, that, if the tenant used the premises for an illicit purpose, it was the right and duty of the landlord to put an end to the lease, and that his failure to take active measures to stop the traffic, after he had knowledge of it, was allowing the spirits to be sold, within the meaning of the statute. The jury returned a verdict of guilty, and the defendant was condemned to pay a fine of \$200, and suffer 30 days' imprisonment. The refusal of the defendant's prayers was not an error. A landlord may be convicted under this act upon evidence that he knew, at the time of the letting, the purpose for which the house was to be used, or that he afterwards advised, encouraged, or aided the illegal traffic. The evidence would have been sufficient to convict Jones. And all who procure, participate in, or assent to the commission of a misdemeanor are punishable as principals. *Foster v. State*, 45 Ark. 361, and cases cited; *Fortenbury v. State*, 47 Ark. 188, 1 S. W. Rep. 58; *People v. Erwin*, 4 Denio, 129; *State v. Williams*, 30 N. J. Law, 102.

But the court went too far in instructing the jury that the mere non-interference of the landlord, after he became aware that his tenant was violating

the law, involved him in the guilt of his tenant. The enforcement of a law is a duty which rests primarily upon the officers and courts. The law is not so unreasonable as to require the private citizen to embroil himself in personal difficulties, contentions, and lawsuits for the public good. *Robinson v. State*, 24 Tex. 152.

Reversed, and a new trial ordered.

WORMSEER and others v. MERCHANTS' NAT. BANK and others.

(*Supreme Court of Arkansas.* April 29, 1887.)

RECEIVERS—INSOLVENCY—MORTGAGE.

Where a receiver is appointed to take charge of an insolvent estate upon the application of a secured creditor, pending litigation or threatened litigation concerning the property held as security, the court will not permit the receiver to retain a portion of the fund, as to which there is no contract or legal lien giving it protection from the remedies of creditors. Upon the application of unsecured judgment creditors, therefore, an order will be made directing such receiver to pay such portion of the fund to them in the order of their priority, without allowance for costs.

Appeal from chancery court, Pulaski county.

Geo. H. Saunders and Collins & Balch, for appellants. *John McLure*, for appellees.

BUNN, Special Judge.¹ It appears that the defendant the Van Etten Lumber & Shingle Company, being indebted to the plaintiff bank in the sum \$62,150, as evidenced by its three several promissory notes, all due August 30, 1884, on the thirty-first July, 1884, executed, acknowledged, and delivered to plaintiff John M. Rose, as trustee, its deed of trust to secure said notes, in which it conveyed a large amount of property, both real and personal, situated in Pulaski, Prairie, and St. Francis counties, in the state of Arkansas. This was also to secure all other indebtedness that might become due the plaintiff bank by the defendant company. This deed of trust authorized the trustee, after default of payment, to take possession of said property, and sell the same in the manner and on the terms therein named. That, being indebted in the further sum of \$8,600 as evidenced by its note, the defendant lumber company, in order to secure the same, executed to said John M. Rose, as trustee, another deed of trust on the ninth July, 1884, in which certain other property was conveyed. That on the twenty-third of October, 1884, its claims against the defendant lumber company amounting at the time to \$84,000, the plaintiff bank and the plaintiff trustee filed their bill in the Pulaski chancery court, praying for the appointment of a receiver to take charge of, manage, and dispose of all of the property of defendant lumber company, alleging that all of any material value was embraced in said deeds of trust, and further alleging that said property would be insufficient to pay said debts; that defendant lumber company was indebted to various other parties, none of whose claims were secured, but that some of whom were then prosecuting and others threatening to prosecute their claims to judgment; that it would be detrimental to defendant lumber company and said creditors to attempt to sell said property under said deeds of trust, and that it would in fact be with great difficulty that such sale could be made, on account of the *status* and situation of said property. Plaintiffs therefore asked that said receiver be appointed, with power to dispose of all the property of said defendant lumber company, and in the mean time to carry on the business thereof, which appears incidentally to be a corporation. All the creditors of defendant lumber company appear to have been made parties to the proceeding. The prayer of the bill was granted by the court.

¹ BATTLE, J., being disqualified.

The appellants Block Bros. and Weeks & Co. first moved the court to discharge the receiver on the grounds that the case is not such as to warrant his appointment, and afterwards they and appellants Wormser & Sons, by their separate but substantially the same petitions, represented to the court that there was collusion between plaintiff bank and defendant lumber company in procuring the order appointing the receiver; that plaintiff bank's demand was in fact simulated, and that there was other security for the same other than that named in the bill; that appellants Wormser & Sons' claim was for the purchase money of certain personal property then in the hands of the receiver under said order; that the receiver had in hand property and proceeds of property not included in said deeds of trust, amounting to about \$4,000; that appellants Wormser & Sons had obtained judgment against defendant lumber company for \$1,161.90, and \$10 costs, in the Pulaski circuit court, on the twenty-third October, 1884, which they claimed specially to be a lien on said certain personal property in the hands of the receiver as purchase money; and that appellants Block & Bros. and Weeks & Co. had obtained judgments in the Pulaski circuit court on January 2, 1885, the first for the sum of \$1,154.48 and costs, and the last for \$727.55 and costs; that all the appellants had caused executions to be issued on said judgments, and to be placed in hands of the sheriffs of Pulaski, Prairie, and St. Francis counties, but that the same could not be levied because the property of the defendant lumber company was in the hands of the receiver as aforesaid. Appellants asked that the receiver be made to report the property he had on hand not embraced in plaintiff's mortgages, (the receiver reported the sum of \$3,325.33,) and that the same be appropriated to the payment of their judgments. The prayers and petitions of the appellants were all denied by the court, and they jointly appealed.

While the court desires to say that, in its opinion, the bill does not disclose such a case as warrants the appointment of a receiver, and while the object of the bill, as shown on its face, is not in all respects a strictly proper one to be attained by equitable interposition, yet as all the parties to this proceeding, except the appellants, seem to acquiesce therein, and since the prayer of the appellants is mainly granted herein, we deem it best to let the cause proceed in the court below under the receivership, and the further directions and orders of that court, except in so far as concerns the fund in the hands of the receiver, the proceeds of property not embraced in the deeds of trust of the appellee bank.

In proper cases coming under the statute and the well-established equity doctrines, receivers are appointed to take charge of, manage, and dispose of property which is the subject of litigation, under the direction of courts of equity, but the authority of the court does not extend to placing *all* property in the hands of receivers,—that which is not, as well as that which is, specially bound for the payment of claims. In this case, the receiver, under the orders of the court below, has in his hands property neither embraced in the plaintiff's mortgages, nor, so far as we can know, protected from the remedies of other creditors by any other contract or legal liens. The effect of the appointment of the receiver is plainly to prevent judgment creditors from levying their executions on property subject thereto, so far as the parties are concerned. We do not think this ought to be permitted. It is only the property in litigation—in this case the mortgaged property—that should be placed in the hands of the receiver. See *Noyes v. Rich*, 52 Me. 115; High, Rec. § 378.

The \$3,325.33 in the hands of the receiver not being properly the subject-matter of the jurisdiction of the court below in this particular proceeding, and consequently a fund not properly in the hands of the receiver, it is subject to the payment of the claims of the general creditors of the defendant the Van Etten Lumber & Shingle Company, to be paid on the same in the order of their priorities. From all that appears to this court, the appellants, as judg-

ment creditors of defendant lumber and shingle company, have prior claims on said fund to the plaintiffs or the other defendant creditors. Nor is that fund to be diminished by deduction of allowances to the receiver, or costs of court, so far as affects appellants; for, the possession of the receiver being wrongful as to appellants, he must look elsewhere for reimbursement for his trouble, as must the officers of court.

The decree of the court below, in so far as it denies to the appellants the right to have the money in the hands of the receiver, not derived from the property included in plaintiff's mortgages, appropriated to the payment of their debts according to their just priorities, is reversed, and the cause is remanded, with directions to cause said receiver to forthwith pay off the claims of appellants out of said fund as far as may be, subject only to such prior judgments and special liens as may exist on the property of defendant lumber and shingle company, from which said fund in the hands of the receiver was derived.

RUSSELL and others v. MARCHBANKS and others.

(*Supreme Court of Arkansas. April 29, 1887.*)

TRUSTS—IMPLIED—EVIDENCE.

In 1859, A. was sent by his parents to Arkansas, to buy a home for them, and accordingly bought a farm for the price of \$4,000. He paid \$2,000 cash, which had been borrowed on his mother's credit, and subsequently paid the residue of the purchase money out of his own funds, and took the title in his own name. A. lived on the farm with his parents, and worked it for them, and died in 1878. The evidence failed to show that the money which had been borrowed on the mother's credit had ever been repaid, but a reasonable presumption of payment existed, and the whole testimony indicated that it had been paid, if at all, out of the mother's money. *Held*, that the heirs of A. were chargeable with an implied trust in the land, to the extent of the first payment of the purchase money, but not as to the residue.

Appeal from circuit court, Lee county. In chancery.

Tappan & Hornor, for appellants. *Stephenson & Trieber*, for appellees.

BUNN, Special Judge. This cause has once before been in this court, (40 Ark. 56,) having been remanded for the purpose of having all the defendants properly brought into court; and on that being done, and having been retried in the Lee county circuit court in chancery, now comes up again, this time on the appeal of the plaintiffs, and the cross-appeal of the defendants in the court below. The plaintiffs in the court below claim as sole legatees and heirs under and through the will of their mother and grandmother, Mrs. Elmira T. Freeman, deceased, and the defendants claim under W. D. Freeman, deceased, son of said Elmira T., and her husband, Robert Freeman, also deceased; the defendant Julia C. Marchbanks, formerly Julia C. Freeman, as the late widow and more recently administratrix, and her husband, George Marchbanks, as administrator at present, of said W. D. Freeman, and the other defendants as his children and heirs. The object of the bill is to have an implied trust declared in favor of plaintiffs, and against defendants, as to the S. W. $\frac{1}{4}$ of section 22, in township 2 N., and range 3 E., less some town lots sold off, the same being a portion of the town of Marianna.

The undisputed facts are as follows, to-wit: The Freemans formerly resided near Huntsville in the state of Alabama, and there, some time in the year 1858 or 1859, the father, Robert Freeman, became financially embarrassed; in fact, lost all his property. His wife, the said Elmira T. Freeman, was the owner in her own right, by inheritance, of a number of negro slaves, variously stated to be from 15 to 28. In this state of things, the father and mother sent their son, the said W. D. Freeman, a young man just arrived at his majority, and possessed of little property, to Arkansas, to purchase them a home. The young man was furnished with the money, he subsequently paid

cash for the land in controversy, by his parents, and, while there is some conflict in the testimony on the subject, yet it may fairly be inferred that the money was borrowed from Scruggs, Donnovan & Co., merchants in the city of New Orleans, on the mother's credit. W. D. Freeman proceeded to Arkansas, and in December, 1859, purchased the land in controversy for the price of \$4,000, paying \$2,000 cash, (the money furnished as aforesaid,) taking a bond for title in his own name. In March, 1860, the parents, with the rest of the family, including slaves, removed to the place purchased by the son, and, with him in charge of the farm, continued to reside thereon; the father until his death, in 1861, and the mother, with the exception of a few years, until the death of W. D. Freeman, in 1878. In 1865 or 1866, W. D. Freeman paid the remainder of the purchase money, and took the deed in his own name.

It is almost impossible to escape the conclusion, from the testimony, that the money with which the cash payment was made was obtained on the credit of the mother, as has been stated. It, at all events, does not seem to be contended by appellees themselves that W. D. Freeman used his own funds in making this payment, and the proof is he had no means of his own to make such a payment. The contention of the appellees seems to be that, it being borrowed money, W. D. Freeman, as manager and controller of the farm, not only for the support of the family, but as the owner thereof, repaid the same in the course of time to the merchants in New Orleans. There is, however, no evidence of this repayment by any of the family, although it is reasonable to presume that it was made.

From the whole testimony, and the circumstances surrounding the family at the time and subsequently, we are of the opinion that the money so borrowed, if repaid at all, must have been repaid more by the proceeds of the labor of the mother's slaves and other property than by the unaided personal efforts of a young man who merely managed and controlled the farm. Besides, to adopt the theory that the son repaid the borrowed money and thereby was the real purchaser of the land would be to assume that the mother loaned him the money in the first instance, or finally consented that he might repay it to the merchants, thus treating it as a loan to him or for his use. The testimony does not support such a presumption. The testimony goes to show that the mother (the father having died in the meantime) lost all her negroes in 1862, by reason of the war then existing, and that the son, from 1864 until his death, in 1878, continued to cultivate the land in controversy with his own means, as well as other lands of his own; that he was a good farmer and manager; and that he annually paid his mother four or five hundred dollars, as rent, as some witnesses state from hearsay; as an allowance, as others state. He paid the balance due evidently out of his own money, not out of his mother's money, for she had none above her living; and, besides, never in her life-time claimed to have furnished money to him to make this payment. We must conclude that W. D. Freeman made this payment with his own money.

As to the first or cash payment, the equities are with the appellants, Robert F. Russell and others; and as to the last payment, the equities are with the appellees, Julia C. Marchbanks and others.

The decree of the court below is therefore affirmed, and the costs of this appeal will be against appellants, Russell *et al.*

HENRY v. ALLEN and others.

(Supreme Court of Arkansas. April 29, 1887.)

1. APPEAL—REVIEW—FACTS.

Where the facts of a case are fairly submitted to a jury, under proper instructions from the court, an appellate court will not disturb the conclusions of the jury.

2. CONTRACT—UNSIGNED INSTRUMENT—EVIDENCE.

In an action to recover a balance claimed upon a parol contract for the building of certain houses, in which defense was made as to the terms of the contract, the plaintiffs offered in evidence a written instrument, purporting to set out the conditions of the contract, which instrument was signed by the plaintiffs, and was in the handwriting of the defendant, but was not signed by him otherwise than the writing of his name in the body of the paper. *Held*, that such writing related directly to the matter in issue, and was properly admitted in evidence.

Appeal from circuit court, Miller county.

U. M. & G. B. Rose, for appellant. *Scott & Jones*, for appellees.

SAUNDERS, Special Judge. H. J. Allen & Bros. sued Frank M. Henry, in the Miller circuit court, for an alleged balance due on a contract for the erection of a block of brick buildings in Queen City, Texas. The complaint set out the contract and cause of action as resting in parol. The defendant answered, denying the contract as stated by plaintiffs, and averred that he was jointly interested in the contract to build the houses with Allen Bros., and that the contract, though made in the name of Allen Bros., was for his benefit, as one of the parties to perform the work, though one of the houses was to be erected for him. Whatever of truth there may be in the contention of the appellant as to this anomalous position occupied by him, the facts were all fairly submitted to the jury under proper instructions from the court, and this court, under well-established principles, will not disturb the conclusions of the jury. *Hill v. Fellows*, 25 Ark. 11; *Carroll v. Bowler*, 40 Ark. 168.

During the progress of the trial, what appears to have been an unexecuted written contract between the plaintiffs, Allen & Bros., and the parties interested in the buildings as owners, purporting to set out the terms and conditions of the contract, was offered in evidence by the appellees. The appellant objected, and over his objections the court permitted the introduction of this instrument as evidence. This objection and exception of the appellant was carried into the motion for new trial, and is urged before this court as ground for reversal of the judgment. It was admitted on trial that this contract was written by the appellant himself, and his name appears in the body of the instrument as one of the parties contracting to pay Allen & Bros. for the buildings. It was signed by Allen & Bros., and also by two of the parties contracting to have said work performed, but not signed by the appellant otherwise than the signature or name in the body of the instrument, and there was no proof as to its complete execution by delivery and acceptance of the parties. The question at issue was whether the appellant, Henry, had contracted jointly with others to pay the appellees, Allen & Bros., for the buildings erected as stated in the complaint, or whether he was one of the parties contracting to do the work, and build the houses, as set up in his answer. It was admitted that the appellant drew the instrument, and its object and purpose was necessarily to set out the subject-matter of the contract, the contracting parties, and their relations to each other, in the contract. As evidence, its bearing was directly upon the issue involved, and was a statement in writing of the fact at issue made at the time, and on the subject in dispute, by the parties contracting, and was properly given in evidence to the jury.

We find no error in the instructions of the court, and the judgment is in all things affirmed.

MENSING v. ENGELKE.

(*Supreme Court of Texas. March 22, 1887.*)

1. GARNISHMENT—PLEDGE—RIGHTS OF CREDITOR.

A., a cotton buyer for eastern purchasers, agreed with E. that the latter should cash his (A.'s) drafts, drawn on the eastern purchasers, and hold the cotton purchased as security. A judgment creditor of A. garnished E. *Held*, that the most that the creditor could claim from E. was the excess of the proceeds of the sale of the cotton over and above the amount paid on account of A.'s drafts.

2. SAME—SALE BY PLEDGE.

Under the contract between A. and E., the latter had a lien on the cotton for advancements made by him, and the right to ship it east for sale subject to his lien; and the fact that the cotton might have sold for a higher price in the local (Texas) market than it realized in the east does not render him liable to the garnishing creditor for the difference.

3. SAME—FRAUD—EVIDENCE.

E. failed to preserve the weights and grades of the cotton shipped by him, by which he might have shown that it was sold for a fair price, and that none of its proceeds belonged to A. on a settlement. *Held*, that the failure to do so is no evidence of an intention on his part to assist A. to defraud his creditors.

4. SAME—ATTORNEY'S FEE.

As the contract made attorney's fees incurred by E., on account of the transaction, a charge against the cotton, no objection could be made to the payment by E. of \$100 to his attorney for defending him in this action.

Appeal from Washington county.

Sayles & Bassett, for appellant. *J. T. Swearingen*, for appellee.

WILLIE, C. J. The appellant, Mensing, being a judgment creditor of William Axer, sued out a writ of garnishment against the appellee, F. A. Engelke. The garnishee denied indebtedness to Axer, or possession of any of his effects, and this answer was contested by the appellant. The cause was tried by the court without a jury, and judgment rendered for the garnishee, and from this judgment Mensing appealed.

The writ of garnishment was served upon Engelke, April 18, 1879, and his answer was filed on September 5, 1879, which was the return-day of the succeeding court. On October 1, 1879, Axer and Engelke entered into an agreement of which the following is a copy:

"The State of Texas, County of Washington—ss.: This memorandum of contract, this day made and entered into by and between Wm. Axer of the first and F. A. Engelke of the second part, witnesseth: Whereas, the said Wm. Axer desires to continue his business as cotton-buyer in the city of Brenham, state and county aforesaid, upon orders and for account of eastern purchasers, and desires to realize in Brenham upon drafts drawn by him upon his principals (for whom he may purchase) against the cotton so purchased; and whereas, to facilitate the said Axer in his said purchases as aforesaid, the said F. A. Engelke has consented to cash such drafts as said Axer may from time to time draw against cotton purchased for eastern buyers by said Axer: Now, therefore, in consideration of the premises, and to fully secure and indemnify the said F. A. Engelke against loss by reason of advancing money upon such drafts as are above contemplated, or any other loss, damage, expense, or cost, including counsel fees, incurred, or that may be incurred, by reason of the transactions herein contemplated, or connected therewith, or in any manner arising therefrom, it is hereby agreed (1) that the said Wm. Axer shall deliver to the said F. A. Engelke, at Brenham, all and every the cotton so purchased and paid for with money drawn from him, said Engelke, on drafts upon dealers for whom said Axer so purchases, and the said cotton so delivered shall be and remain the property of said Engelke, and in his possession and absolute control, until the payment of all such drafts as are hereinbefore referred to. (2) In addition to the delivery and possession of the cotton as above provided for, and as still further security to the said F. A. Engelke against the losses, costs, and expenses as herein above mentioned, or that might or may arise from failure of said Axer's principals, or from depreciation in the value of cotton or loss thereof by accident, fire, or any other contingency, it is hereby stipulated and agreed that any and all balance at any time due said Axer on bank account with said Engelke is hereby hypothecated to, and may be held by, said Engelke until all amounts between said

Axer and said Engelke shall have been fully settled, and all drafts cashed as above mentioned shall have been paid.

"Witness my hand the first day of October, 1878.

[Signed]

"WILLIAM AXER.
"F. A. ENGELKE."

The judge below found, as conclusions of fact, that between the eighth of April and the fifth of September, 1879, Engelke had in his hands 1,421 bales of cotton, bought by Axer and paid for by Engelke, he holding the cotton as security for the money advanced; that all of said cotton, except six bales, was sold by the concurrent action of Axer and Engelke at private sale, without any notice to Mensing; that the cotton was sold for its fair value in the market at the time of the sale; that the amount for which said cotton was sold, including the six bales on hand on the fifth of September, 1879, was insufficient to repay Engelke the money he had advanced on the cotton; that the transactions between Engelke and Axer were all had under the written agreement. Upon these findings he discharged the garnishee.

If the garnishee was not indebted to Axer, and had no effects of his in possession when the garnishment was served, or from that time continuously down to and including the date of filing the answer, he was, of course, properly discharged. Whether Engelke owed Axer, or had property of his in possession during such time, must be determined by the nature of the contract between them, and their course of dealing under it, both before and after the writ was served. It is a cardinal principle in the law of garnishment that the service of the writ cannot have the effect of changing the nature of a contract between the defendant and the garnishee. *Baltimore & O. R. Co. v. Wheeler*, 18 Md. 372. The attaching creditor stands upon no higher footing than his debtor in relation to the garnishee, and cannot compel the latter to violate his contract for the purpose of creating a fund for the benefit of the plaintiff which would not exist in case the contract were faithfully carried out according to its terms and its true intent and meaning. *Baugh v. Kirkpatrick*, 54 Pa. St. 84.

Whatever contract existed between Axer and Engelke, as to the purchase and shipment of cotton, and the disposition of its proceeds at the time the garnishment was served, could still exist notwithstanding the garnishment; and unless, in the legitimate performance of such contract, Engelke became indebted to Axer, or became in possession of effects belonging to him, subject to garnishment, he could not be charged as garnishee. No fraud would be perpetrated against the plaintiff, no money or other effects belonging to his debtor placed beyond his reach, by the act of the garnishee. The contract in question contemplated a purchase by Axer of cotton upon orders and for account of eastern purchasers. This shows that the purchases were to be made by Axer as agent for other parties. Indeed, the eastern purchasers are denominated his principals in the contract itself. Axer's drafts upon his principals were to be cashed by Engelke, and the cotton bought was to "remain the property of said Engelke, and in his possession and absolute control, until the payment of all such drafts as" Axer might thus draw upon his principals. To put the most favorable construction possible for the appellant upon this provision, it gave Engelke a lien upon the cotton thus bought and in his possession till the money advanced by him should be refunded. The most that could be claimed by the appellant was that the excess of the proceeds of the cotton in the hands of Engelke, over and above sufficient to satisfy his lien upon the same, should be appropriated to the payment of his judgment. Indeed, there are numerous decisions to the effect that under such circumstances, the property is not subject to garnishment at all in the hands of the lienholder. See *Badlam v. Tucker*, 1 Pick. 389, and other authorities cited in note 2 to section 539, Drake, Attachment.

But, as this is a case where the property in the hands of the garnishee was

to be sold to pay the debt for which it was pledged, the excess of the proceeds of sale above the amount necessary to satisfy the lien may be considered as subject to garnishment. The evidence abundantly proved that Engelke was at no time behind with Axer on account of cotton transactions occurring under the contract. The only question then is, was the contract faithfully carried out after the service of the writ of garnishment?

As to this the plaintiff says, *first*, that the contract did not provide that the cotton was to be shipped to eastern purchasers, but that it was to remain in the hands of Engelke as a pledge for the money advanced by him upon it. If we look at the object of the contract, and the manner in which the money to repay Engelke's advances was to be raised, no other construction can be given to the instrument except that the cotton should be shipped to the north subject to the order of Engelke, and for his benefit. The object, as stated, was to furnish Axer money to pay for cotton bought for his eastern principals, and drafts were to be drawn by him upon his principals against the cotton so purchased. How this could be done without a shipment of the cotton to the purchasers, who were to pay Axer's drafts, is not apparent. It could not certainly be done otherwise, unless these purchasers constituted Engelke their agent to hold the cotton for them, and treated its delivery to him as a delivery to themselves; which in view of the evidence, the nature of the contract, and the relation which the parties to it bore to these purchasers, is unreasonable. To carry out the spirit of the contract, a shipment to northern purchasers was necessary, and a consent of both was essential to any other disposition of the cotton. This, too, was the construction placed upon the contract by the parties themselves from the time it was made down to the filing of the garnishee's answer. The cotton purchased by Axer with the money of Engelke was always shipped to the persons for whom it was purchased, unless by mutual consent of Axer and Engelke it was sold in the home market, and then Engelke got the sole benefit of the purchase money, and the northern purchasers received other cotton in its stead. Axer had no right to compel Engelke to hold it; if so, the fall in the price, or the accumulated interest upon the money advanced, or the rise in freights, might have reduced the value of the property as a security to Engelke. So long as Engelke complied with the spirit of his agreement, and paid over the money necessary to buy the cotton, he had the right to dispose of it in the manner contemplated by the agreement, in order to have the purchase money refunded, together with his charges for advances, the expenses paid by him, and the premium upon exchange, which was one of the principal if not the main source from which he derived any profit from such transactions. Axer, at least, could not force him to do otherwise with the cotton without tendering him everything due, or to fall due, upon it if shipped, and the plaintiff was in no better position in this respect than was Axer.

2. But the appellant says that, at the time some of the sales of shipments north were made, cotton was worth more in Brenham than in the places where it was sold, and Engelke was bound to sell at Brenham for the protection of the plaintiff. The plaintiff had no greater rights in the cotton than Axer had, and he could not have compelled Engelke to sell at home, as we have seen, at least without tendering him expenses, and all profits which he could reasonably reap from a sale of the cotton in foreign markets. Nothing of this sort was done by the plaintiff; but his contention is that, as successor to the rights of Axer, he could compel the garnishee to acquaint himself with the state of the market, and sell when he could sell highest, and pay over whatever would have been coming to the defendant, in case of such sale, to the plaintiff, though the garnishee might lose thereby, when he would not have lost in fulfilling his contract as made by him. Axer having no right to change the contract without the garnishee's consent, the plaintiff could not do so. The change proposed would have made Engelke the recipient of cotton from Axer

belonging to northern purchasers, and bought by Axer upon their orders, for the purpose of applying a portion of it to the payment of the plaintiff's debt, and thereby to suffer a loss not contemplated by the contract. It would have compelled him to violate the spirit and meaning of his contract, to the injury of himself and the owner of the cotton, to make a profit for Axer to be reaped by the plaintiff in garnishment. This does not seem reasonable, and there is no law for it, so far as we can discover. But, if the plaintiff's position were correct, we cannot see, upon a close examination of the evidence, making allowances for the advances in the price of cotton, the price of freights, and other expenses attendant upon its shipment, that the cotton did not bring its full value at the time it was sold in the northern markets.

3. The plaintiff says that it was the duty of the garnishee to preserve the weights and grades of the cotton bought and shipped, in order to show that it was sold for a fair price, and that none of its proceeds in the hands of Engelke belonged to Axer. He claims that the failure to do so is evidence of an intention on the part of Engelke to assist Axer in an attempt to defraud his creditors. We do not so regard it. It was shown that the cotton was bought for northern purchasers on orders, and belonged to them subject to such claim as Engelke had against it by reason of his advancing the purchase money. The only object in knowing the grade or class of the cotton was to ascertain its value. But what difference would it have made, under the circumstances, whether it was of one value or another? The very cotton bought went north, and brought its full value there, and yet not enough to more than pay what was due upon it to Engelke. If Axer drew upon Engelke for more than the cotton was worth, (which was not shown to be the case,) the money was paid to the owners of the cotton, and not to him. If they allowed him to take any of the proceeds of the drafts, it was their fraud, and not Engelke's; and, if it were committed, it was within the power of the plaintiff to prove it by the owners, and no attempt to make this proof was made. It was to the garnishee's interest to see that he paid no more for the cotton than it was worth. The payment of more would have been a fraud upon himself. He shows that he was sufficiently watchful of his own interest to prevent this fraud; and, it not being shown that the plaintiff was defrauded by a failure to preserve a statement of weights and classification of the cotton, the court below properly refused to find to that effect.

4. The plaintiff complains that the garnishee paid out, pending the garnishment, certain sums of money for the benefit of Axer, not coming within the scope of the contract, and that for these he should be held liable. So far as the \$100 paid Swearingen is concerned, that was shown to have been paid on his fee for representing the garnishee in this case. The contract makes attorney's fees a charge against the cotton. There was no objection to such an agreement at the time it was made, and hence to carrying it out after the garnishment was served. But it is a sufficient answer to the objections made to all these payments that it is not shown that they came out of the proceeds of the cotton. It is not made to appear that, at the time they were made, the garnishee was indebted to Axer in any amount whatever, or that subsequent proceeds of the cotton went towards their payment. On the contrary, it does appear that large sums of money were paid by Axer to Engelke to make good his account, and that these were in excess of what Engelke had paid out for his benefit. The garnishee, therefore, did not pay any debt or deliver any effects to Axer pending the garnishment. The sums advanced to pay these small bills were loans which the garnishee might lawfully make, provided they were not to come out of the cotton, and they cannot be construed as having done so, when more than the amount of these loans was paid back in money. The plaintiff has not had his rights acquired by the garnishment interfered with in the least by these transactions, and hence has no right to complain. It follows from what we have said that the court has not erred in

its conclusions, nor in failing to find upon the issues submitted by the plaintiff, as there was no evidence to warrant them. The plaintiff's theory of this case would make the garnishee an insurer of the price of cotton liable to fluctuations; a dealer in it to such an extent as to sell it when it could be best sold, in order to raise a fund for the plaintiff, though the garnishee should be the sufferer thereby; a guarantor of the good faith of other parties dealing with the defendant; and, finally, would prohibit the garnishee from any money transactions with the defendant, though they did not deprive the plaintiff of any fund upon which he had a claim by reason of his garnishment. We do not think the law requires any such duties of the garnishee, or imposes any such restrictions upon him.

We think the judgment below is correct, and it is affirmed.

CITY OF WAXAHACHIE v. BROWN and others.

(*Supreme Court of Texas. March 22, 1887.*)

1. MUNICIPAL CORPORATIONS—BONDS—SCHOOLS.

Rev. St. Tex. art. 3783, authorizes the council or board of aldermen of any city or town to pass such ordinances, not inconsistent with the constitution and laws, as may be necessary to establish and maintain free schools, purchase building sites, and construct school-houses. *Held*, that this article does not confer on a town, which has taken charge of its free schools, power to purchase school buildings, and issue bonds in payment thereof.

2. SAME—INDEBTEDNESS—RAILROAD BONDS.

Rev. St. Tex. arts. 419, 420, authorize cities to issue bonds to pay off their existing or future debts incurred in improving public markets, streets, erecting city halls, hospitals, water-works, etc., but provide that the amount of bonds issued shall not exceed 6 per cent. of the value of the city's taxable property. *Held*, that in ascertaining the amount of bonds outstanding, those issued in aid of a railroad are to be included, and a sum of money in the city treasury applicable to the bonds could not properly be deducted.

Appeal from Ellis county.

M. B. Templeton, for appellant. *Seth Shepard*, for appellees.

GAINES, J. The leading question in this case is, did the town of Waxahachie, at the time the contract here sought to be enforced was entered into, have the power to create an indebtedness for the purchase of a school-house, and to issue bonds therefor? The corporation was then organized and performing its functions under a charter granted by a special act of the legislature passed April 28, 1871. The sections of this act, which define the powers of the town and of its board of aldermen, are as follows:

"Section 1. Be it enacted by the legislature of the state of Texas that the citizens of the town of Waxahachie, in Ellis county, be, and they are hereby, declared a body corporate and politic, and, under the style of the 'Town of Waxahachie,' may sue and be sued in all courts and suits whatever, and may purchase, hold, and convey any real or personal estate within the limits of said town, and may have a corporate seal."

"Sec. 13. That the mayor and aldermen shall have the power to enact such by-laws and ordinances, for the government of said corporation, and for the quiet, peace, good order, and happiness of the citizens of the same, not inconsistent with the laws of the state, as may be deemed proper; and may impose fines and penalties for the violation of the same, and not to exceed one hundred dollars in any one case.

"Sec. 14. That the mayor and aldermen shall have and exercise control over the public square, streets, sidewalks, and roads within said corporation.

"Sec. 15. That the board of aldermen shall have power to levy and provide for the collection of an *ad valorem* tax on property situated in said corporation, taxable by the general law of the state; and also the power to levy and collect a poll-tax, not to exceed one dollar each, on all male persons of said

corporation over the age of twenty-one years, which tax shall be collected in such manner as may be provided by the by-laws of said corporation: provided, said *ad valorem* tax shall not exceed one-half of one per centum on the value of the property taxed, and that it shall require the vote of two-thirds of the members of the board of aldermen to levy such tax, and the same shall be done at a regular meeting of the board.

"Sec. 16. That the board of aldermen shall have the power to license, tax, and regulate hawkers, peddlers, auctions, theatricals, and other exhibitions, shows, and amusements, billiard tables, nine and ten pin alleys, groceries, tipping-houses, and dram-shops, and to determine the amount of tax upon the same, and to suppress gaming or gambling-houses, by whatever description known, and all disorderly houses."

We do not understand it to be seriously claimed that the authority to make the contract in question is derived from these provisions. But in 1884, the town, by a vote of the people, availed itself of the right granted by the act of April 3, 1879, (Laws 16th Leg. 76,) and took exclusive control of the public schools within its limits. Subsequently, in the same year, (1884,) the agreement for the purchase of the school property and building then belonging to appellees was made between them and the school trustees, and was ratified by an ordinance duly passed by the board of aldermen of the town. Now, it is contended that, after having assumed control of its public schools, the town of Waxahachie had power, not only to purchase building sites, and to construct school-houses, and hence to purchase a site with a building already erected, but also to create a debt, and to issue bonds in consummation of the transaction. The provision of the law from which it is claimed that this authority is derived is as follows: "The council or board of aldermen of any such city or town * * * are furthermore authorized to pass such ordinances, rules, and regulations, not inconsistent with the constitution and laws, as may be necessary to establish and maintain free schools, purchase building sites, construct school-houses, and generally to promote free public education within the limits of their respective cities or towns." Rev. St. art. 3783.

Construing this enactment, this court held in *Dwyer v. Hackworth*, 57 Tex. 245, that, when a town or city had voted to take charge of its free schools, school-houses within the city became public buildings, within the meaning of the law, which provided for a tax of one-fourth of 1 per cent. for the erection of public buildings. That suit was brought to enjoin the collection of certain taxes levied by the city council of the city of Brenham, which was incorporated under a special charter, authorizing the levy of a tax for public buildings, and also an issue of bonds for general purposes to a limited amount. The only proposition deducible from that decision which assists us in the determination of the present case is that if a town or city has assumed control of its public schools, and has the power to levy a tax for the erection of public buildings generally, a levy for the purpose of building school-houses is valid. The statutes relating to the management of free schools, by towns and cities, authorize a special tax for their support by a vote of the tax-payers, but do not authorize such tax specifically for school-houses; and section 9 of article 8 of the constitution, as amended, would seem merely intended as a limitation of the extent of taxation, and in itself not a self-executing grant of power. It may be seriously doubted, therefore, whether the town of Waxahachie, and other towns with like charters, had any authority to levy a tax for this purpose. But, if the town had the power to create a bonded indebtedness, it might be made chargeable upon its general funds. Therefore the question is not necessarily involved in the determination of this case, and we do not feel called upon to decide it. Article 420 of the Revised Statutes confers authority upon cities organized under the general laws to purchase sites, and erect public buildings, and to issue bonds for that purpose. Similar provisions may doubtless be found in the special charters of other cities in the

state, but no such power is given to towns under the general laws; and it may be doubted whether such power has been given to any town by special charter. The question, therefore, recurs, does the provision in article 3783 of the Revised Statutes, (which we have quoted,) in the absence of an express statutory provision conferring the power to create debts, authorize towns, which have taken charge of their free schools, to issue bonds for the purchase of school buildings?

In *Robertson v. Breedlove*, 61 Tex. 816, it was held, in effect, that commissioners' courts, though charged with the duty of providing court-houses, could not issue bonds for that purpose, in the absence of an express legislative grant; but left it an open question whether a different rule might not apply to municipal corporations proper. The opinion in that case recognizes the conflict between the authorities upon the latter question. A discussion of these authorities, however, would lead to no profitable result at this time, since, in our opinion, the provisions of our constitution and statutes, relating to the power of municipal corporations to levy taxes and to create debts, are decisive of the point now before us.

Article 11 of the constitution, in so far as it refers to towns and cities, is principally devoted to a careful restriction upon these powers. As to towns, there is no provision indicating any authority to create a debt, nor any to issue bonds, except, possibly, for the purpose of paying any indebtedness which had accrued up to the time the constitution went into effect. Const. art. 11, § 6. By section 5, the power of annual taxation in cities having over 10,000 inhabitants is limited to 2½ per cent. of its taxable property, and the amount of indebtedness authorized to be incurred is correspondingly restrained, by the declaration that no debt shall be created "unless at the same time provision be made to assess and collect annually a sufficient tax to pay the interest thereon, and create a sinking fund of at least 2 per cent. thereon." A like restriction is placed upon cities upon the coast, in regard to the indebtedness authorized to be contracted for the construction of sea-walls, breakwaters, and for sanitary purposes. Article 11, § 7. The right of cities and towns having 10,000 inhabitants or less being neither granted nor prohibited, was evidently left to the wisdom of the legislature. The legislature, subsequent to the adoption of the constitution, seems to have pursued rigidly the policy of the framers of the organic law.

Title 17 of the Revised Statutes relates to the organization of, the powers and duties of, cities having over 1,000 and not less than 10,000 inhabitants, and of towns containing 200 and not more than 1,000 people. Articles 419 and 420, which apply to cities only, provide that, for the purpose of paying and discharging existing indebtedness, and improving public markets and streets, erecting and conducting city hospitals, city-hall, water-works, and so forth, that the city council shall have the power to borrow money upon the credit of the city, and to issue coupon bonds therefor; but also provide that the aggregate amount of said bonds shall at no time exceed 6 per cent. of the value of the property within such cities subject to *ad valorem* tax. Article 421 directs that when any bonds are issued, provision shall be made for taxation to pay the interest, and create a sinking fund to redeem them. Articles 423 and 424 further provide that the bonds shall be forwarded to the comptroller of the state, with a statement of the value of the taxable property of the city, and also of the tax levied for the payment of the interest, and to create the sinking fund; and it is made the duty of the comptroller to see that a sufficient sum is collected annually to pay such interest, and to create the sinking fund. By article 427 it is also declared, in effect, that no city shall create any debt without at the same time providing for the payment of the interest and a sinking fund. There are no such provisions relating to towns organized under the general laws. The difference between the provisions of the title referred to in reference to cities, and those relating to towns is remarkable. There are ten chap-

ters devoted to the former, and but one to the latter, class of municipal corporations. The powers granted to towns in chapter 11 of that title are hardly more than are absolutely essential to their existence as bodies corporate. No authority to issue bonds, or to create debts, is given them, and hence there are no enactments regulating the amount or mode of their issue.

Looking, then, to the policy of our laws as shown by their constitutional and statutory provisions to which we have referred, is it to be presumed that it was intended by article 3783 of the Revised Statutes to give to such towns as should assume control of their public schools the right not only to buy building sites, and to erect school-houses, but also to create a bonded indebtedness in furtherance of that object? We cannot think so. If they can issue bonds at all, we do not see that they are restricted either by the constitution or the laws as to the amount. The constitution limits the amount of indebtedness which a city of over 10,000 inhabitants can create; and the Revised Statutes (which contain the provision we are attempting to construe) very guardedly restrict the powers of cities organized under the general laws in this respect. It is therefore reasonable to suppose that the legislature did not intend to confer by implication upon these minor municipalities unlimited authority to create debts for any purpose. The power to borrow money or to create a debt is not a necessary incident of the power to buy grounds and build school-houses; and hence should not be implied, against the spirit and policy so clearly manifested by contemporaneous legislation, as well as by the organic law in force at the time this legislation was enacted. If the towns organized under the general laws did not have this authority, then it cannot be claimed for this the town of Waxahachie, because its special charter contains no greater powers than those conferred upon the former towns by the Revised Statutes. In fact the powers given to the one are hardly more or less than those granted to the others. We therefore conclude that the town of Waxahachie did not have the power to make the contract which is sought to be enforced by this suit. The transaction, however, occurred in 1884, and in 1885 the town availed itself of the provisions of the Revised Statutes, and became incorporated under the general law as the city of Waxahachie; and it may be claimed that, if the city is authorized to make such a contract, it is legally bound to carry into effect the original agreement, although it was not binding upon its predecessor, the town. As a legal proposition, this admits of serious doubt. As a matter of fact, however, it appears by the finding of the court that, at the time the suit was brought, the town had outstanding a bonded indebtedness (created under a special act of the legislature, in order to aid in the construction of a railroad) of \$48,100. Its taxable values by the last assessment before the trial were \$989,808. The city had in its treasury the sum of \$800, which could be lawfully applied to the payment of these bonds only. If the entire sum of these debentures is to be estimated in calculating the amount of the bonds authorized to be issued by the city under the last proviso in article 420 of the Revised Statutes, then the \$9,000 of bonds stipulated for in the contract make an indebtedness in excess of the limits therein prescribed, and in no event is their issue authorized by law.

But it is contended that the railroad bonds are not to be converted; and we are referred to *Hitchcock v. Galveston*, 96 U. S. 341, and *Galveston v. Loomie*, 54 Tex. 517, in support of this argument. The decisions, however, in these cases, are merely to the effect that the provision in the charter of that city, that it should not borrow over \$50,000 for general purposes, did not prohibit it from incurring an indebtedness exceeding that amount for the construction of sidewalks. The courts hold that this latter was not a general, but a special, purpose. But article 419 of the Revised Statutes authorizes bonds for funding all existing or future debts of the cities to which it applies, and specially directs the issue of bonds to pay railroad subsidies legally voted. Article 420 authorizes an appropriation of the funds of the city for the purpose of

paying all accrued indebtedness, and of improving markets, streets, building city-halls, etc.; and empowers the council to issue bonds "in furtherance of these objects; clearly embracing, we think, every species of obligation lawfully accrued and to accrue; that is to say, railroad bonds as well as all other debts of every character, having a long time to run. The proviso limiting the amount of bonds to be issued to 6 per cent. of the value of the taxable property of the cities immediately follows, and does not except those issued to railroad companies. We think, therefore, the intention of the legislature was to include within the limitation every character of bonded indebtedness.

But it is also urged that the \$800 in the treasury, applicable only to the railroad bonds of the city, should be deducted from their amount in making the calculation. But the money in the treasury did not actually reduce the amount of the bonds outstanding; and we do not feel warranted in holding that the means to pay in part with money that could be lawfully applied to no other purpose was equivalent to a payment. It is to be presumed that the \$800 was to meet the interest, or to go to the sinking fund, and was not immediately applicable to the payment of the debts. Besides, it is to be noted that in the transaction the town was to assume the payment of an indebtedness for \$6,000, secured by promissory notes having several years to run, with interest payable semi-annually, and secured by a mortgage upon the property; and it is a serious question whether this should not also be included in making the estimate. If not, it would seem that the statutes which have so jealously guarded the interests of tax-payers in these cities would admit of an easy evasion. We conclude, therefore, that the city of Waxahachie could not have made this contract. This relieves us of the necessity of passing upon another point, which has suggested itself to us, which is as to the effect of the possession and use of the property by the corporation after it became a city. If it had not the power to make the original contract, it had not the power to ratify it. But it is claimed that if the town of Waxahachie had not the power to issue bonds, yet it had the authority to contract a debt for the purpose of purchasing a school-house; and therefore, if the city council cannot be compelled to issue the bonds, a judgment should be rendered against the city for the debt, and enforcing the vendor's lien upon the property. But the policy of our laws seems to be to restrict municipal corporations as to the creation of debts, and not merely as to the issue of bonds. The rate of taxation, both ordinary and special, being limited by the constitution and laws, it follows that, if an indebtedness proposed to be created largely exceed the annual tax for one year, adequate provision could not be made for its payment unless the obligations should run for a series of years. Article 427 of the Revised Statutes, already referred to, evidently contemplates that in every such case bonds shall issue and a corresponding tax should be levied to provide for their payment. It would seem, therefore, that no debt can be created, when bonds could not issue, except such as could reasonably be met by current taxation within a reasonable period of time.

It is to be remarked that, at one time during the negotiation which took place between the parties with reference to the contract in question, it was contemplated that the bonds to be issued should be made chargeable upon the tax which had been voted for school purposes. The question presents itself whether this could be deemed adequate provision for the payment of the bonds, since the power to levy this tax was subject to be withdrawn by a vote of the tax-payers of the city. See Laws 17th Leg. 64.

But we need not enter upon a discussion upon this question. It follows from what we have already said, that, in our opinion, the contract sued upon cannot be enforced against the city, either according to its terms, or by a judgment against the city for the purchase money agreed upon for the property. The judgment will accordingly be reversed; and, since we have not the *data* in the record from which to make a complete adjustment of the equities

between the parties, the cause will be remanded for that purpose. The plaintiffs below should be deemed to have the title and possession of the property attempted to be sold, and should have a judgment against the city for the reasonable value of its use and occupation, less the enhancement in its value at the time of the trial by reason of any permanent improvements placed thereon by the city.

The judgment is reversed, and the cause remanded.

FLANNIKEN and others v. NEAL and others.

(*Supreme Court of Texas. April 15, 1887.*)

1. WRIT—RETURN—CONTRADICTION.

Where a sheriff has sold real property under execution, and by mistake has returned that he sold only the interest therein of one of the judgment defendants, L., who owned but a fraction thereof, in an action for partition of lands involving the title to this land, the parties claiming under the execution sale cannot contradict the return by the testimony of the sheriff, or by any evidence; the return importing absolute verity. Their remedy is to procure a reformation by the court of the return in the proceeding in which the return was made.

2. EXECUTION-SALE—TITLE ACQUIRED—SUBROGATION.

Defendants F. & M. derived title through the execution sale, and plaintiffs through the parties against whom the judgment was rendered on which the execution was issued. Defendants F. & M. claimed but were held not to be entitled to have the land allotted to them as vendees of L., if that could be done without prejudice to the other co-tenants, since this was not a case of a sale by L. of the whole interest, which might create certain equities, nor of the subrogation to which a purchaser at a void sheriff's sale is entitled, because the sale was valid. The purchasers at the sale bought only L.'s fraction, and they could convey no more than they bought.

3. COVENANTS—WARRANTY.

A covenant of warranty runs with the land, to the grantee, his heirs and assigns, and is available by a subsequent grantee, claiming title through a quitclaim deed or a sheriff's deed, or both.

Appeal from district court, Bell county.

Geo. W. Tyler, for appellants. *Harris & Saunders*, for appellees.

GAINES, J. W. J. Neal and J. D. Bohannon brought suit against Kitty Taylor and Mary Larou for partition of certain tracts of land in Bell county. Thereafter, on the seventeenth of March, 1884, J. B. Fennell and Warren Clayton, having purchased the interests of the original plaintiffs, joined as plaintiffs in the suit, and, together with their vendors, filed an amended petition, in which they made appellants parties defendant, as well as the original defendants to the suit. By the amended petition plaintiffs claimed four-sixths, undivided, of the N. $\frac{1}{4}$ of the John M. Lemon survey of 1,476 acres, and the same interest in all of the John M. Lemon survey of 1,280 acres, except in a certain tract thereof, consisting of 212 acres, in which they claimed only three-sixths undivided. In this last-named tract they admitted an undivided one-sixth interest in appellants, and they also admitted that defendants Kitty Taylor and Mary Larou owned two-sixths, undivided, of each of the tracts sought to be partitioned. These last-named defendants admitted the allegations of the petition, and joined in the prayer of plaintiffs. Appellants in their answer claimed the entire title of the 212-acre tract. It was admitted, by a written agreement filed in the cause, that plaintiffs and defendants Kitty Taylor and Mary Larou had title to all the land except this last-named tract, and that appellants owned one-sixth interest in that tract. The issue made upon the trial was whether appellants or the other parties were entitled to recover the other five-sixths interest in that parcel of land.

The title to all the tracts seems to have been in John M. Lemon, deceased. After his death, a suit was brought in the district court of Travis county, by one Freeman against his heirs,—six in number,—for the specific perform-

ance of a contract of location of lands in which plaintiff recovered a judgment for partition and for costs. The lands described in the petition in this suit were allotted to the heirs, and an execution was issued against them for the costs to the sheriff of Bell county. This execution was levied upon the 1,280-acre survey, and the 212 acres of that survey now in controversy were sold by the sheriff under that execution to X. B. Saunders and J. S. Allen. The sheriff's return on the execution recites that he sold the interest of John F. M. Lemon in said 212 acres, who was one of the heirs, and a defendant in the execution. The sheriff's deed purports only to convey the interest of that heir in the land. Saunders and Allen subsequently sold to one Barry and others, by a warranty deed, for \$636, one-half in cash, and one-half on a credit, as evidenced by a promissory note executed to them by their vendees. They transferred this note to one Denny, who brought suit thereon, and obtained a judgment foreclosing the vendor's lien on the land. The land was sold under this judgment, and Denny became the purchaser. He subsequently conveyed it to appellants by quitclaim deed. They set up these facts in their answers, and asked that Saunders and Allen, as warrantors, be made parties, and that, in the event judgment be had against them, they have judgment against Saunders and Allen upon their warranty.

The appellants having pleaded that the sheriff, at the sale under execution from Travis county, in fact sold the interests of all the defendants therein in the 212 acres of land, that the recitals in the return were a mistake, and made by inadvertence, and that the deed conveying only the interest of one of said defendants was also erroneous, and was so made through inadvertence, offered to prove these facts by the sheriff and other witnesses. Upon objection by the plaintiffs the testimony was excluded, and defendants excepted. We think the court did not err in its ruling. It is settled law in this state that a sheriff's deed is not necessary to pass title at a sheriff's sale of real estate. A valid judgment, execution, and sale are sufficient for that purpose. But a sheriff's sale is not excepted from the statute of frauds, which requires all contracts for the sale of land to be in writing, and to be signed by the party to be charged therewith. The return of the officer upon his execution ordinarily constitutes a sufficient memorandum in writing to meet the requirements of the statute, but, like other written instruments, is not subject to be varied or contradicted by parol evidence. On the contrary, as part of the record in the case, it imparts absolute verity, (*McMicken v. Com.*, 58 Pa. St. 213;) and is conclusive upon the parties until set aside by some direct proceeding for that purpose, (*Barrows v. Rubber Co.*, 13 R. I. 48; *Swift v. Cobb*, 10 Vt. 282; *Campbell v. Webster*, 15 Gray, 28; *Whitaker v. Sumner*, 7 Pick. 551; *Sykes v. Keating*, 118 Mass. 517; *Bamford v. Melvin*, 7 Me. 14.)

In *Ayres v. Duprey*, 27 Tex. 599, this court say: "As a general rule, in the absence of fraud or mistake, it certainly cannot be maintained that the return of the sheriff can be varied or contradicted by parol testimony." Also in *King v. Russell*, 40 Tex. 124, it is said that the sheriff might be called to show that he was mistaken in saying in his return that the property levied on was pointed out by the defendant in execution; but, it being a case in which the validity of the sale by the officer was not called in question, it does not come under the rule we have stated. We are of opinion that, if the facts were as claimed by appellants, the purchasers at sheriff's sale had a remedy to correct the mistake. But this should have been by direct proceeding, brought in the court from which the execution issued, for the purpose of correcting or amending the return.

The title to five-sixths of the 212-acre tract of land depending upon the sheriff's sale we have just had under consideration, the court did not err, as claimed in appellants' second assignment, instructing the jury to find in favor of plaintiffs for that interest. Appellants' second assignment of error is that "the court erred in instructing the jury to find five-sixths of the 212 acres in

controversy in favor of plaintiffs and defendants Taylor and Larou." The proposition under this assignment is that "Flanniken and Moffett were entitled to have the 212 acres allotted to them as vendees of John F. M. Lemon, if that could be done without prejudice to the other co-tenants." If John F. M. Lemon had sold this specific tract of land to Saunders and Allen, it may be that, under certain circumstances, equity would have decreed his vendees the specific portion so sold, provided it did not exceed in value his interest in the entire tract. But here the sheriff sold only his interest, which was only one-sixth. It is clear that the purchasers could only claim this sixth, and they could convey no more than they bought.

A purchaser at a sheriff's sale whose bid pays off a judgment is entitled to be subrogated to the rights of the plaintiff in execution, provided the sale be held void. *Howard v. North*, 5 Tex. 315. But in the case before us the sale was valid, and, on the trial in the court below, was admitted to pass such title as the deed and return of the sheriff purported to have conveyed. Hence appellant's fourth assignment of error is not well taken.

We think, however, that the court erred in instructing the jury to find in favor of defendants Saunders and Allen, as against appellants' claim on their warranty to Barry. The proposition by which counsel for appellees seek to sustain the correctness of this charge is as follows: "Appellants claiming under a quitclaim deed from Denny, who purchased at sheriff's sale under execution, there was no privity of estate between appellants and Saunders and Allen, and the court did not err in directing the jury to find in favor of Saunders and Allen, whose personal covenant to Barry did not pass to appellants by said quitclaim deed and sheriff's deed." We know of no decision of our own courts which maintains this doctrine, and none has been cited in the brief of counsel. Nor have we found such authority elsewhere. The covenant of general warranty provided for in article 552 of the Revised Statutes binds the grantor "to warrant and forever defend" the title to the grantee, "his heirs and assigns." Such is universally held to be a continuing obligation and a covenant which runs with the land. *Rawle, Cov. Tit.* 334; 3 Washb. Real Prop. (8d Ed.) 899; Mart. Conv. § 162; 2 Hil. Real Prop. 598 *et seq.*

By this is meant that it is a covenant which accompanies a conveyance of the land, and passes from one purchaser to another, through each successive link in the chain of title. It is not to be disputed that a deed without warranty may convey all the right, title, and interest of the grantor at the time of its execution as fully as one with warranty. *De Chaumont v. Forsythe*, 2 Pa. 507. The effect of the conveyance is merely to pass by its own vigor any title subsequently acquired by the covenantor himself, and to bind him to pay the covenantee, his heirs and assigns, in case the title fails, damages to the amount of the purchase money and interest. It adds nothing to the deed, in so far as it operates as a conveyance of the existing right; and hence no reason is seen why it should be deemed necessary in order to transfer such former covenants as ran with the land. But we are not without authority upon the question. In *Beddoe's Ex'r v. Wadsworth*, 21 Wend. 120, it is expressly decided that a quitclaim deed assigns to the grantee the covenants of warranty in the chain of title under which the grantor claims. *Brady v. Spurck*, 27 Ill. 478, is cited in support of the same proposition. But that volume is not accessible to us at this time. See Mart. Conv. § 57. That such is the law as to sheriff's deeds has been repeatedly held by courts of high authority. *Carter v. Denman*, 23 N. J. Law, 270; *McCready v. Brisbane*, 1 Nott & M. 104; *Lewis v. Cook*, 13 Ired. 196; *Markland v. Crump*, 1 Dev. & B. 94; *Town v. Needham*, 3 Paige, 546; *Redwine v. Brown*, 10 Ga. 320.

It is said by an eminent text-writer: "The covenant of warranty is a personal one. * * * It is a covenant that runs with the estate with reference to which it is made, and may be availed of as such, in his own name, by any one to whom the same shall come by deed, even after successive convey-

ances or a descent or devise. It is often difficult to distinguish between a covenant in gross and such as runs with the land, but a covenant of warranty seems clearly among them which will always run with the land. In the first place, there is the requisite privity between the grantor, who is the covenantor, and the purchaser or holder of the land, in relation to which the covenant is entered into; in the next, the covenant for title entered into and formed a part and parcel of the contract by which, and of the consideration for which, the grant of the land was made; and whoever purchases the one is supposed to pay for the other, and to become substituted in all respects in place of the first covenantee, so far as the right of being indemnified for any failure by defect of title." 3 Washb. Real Prop. 399.

It follows from what we have said that, in our opinion, the court erred in so much of its charge to the jury as is complained of in appellants' third assignment of error.

The judgment will therefore be reversed, and the cause remanded.

MOORE and others v. HAZELWOOD.

(*Supreme Court of Texas. April 12, 1887.*)

VENDOR AND VENDEE—MISTAKE—DEED—BOUNDARIES.

The description of land in a deed was: "Beginning at the N. W. corner of the Miller survey; thence S., 62° W., 1,881 varas, to a stake in prairie; thence N., 28° W., 300 varas, to a stake in south line of C. Dorsett's survey; thence N., 62° E., 1,881 varas; thence S., 28° E., 300 varas, to place of beginning,—containing 100 acres." In a suit for part of the purchase money, the answer averred a partial failure of consideration, in that the land which the deed purported to convey was so covered by the surveys referred to that only 23½ acres could pass by it; that the land sought to be conveyed was a narrow strip between surveys supposed to be 300 but only 70 varas wide; that the mistake was mutual, and the price was the full value of the 100 acres; that the lines of the said surveys run the corners named in the deed, but they were in no way marked and could only be identified by known points on other surveys. *Held*, that defendant was entitled to relief for the mistake, since this was not a case in which title to all the land embraced within the boundaries given in the deed did pass, which, however, was afterwards found to embrace a less area than was recited in the deed; but it was a case in which there was a mutual mistake as to boundaries of surveys called for, whereby title to all the land described in the deed did not pass.¹

Appeal from district court, Falls county.

Martin & Dickinson, for appellant. *B. L. Aycock*, for appellee.

STAYTON, J. This action was brought by W. W. Hazelwood against Robert Moore, to recover on two promissory notes given by the latter to the former, for a part of the purchase money of a tract of land, and to enforce a vendor's lien on the land sold. The present parties to the action are the representatives of the original parties. It appears that Hazelwood sold to Moore a tract of land for \$250, on which as much as \$135 had been paid, and the action is to recover the balance. The description of the land in the deed is as follows: "Beginning at the N. W. corner of the W. Miller survey, from which corner an elm marked 'X' bears N., 57° W., 7.3 varas; thence S., 62° W., 1,881 varas, to a stake in prairie; thence N., 28° W., 300 varas, to a stake in south line of C. Dorsett's survey; thence north, 62° E., 1,881 varas; thence south, 28° E., 300 varas, to place of beginning,—containing one hundred acres."

The answer alleged a partial failure of consideration, in that the land which the deed purported to convey was so largely covered by the surveys referred to in it as to have only about 23½ acres of land which could pass by the deed. The answer further alleged that the land intended to be conveyed was a

¹As to when equity will afford relief for mistake by the reformation of an instrument, see *Guilmartin v. Urquhart*, (Ala.) 1 So. 897, and note.

narrow strip between the House survey on the south and the Dorsett and Higgins surveys on the north, supposed by the vendor and the vendee to be 300 varas wide, and to contain 100 acres of land, when in fact it was only about 70 varas wide. The averments of mutual mistake were full, and it was averred that the land covered by the surveys referred to in the deed was not owned at the time or subsequently by the vendor, and that the price agreed to be paid was the full value of 100 acres of land contained in the boundaries set out in the deed. The answer further shows that the land is situated in a prairie country, and that the line of the House survey on the south, and of the Dorsett and Higgins on the north, run the corners named in the deed, but that they were in no way marked, and could only be identified by measuring from known points on other surveys, except that one corner of the House survey was marked. The deed was one with warranty only against persons claiming through the vendor.

A demurrer to the answer was sustained, and we think improperly. If the averments of the answer are true, it is evident that the parties acted under a mutual mistake as to the true position of one or more of the surveys named in the deed, which were supposed by both parties so far distant, the one from the other, as to leave a space 300 varas wide, which it was the intention of the seller to sell, and the purchaser to buy. We know of no case in which relief has been denied under such facts. This is not a case in which title to all the land embraced within the boundaries given in the deed did pass, which, however, was afterwards found to embrace a less area than was recited in the deed, but it is a case in which there was a mutual mistake as to boundaries of surveys called for, whereby title to all the land described in the deed did not pass. Against mistakes of this character, a court of equity will give relief as fully as for mistakes as to area embraced within named boundaries. The rules applicable to such cases have often been announced. *Smith v. Fly*, 24 Tex. 345; *O'Connell v. Duke*, 29 Tex. 300; *Daughtrey v. Knolls*, 44 Tex. 450.

That the land was conveyed with special warranty is of no importance, for this action is not based on any breach of warranty. The defense is one which may be urged at any time when the vendor seeks to collect the purchase money that would be due had the contract not been made under mutual mistake as to a matter which must have influenced the making of it. Had the vendee paid the purchase money, and afterwards sought to have recovered a part of it on account of the deficiency in the land, he might be barred by limitations, but that is not the character of the action.

For the error of the court in sustaining the demurrer, the judgment will be reversed, and cause remanded.

INTERNATIONAL & G. N. R. Co. v. UNDERWOOD.

(Supreme Court of Texas. April 8, 1887.)

1. NEGLIGENCE—CARRIERS—PLEADING.

In an action to recover damages for injuries received by plaintiff, through the negligence of defendant, though it is not specifically alleged in plaintiff's petition that the point at which the accident occurred was between the place of departure and destination, yet, if it appears by the petition that plaintiff was injured while he was being carried by defendant under its agreement, the allegation is sufficient without greater particularity.

2. SAME—WHO IS LIABLE—LEASE OF RAILROAD.

Where one railroad company, without due statutory authority, conferred either by a general or private act, leases and surrenders the control of its line to another, it becomes liable for the torts of the company operating it which are committed upon its line.

3. APPEAL—REVIEW—RECORD.

Where the statement of facts has been stricken from the record, the appellate court cannot review alleged errors of the court below in giving and refusing instructions, or as to the sufficiency of the evidence to sustain the verdict.

4. SAME—ASSIGNMENT OF ERROR.

An alleged error of the lower court cannot be revised by the appellate court without an assignment specifically pointing it out.

Appeal from Bexar county.

McLeary & Barnard, for appellant. *Houston Bros.*, for appellee.

GAINES, J. This action was brought in the court below by appellees against appellant, to recover damages for personal injuries. The statement of facts having been stricken out on motion of appellee at the last term of this court, there are many questions raised in appellant's brief which we need not consider. By its first and second assignments of error appellant complains that the court erred in overruling its general and special demurrers to plaintiff's petition. The main ground of the demurrers is "that the petition nowhere alleges that the defendant undertook to transport plaintiff as far northward from San Antonio as Corbin station, where the accident is alleged to have occurred." The allegations in the petition in reference to this matter are "that heretofore, to-wit, on or about the third day of July, 1883, the defendant, acting as a common carrier of passengers and freight, for a valuable consideration, undertook to transport the plaintiff as a passenger over the said line of road northwards from San Antonio, towards St. Louis, Missouri; that plaintiff, on said third day of July, 1883, at the instance of defendant, and under the instructions and directions of its officers, agents, and employes, entered the car or 'caboose' of the defendant provided for his use and occupancy, and the defendant, acting through its agents, officers, and employes, started said car and train on its journey over its line of road to the northward; that the plaintiff conducted himself in a prudent manner, and was guilty of no negligence or imprudence whatever; that when said car and train reached Corbin station, about 20 miles, more or less, from San Antonio, on the defendant's line of road, which was about 11 o'clock at night on said date, the defendant, by its gross negligence and outrageous carelessness in the management and running of the trains on said road, caused the car on which the plaintiff was, it being the car furnished by the defendant for his use and occupancy, to be run into by another engine and train of said defendant, breaking the said car, scalding, burning, bruising, wounding, and crippling this plaintiff, throwing him from said car, dragging him upon the track and road-bed, breaking his bones, crushing his body and limbs, tearing his clothing, and mutilating him in a horrible manner."

It is true that it is not here specifically alleged that the point at which the accident occurred is between the place of departure and that to which it was contracted that plaintiff should be carried. But we think that it appears from the averments that the plaintiff received the injuries complained of while he was being carried by defendant under its agreement, and that greater particularity than this cannot be required. We are of the opinion, therefore, that the exceptions to the petition upon this ground were properly overruled.

There were other special exceptions to the effect that the averments of the petition were not sufficient to warrant a judgment for exemplary damages, as therein claimed. But plaintiff distinctly waived his claim for such damages upon the record before the trial of the cause; and it seems from the appellant's briefs that the exceptions based upon this ground were not insisted upon in this appeal.

It is complained by the fourth assignment that the court erred in sustaining plaintiff's exceptions to so much of the defendant's answer as set up a lease for 99 years, made in 1881, by the defendant company to Missouri, Kansas & Texas Railroad Company, of defendant's road and property, and a subsequent

lease by that lessee to the Missouri Pacific Railway Company, which last named corporation defendant averred was operating defendant's road at the time the accident occurred. This assignment was not well taken. It was held by the court in the cases of *Gulf, C. & S. F. Ry. Co. v. Wheat* and of *Central & M. Ry. Co. v. Morris*, 8 S. W. Rep. 457, (decided at the last Galveston term,) that, without authority conferred by statute, one railroad company could not lease its road to another so as to absolve itself from its obligations to the public. Where one such company, without such authority, surrenders the control of its line to another, it becomes liable for the torts of the company operating it which are committed upon its line.

The case of the *Missouri Pac. Ry. Co. v. Waits*, 63 Tex. 549, cited by counsel for appellant, is not in conflict with this opinion. That action was brought both against the Missouri Pacific Railway Company and the International & Great Northern Railroad Company, and the court then say: "It is alleged and shown that, at the time of the injury, the appellee was the servant of the Missouri, Kansas & Texas Railway Company. That company had previously leased the road and property of the International & Great Northern Railroad Company, and was in charge of and operating the same at the time of the injury. 'The leasing of a railroad, under due authority of law, affects a transfer of rights and liabilities in its management, so that the corporation owning the railroad is discharged from liabilities for the lessee's torts.' Pierce, R. R. 283, and note 6. In accordance with that doctrine, the International & Great Northern Railroad Company would not be liable to the appellant for the damages arising from the injury."

The proposition that the owner is absolved from liability when the lease is duly authorized by law is not to be disputed; but that, without a statute conferring that power, a railroad company cannot lawfully lease and transfer the control of its road, is settled by the cases we have previously cited. We have been referred to no general law of our legislature authorizing such lease. If any private act existed, defendant should have pleaded it, so as to show that the lease was lawfully made. This not having been done, we conclude that the leases were not warranted by law, and hence that the court did not err in sustaining the exceptions to so much of the answer as set up that the defendant's railroad was being operated by the Missouri Pacific Railway Company at the time of the injury.

The sixth assignment of error is that "the court erred, in the sixth paragraph of its charge to the jury, in stating the rule for assessing the damages differently from the claim made in the petition. The items as stated in the charge, do not correspond with the items as stated in the petition, as they should do." This assignment is not well taken. The elements of damages which the jury were instructed by the court to take into consideration are substantially the same as those alleged in the petition.

The other assignments which allege error in the action of the court, in giving and refusing instructions, are of such a nature that they cannot be considered, in the absence of a statement of facts. Without knowing what evidence was adduced upon the trial, we cannot say that there was error in either of the particulars complained of in these assignments. The other assignments call in question the sufficiency of the evidence to sustain the verdict, and, without a statement of facts, cannot be considered.

In a written argument filed since the statement of facts was stricken from the record, we are asked to reverse the judgment, because as is claimed the judge who tried the cause below failed to make out and certify a statement of facts within the time required by the statute. The trial was had in December, and the court did not adjourn until the ninth day of March. On the morning of that day counsel of plaintiff and defendant each presented the judge with a statement of facts, stating that they could not agree. Ten days were allowed for preparing and filing the statement, but this was not done

until the fifth day of April, when he certified a statement, and directed the clerk to file it as of the ninth of March, and at the same time made a certificate to the foregoing facts, as well as to the further fact that he had prepared the statement as soon as his "other engagements would admit." Appellant treated the paper so prepared and filed as a statement of facts, and brought it up in the record. The action of the court was neither excepted to nor assigned as error, and is nowhere complained of except in the written argument. It is obvious we cannot revise it. If error at all, it is not of that fundamental character which it is our duty to consider without an assignment specifically pointing it out. It is to be remarked, however, that the court continued in session for more than two months after the case was tried, and more than one month after the motion for a new trial had been overruled. The statement prepared by counsel not having been presented to the judge until the last day of the term, it may be doubted whether appellant could have complained, if the judge had at that time refused either to make out and certify a statement, or allow additional time for that purpose.

We find no error in the judgment, and it is affirmed.

HUGHES v. GALVESTON, H. & S. A. RY. CO.

(*Supreme Court of Texas. April 8, 1887.*)

1. NEGLIGENCE—CONTRIBUTORY—RAILROADS.

A recovery cannot be had against a railroad company for the death of a person who, being capable of taking care of himself, enters upon the company's track, and remains there until struck by a train, whose approach he might see, even if the train might have been stopped in time to avoid striking him.¹

2. SAME—EVIDENCE—APPEAL.

Several witnesses who were present when plaintiff's husband was struck by defendant's train testified that the bell was ringing, and the head-light of the engine burning, for some distance before reaching the point at which the deceased was first seen. In this state of the evidence, *held*, that the exclusion of the testimony of a witness living near by, (it did not appear how far from the place of the accident,) that the bell was not ringing, nor the head-light burning, when the train passed her house, was not prejudicial error.

3. APPEAL—PRACTICE—ASSIGNMENT OF ERRORS.

Rev. St. Tex. art. 1037, and rule 26 of the supreme court, require an assignment of error to point out the specific error relied on; and where, in an assignment, several errors are collectively referred to, the assignment will not be considered.

Appeal from Bexar county.

Teel & Haltom, for appellants. *Waelder & Upson*, for appellees.

STAYTON, J. This action was brought by the widow of Michael Hughes, in her own right and for the benefit of the minor children of herself and her deceased husband. She seeks to recover damages for an injury which she alleges was caused by the negligence of the railway company and its servants, that resulted in the death of her husband. It is now urged, as a ground for reversal, that there was such evidence as required a verdict for the plaintiff, and denied one to the defendant. The assignments of error relate to the admission and exclusion of evidence, and to the giving and refusing to give instructions to the jury.

The uncontroverted evidence shows that the deceased was first seen sitting on the railway track about 30 feet in advance of the locomotive which came in contact with him, and that, so soon as seen, effort was made to avoid the collision; but there is some evidence to the effect that a locomotive could be stopped in a less distance than that intervening between the deceased and the locomotive when he was first seen. The appellant, on cross-examination, was

¹ Respecting what constitutes negligence of one going upon a railroad track, see *Mynning v. Detroit, L. & N. R. Co.*, (Mich.) 31 N. W. Rep. 152. Digitized by Google

asked whether, when informed of the injury to her husband, she did not say that "he always went to the track when drunk." This question was objected to, and the objection overruled, and the witness then stated that she made no such remark. If this question was an improper one, the answer to it certainly could not have had any injurious effect upon the case. If this question was irrelevant, and asked for the purpose of laying a predicate to impeach the evidence of the witness, by proving that she made such a remark, the latter evidence might have been excluded; but there is no assignment of error presented in the brief of counsel which raises the question of admissibility of evidence to show that she did make the remark. Such an assignment is found in the record, but, as it is not presented in brief of counsel, it must be deemed to be waived. Rule 29.

Several witnesses, who were present when the accident occurred, stated that the bell on the locomotive was ringing for some distance prior to reaching the point at which the deceased was first seen, and so continued, and that the head-light was burning; but one witness stated that the head-light was not in good order. Thus standing the evidence, a witness who lived west of the place of accident, how far not shown, proposed to testify that the bell was not ringing, or the head-light burning, when the locomotive passed her house, and this evidence was excluded. No injury could have resulted from the exclusion of this evidence, which it seems to us ought not to have been admitted, even if in some cases proof of the condition of a locomotive near to, but not at, the place and exact time of an accident might be admissible.

The fourth assignment of error is that "the court erred in giving the special charges asked by defendant." Two charges, relating to different matters, were given at request of defendant, and the assignment does not point out, as required by the statute and rules of this court, the specific error relied on. The statute, as well as the rules of this court, declare that such assignment shall not be considered. Rev. St. art. 1037, rule 26.

The fifth assignment is that "the court erred in refusing to give the special charges asked by plaintiff." The charges so asked consisted of five distinct paragraphs, relating to as many different matters, and, for the reasons before stated, is not such an assignment as is required. In view of which case we deem it proper to say that we have looked to the charges given at request, and refused, to ascertain whether there was any such error in either of these respects as we could or ought to notice, in the absence of any assignment, and we find none such. Under the case made by the evidence, the charges asked and given were substantially correct, while those asked and refused were in part erroneous, and not applicable to the case made, and, in so far as correct, they were covered by charges given. The charges given without request fairly submitted the case to the jury, while some refused would have entitled the appellant to recover, notwithstanding the injury may have resulted from the contributory negligence of the deceased, if there was the slightest neglect on the part of the defendant in regard to matters which in no way could have contributed to the injury.

The deceased was sitting on the railway track, and there is not a particle of evidence tending to show that he was compelled to be there, or in any manner detained there by the faulty manner in which the railway may have been constructed, nor tending to show that he might not have traveled on the street without entering on the track of the railway. However, the condition of the track was an unimportant inquiry. A high degree of care is necessary on the part of a railway company in operating its trains or locomotives on any part of its road, and especially so in the streets of a town or city, though such streets may be in the suburbs, and but little used; but if, while so operating its road, one fully capable, mentally and physically, to take care of himself, enters upon and remains on its roadway until he is injured by an approaching train or locomotive which he might see and hear by the use of

his senses, then it must be held that the contributory negligence of such a person will defeat a recovery by him, or by one who can recover only on such facts as the injured person could have recovered on had he not died through the injuries received by him. There is nothing in the evidence tending to show that the deceased was not in mind and body sound, nor that he was wanting in any of the senses necessary for him to perceive and avoid danger, and the rule which denies a recovery to one whose contributory negligence brings about the injuries complained of finds application.

There is no error in the judgment, and it will be affirmed.

KIBER, Adm'x, and others v. KIBER.

(*Supreme Court of Tennessee.* March 14, 1887.)

APPEAL—TRANSCRIPT—FILING.

Where the appellant fails to file a transcript, and the appellee does so, and asks an affirmance, which is resisted on the ground that it was agreed by the parties that no transcript need be made out, as they were negotiating a compromise, which agreement is denied, the supreme court will not try the issue of fact in regard to such alleged agreement, but will affirm.

Appeal from chancery court, Davidson county.

Bill by administratrix to set aside a conveyance by her intestate, on the ground of fraud. Decree for complainant, from which defendant appealed. The transcript was not filed by appellant, and the appellee filed the same, and asked for an affirmance of the decree.

Dodd & Anderson and *T. M. Steger*, for complainants. *W. D. Covington* and *E. T. Holman*, for defendant. *Wm. G. Brien*, for defending creditors.

TURNER, C. J. The appellee files the transcript, and asks affirmance under the statute. This is resisted upon the ground that the parties had agreed that no transcript need be made out, as the parties were negotiating a compromise of the suit. The one side affirms; the other denies. This makes an issue of fact which we will not try. In a case of contest like this one, we must pursue the statute, and affirm the decree of the court below. In *Hahr v. Musgrove*, 12 Lea, 289, there was no disputed agreement.

Affirmed.

POLK and others v. MITCHELL and others.

(*Supreme Court of Tennessee.* April 14, 1887.)

1. TAXATION—SALE—PLEADING.

For a chancery sale for taxes to be valid, the bill must describe the tracts to be sold, and the amount of taxes due on each tract. A statement of the gross amount due on several tracts is irregular.

2. EQUITY—CROSS-BILL—DECREE.

Although, as a general rule, a decree for the payment of money by complainant in an equity suit is irregular in the absence of a cross-bill claiming such decree, yet where, in a bill to prevent the foreclosure of a mortgage, the complainant prays for an account, and offers to pay what may be found to be justly due by him, he must abide the result of the account, and a decree against him is valid, though no cross-bill is filed.

3. TENDER—BRINGING MONEY INTO COURT—PLEADING.

A bill to redeem land sold for taxes, which avers that complainant is ready and willing to pay the sums already tendered, "and hereby offers to pay them, and here brings the money into court," and will pay the same as directed, is sufficient to support a decree, though the money were not actually brought into court. If defendants objected to this, they should have demurred.

From chancery court, Shelby county.

Gantt & Patterson and *Wright & Folkes*, for plaintiffs in error. *Taylor & Carroll*, *Humes & Poston*, and *Harris & Turley*, for defendants in error.

LEHMAN, Special Judge. The original bill in this cause was preferred by O. B. Polk in the chancery court of Shelby, on the fifth day of August, 1878, for himself, and as trustee of the heirs of J. J. Polk, deceased, who are all named, and by James and John Roper and others, their tenants on the land in controversy in the suit, against the children and heirs of William P. Mitchell, Sr., deceased, and especially Edward B. Carroll and William P. Mitchell, Jr. The original bill asserts that said Oscar B. Polk, trustee, is the owner in fee of two tracts of land in Shelby county, containing, respectively, about 185 acres and 500 acres, which he acquired upon a sale thereof under an order of sale, based on a prior levy of an execution thereon, on a judgment rendered in this court in favor of the personal representatives of J. J. Polk, deceased, on the fifth of May, 1874, against William P. Mitchell and A. W. Mitchell for the sum of \$9,522.56. The bill further alleges that execution was issued upon said judgment on July 8, 1874, and the same was levied on said two tracts of land on July 21, 1874; and, without any sale by the sheriff, such execution was returned; that orders for the sale of said lands were issued at every successive term of this court, all of which were returned unexecuted, until the fourteenth of February, 1877, when a *pluries venditioni exponas* was issued, under which said lands were sold, on March 10, 1877, to Oscar B. Polk,—the 185 acres for \$2,775, and the 500 acres for \$10, upon which sale and purchase the sheriff executed a deed to him on March 10, 1877.

The bill further alleges that William L. Vance, on April 6, 1875, recovered a judgment against said William P. Mitchell for \$7,649.48, in the First circuit court of Shelby county, under which an execution was levied on the 500-acre tract of land on June 28, 1875; and which was sold to William P. Vance for \$160, and a deed therefor executed to him; that Vance advanced his bid, under said purchase, to \$2,000, and afterwards Oscar B. Polk and P. H. Bowers, as administrators of J. J. Polk, deceased, redeemed said 500 acres of land from said Vance as judgment creditors, by paying him \$2,333.33, and crediting their judgment by \$3,868.67, and making said land cost them \$6,204.34; that, upon such redemption, Vance conveyed said 500 acres, by his deed, to Oscar B. Polk and P. H. Bowers, as administrators. It also appears from the bill that shortly after March 10, 1877, Oscar B. Polk, as trustee, took possession of both of said tracts of land, and on January 21, 1878, made a lease of the 500-acre tract to James and John Roper, who went into the possession thereof, and sublet the same to others of the complainants, and that said Polk made a lease of the 185-acre tract to the complainants Gilliam and Paine.

The bill also avers that the defendants W. P. Mitchell, Jr., and Edward B. Carroll went upon said two tracts of land under a writ of possession issued from the chancery court of Shelby county; and, under threats of dispossessing the tenants who occupied the same, coerced such tenants to attorn to them. Such writ of possession was issued upon a purchase of said lands by W. P. Mitchell, Jr., and Edward B. Carroll under a decree of said chancery court in a proceeding to sell the same for taxes. It is claimed in the bill in this suit that such proceedings were void, because, among other grounds, there was no valid description in the bill therein of said two tracts of land.

On the seventeenth day of February, 1879, the complainants filed an amended and supplemental bill in this cause, wherein the averments of the original bill are stated to be true, and that on May 18, 1874, one W. W. Wallace recovered a judgment, in the circuit court of Shelby county, against William P. Mitchell, Sr., for about \$125, from which an appeal was taken to this court, where, in June, 1877, the judgment was affirmed, execution issued thereon and levied on the two tracts of land, which were sold on or about August 15, 1877; the 500-acre tract to William P. Mitchell, Jr., and Edward B. Carroll, and the 185-acre tract to William Y. C. Humes, David Poston, and William K. Poston. Such sales are in the amended and supplemental bills as-

serted to be void because of the previous sales to William L. Vance and Oscar B. Polk and B. H. Bowers. The bill, in this connection, charges that the sales under the Wallace judgment were made secretly and privately, without publication and notices as required by law, upon a waiver of notice by the debtor William P. Mitchell, Sr. It is also averred that William P. Mitchell, Sr., on the thirty-first of August, 1877, for the pretended consideration of \$150, fraudulently conveyed to William P. Mitchell, Jr., and Edward B. Carroll, his equity of redemption in said lands, and that on February 13, 1877, Humes & Poston took of Mitchell, Sr., a deed of trust on the 185-acre tract, which was not recorded; that complainants, on January 9, 1879, offered to pay William P. Mitchell, Jr., and Edward B. Carroll what they had paid out for taxes on said two tracts of land, and in their purchases under the Wallace judgment and the chancery decree, and then made a tender of more than sufficient to cover the amounts; that complainants, on the ninth day of January, 1879, tendered to Humes & Poston the amount bid by them in their purchase under the Wallace judgment, with interest, etc., and asked to be allowed to redeem the 185-acre tract.

To the original and amended and supplemental bills W. Y. C. Humes, David H. Poston, and W. K. Poston interposed their answer and cross-bill, in which they attack the decree. The complainants recovered in this court, in 1874, upon the allegations that it was rendered without notice to William P. Mitchell, Sr., of the suing out of the writ of error in the cause, and that therein J. J. Polk, who was a defendant, had filed no cross-bill, and was entitled to no money judgment; and it is contended, upon these grounds, that the complainants were not judgment creditors of W. P. Mitchell, Sr., and not entitled to redeem. It is further contended in said cross-bill that the decree in favor of J. J. Polk was rendered in Madison county, and W. P. Mitchell, Sr., resided in Shelby county. It was therefore no lien on said lands until the execution issued thereon had been levied, which occurred long after the rendition of the Wallace judgment.

The defendants William P. Mitchell, Jr., and Edward B. Carroll also answered the bill, and filed their cross-bill, in which all charges of fraud are denied, as well as the claim of title to the lands in controversy of Polk. In such answer and cross-bill the money decree rendered in favor of Polk, in 1874, is assailed, because the pleadings in the cause did not authorize it, and that an execution based on the decree was void. It is admitted in the answer that Mitchell & Carroll claimed the lands in controversy under the decree of sale for taxes of the chancery court, and caused a writ of possession to issue in their behalf, upon which the tenants in possession agreed to attorn to them; and it is averred that no tender or offer to redeem was made within two years from the date of the purchase at the chancery sale. The defendant Edward B. Carroll admits in his answer that on January 9, 1879, Oscar B. Polk made the tender of money mentioned in the bill. The defendant William P. Mitchell avers that he was not present when such tender was made to Carroll, but admits that Polk called on him, and said his object in calling was to make a tender, and took out some money, as he then said \$1,060, and counted it, and offered it to him, (Mitchell;) and both said defendants admit that they refused the moneys which were tendered to them.

The chancellor, by his decree in this cause, adjudged the following points: (1) That W. P. Mitchell, Jr., and E. B. Carroll acquired title to the 500-acre tract under the Wallace judgment as tenants in common in equal moieties; (2) that W. P. Mitchell, Jr., and E. B. Carroll acquired title to both tracts involved in this litigation as such tenants in common, under the chancery sale for taxes, which title was superior to the claim of title or judgment lien of complainants; (3) that W. P. Mitchell, Sr., and his judgment creditors, had the right to redeem of defendants the title so acquired, and said W. P. Mitchell, Jr., and E. B. Carroll, being tenants in common, W. P. Mitchell, Sr., and his

judgment creditors had the right to redeem of each of them severally his undivided half interest by payment or tender of one-half of the amount necessary to redemption; (4) that on June 9, 1879, O. B. Polk, administrator of J. Polk, deceased, who was a judgment creditor of W. P. Mitchell, Sr., tendered to E. B. Carroll a sum sufficient to redeem his undivided one-half interest in said lands; (5) that the attempt, by said O. B. Polk, to redeem said lands from W. P. Mitchell, Jr., was defective and insufficient, and said Mitchell is vested with an undivided one-half of said lands; (6) that the tender by O. B. Polk to defendants Humes and Poston was good, and that it was unnecessary to tender them the amount of their trust deed; (7) that the conveyance by W. P. Mitchell, Sr., to W. P. Mitchell, Jr., and E. B. Carroll was not fraudulent; (8) that the undivided one-half interest of E. B. Carroll in said lands be divested out of him; (9) that Polk pay the redemption money into court, \$1,475.75, and that the clerk and master pay the same over to E. B. Carroll; (10) that complainants pay one-half of the costs, and defendants Carroll and Humes and Poston the remaining one-half thereof. From that decree the complainants and the defendants E. B. Carroll and Humes and Poston appealed to this court.

The commission of referees in their report find O. B. Polk's tender was good as to the defendant W. P. Mitchell, Jr., and recommend a reversal of the chancellor's decree on that point. The defendants W. P. Mitchell, Jr., E. B. Carroll, and Humes and Poston file exceptions to the report of the referees, which raise only questions of law, inasmuch as no evidence or other matter contained in the record is therein referred to for a basis of objection.

It is contended that the personal judgment rendered in this court on the fifth of June, 1874, against W. P. Mitchell, Sr., upon which the personal representatives of J. J. Polk, deceased, placed their right to redeem the lands in controversy, was void, because of the character of the suit in which the said judgment was obtained, and issues made by the pleadings therein. The record of that proceeding is in evidence in this suit, and shows that the same was instituted by W. P. Mitchell, Sr., to enjoin the sale of land, mortgaged by trust deed, to secure the payment of a debt owing by him to J. J. Polk, upon the ground of usury, and unrecognized payments. The complainants in the bill in that case made the following averments: "Complainant is ready and willing and now offers to pay the true and legal amount due, when ascertained;" and in the prayer asked "that an account be taken of the several payments actually made by complainant on said debt, and the amount actually due, and complainant will pay the same." In view of these features of the case, it is clear that the said decree was correct. In *Allen v. Allen*, 11 Heisk. 387, Judge McFARLAND, delivering the opinion, says: "But it is now argued that, as no cross-bill was filed, it was error to render a decree for the defendant for the balance due him. He should have been remitted to his action at law. The position is not maintainable. The complainant, having prayed for an account, must abide the result of it. In such case no cross-bill is necessary."

The next assignment of error controverts the finding of the referees to the effect that the defendants W. P. Mitchell, Jr., and E. B. Carroll acquired no title to the land in controversy under the chancery sale for taxes. The referees reported that sale void on the following grounds: (1) The bill in the suit charged \$1,169 of taxes against four different tracts of land, without showing how much was due on each separate tract; (2) that the land was not sufficiently described. These conclusions are sustained by *Mayor, etc., of Morristown v. King*, 11 Lea, 669, which we will follow, and upon which the finding of the referees on this point will be upheld.

It is insisted that the bill is defective as a redemption bill, because the redemption money was not brought into court. The averment of the bill is, "that complainant is now ready to pay to the said Wm. P. Mitchell, Jr., and

Edward B. Carroll and Humes and Poston the sums severally tendered to them, * * * and hereby offers to pay to them, the said several parties, the sums so tendered, and here brings into your honorable court, with this bill, the said several sums, and will pay the same to your honor's clerk and master, subject to such orders as shall be proper in regard to said money." The defendants did not demur to the bill for the failure of an offer by the complainants to bring the money into court,—the money previously tendered,—but absolutely denied the right of complainant to redeem. But it seems to us that the bill is not defective in any particular whatever criticised by the exceptions of defendants.

The contention that Humes and Poston, by their purchase under the Wallace judgment, acquired a title superior to that of complainants, and that the title thus acquired by them immediately vested in the trustees under the deed of trust made by W. P. Mitchell, Sr., for their benefit, is not tenable. There was no connection between the purchase under the execution and the title of the trustees under the trust deed. And this disposes, also, of the exception which asserts that Humes and Poston were entitled to the payment of their debt secured by this trust deed from the judgment creditor who proposed to redeem.

The result is that the report of the referees must be confirmed, and the decree of the chancellor will be modified in so far as relief was thereby denied to the complainants against the defendant W. P. Mitchell, Jr. The costs will be paid as is suggested in the report of the referees.

MARKS and others v. TICHENOR.

(Court of Appeals of Kentucky. May 5, 1887.)

1. VENDOR AND VENDEE—CONTRACT—RISK.

Upon the sale of land it becomes the property of the vendee from the execution, delivery, and acceptance of the written contract; and, if a building thereon is destroyed by fire between the time of such contract of sale and the time fixed upon in the contract for the delivery of possession by the vendor to the vendee, the latter, and not the former, must bear the loss.¹

2. SAME.

There are only two exceptions to this rule: (1) Where there is an express contract to deliver possession of the land, with the improvements or buildings thereon, in the same condition they were in when the sale was made; (2) where the building has been destroyed by the culpable negligence of the vendor.

3. SAME—AGREEMENT BY VENDOR TO REPAIR.

Where a sale was made and the deed delivered in October, and the vendor agreed to re-roof and paint the house, and deliver it by the following January, held, that this was merely an agreement to repair, and not an undertaking on the part of the vendor to assume the risk of fire; and, the house having been destroyed between October and January, the loss falls on the vendee.

Appeal from circuit court, McLean county.

Owen & Ellis and *W. B. Noe*, for appellants. *Jep. C. Jonson*, for appellee.

LEWIS, J. Appellee having sold, and by deed executed October 24, 1884, conveyed, to appellants three tracts of land adjoining, and constituting one farm, instituted an action to recover judgment on the notes given for the purchase money, and to subject the land to satisfy it. In defense, appellants

¹The purchaser under an executory contract for the sale of land is the equitable owner. *Burkhart v. Howard*, (Or.) 12 Pac. Rep. 79; *Gilbert v. Sleeper*, (Cal.) id. 172; *Alpers v. Knight*, (Cal.) 8 Pac. Rep. 448; *Taylor v. Holmes*, 14 Fed. Rep. 498; *Martin v. Carver*, (Ky.) 1 S. W. Rep. 199; *Bartle v. Curtis*, (Iowa,) 28 N. W. Rep. 73. Any accidental loss accruing between the time of his purchase and the conveyance of the legal title must be borne by him, and he is entitled to all the benefits. *Martin v. Carver* (Ky.) 1 S. W. Rep. 199.

state that the deed as written does not contain the whole contract entered into between the parties, but a portion of it was by mistake omitted, and that they accepted the deed upon the condition of the execution by appellee of the following writing, which embraces the omitted part:

"I have this day sold to James A. and Samuel C. Marks my farm known as the 'Daniel McFarland Farm.' I agree to cover said house, and put two coats of paint on the outside, and deliver the same to said parties by or on the first day of January, 1885. Eleven thousand of the shingles *is* to be hand-shaved shingles, and the remainder to be cut shingles. I also agree to furnish as much as 200 feet of sheeting if needed on said house; and, if any more is needed, said Marks is to furnish it. T. C. TICHENOR."

It is further stated that about November 29, 1884, the dwelling-house mentioned was destroyed by fire, in consequence of which appellee never did deliver it, and they therefore ask that the notes sued on be credited by the value of the house, which they aver was \$1,000. It is stated in the reply, and not controverted, that, at the time of the sale of the land, it was in the possession of a tenant of appellee, whose term did not expire until January 1, 1885, of which fact appellants were aware, and that time was agreed on in view of such tenancy.

In the sale of land it becomes the real property of the vendee from the execution, delivery, and acceptance of the written contract. "It is vendible as his, chargeable as his, and capable of being devised or descending as his." Consequently it is a well-established and reasonable rule that the destruction of buildings thereon by fire, between the time of such contract of sale and the time fixed upon in the contract for the delivery of possession by the vendor to the vendee, must be the loss of the latter and not of the former. *Calhoon v. Belden*, 3 Bush, 674. There are only two exceptions to this rule. The first is when, as was the case in *Combs v. Fisher*, 3 Bibb, 51, there is an express contract to deliver the possession of the land, with the improvements or buildings thereon, in the same situation as was the case when the sale was made. The second is when, as was in *Cornish v. Strutton*, 8 B. Mon. 586, the building has been destroyed by the culpable negligence of the vendor.

There is no allegation or proof that the destruction of the dwelling-house in this case was caused by the negligence of the vendor, or any other person; nor do we think the contract, fairly construed, amounts to an express agreement by the vendor to assume the risk of the destruction of the buildings by fire. The purpose of the supplemental contract executed by appellee was to provide for the repair by him of the house as therein agreed, and which the evidence shows he did do, but not to insure it against destruction by fire, or to shift the risk from appellants to himself. He simply covenanted to deliver possession, without any express undertaking to sustain any loss that might arise from the burning of the house. Judgment affirmed.

CURD, by, etc., v. CURD and others.

(Court of Appeals of Kentucky. May 3, 1887.)

1. WILL—DEVISE—CONSTRUCTION.

A testator, devising his estate to his wife and children, directed that the widow should manage the estate until the youngest child should reach 21 years of age; that then they should have the privilege of dividing the property, if they should desire to do so, the widow to take a child's share; that, if the widow should marry again, her share should be allotted to her, to be hers only during her life, and at her death to revert to the children, to be held together and managed as aforesaid, some one being appointed for the purpose by the proper court. *Held*, that any one of the devisees had a right to demand a division upon the youngest child arriving at 21; that, upon the remarriage of the widow, and the allotment to her of her share for life, the balance of the estate was to be kept together as before, her share

after her death to be held as part of the whole estate, if no division has been made previously; and that the widow's remarriage would not supersede her power as trustee.

2. SAME—TRUST—RIGHTS OF BENEFICIARY.

A testator, who had been twice married, left his property to his widow, his children by her, and a daughter by his first wife, directing the property not to be divided until the youngest child should arrive at the age of 21 years, and meanwhile the widow to live on the farm, and manage the property for the benefit of all, and to "raise, provide for, and school" the children. Held, that the step-daughter, who did not live at home because she did not get along well with her step-mother, was entitled, notwithstanding that fact, to her share of the income of the property, making a deduction, however, in estimating the income, for any increase thereof caused by the labor of the other devisees.

Appeal from circuit court, Mercer county.

P. B. Thompson, Sr., for appellant. *T. C. Bell*, for appellees.

BENNETT, J. R. J. Curd died July 8, 1879, in Mercer county, Kentucky. He left surviving him the appellant, Ella M. Curd, an infant and only child by his first wife. He also left surviving him the appellee Susan B. Curd, his second wife, and three infant children by her, who are also appellees. The appellee Susan B. Curd, married the appellee D. S. Curd, July 12, 1884. R. J. Curd, in his life-time, made a will, which was duly probated in the Mercer county court, and admitted to record. The appellee Susan B. Curd was appointed administratrix with the will annexed of R. J. Curd's estate. She continued to act as administratrix until some time after her marriage with the appellee, D. S. Curd, when B. F. Roach became the administrator with the will annexed. This suit was instituted by the appellant, Ella M. Curd, for a construction of R. J. Curd's will, and for a settlement of his estate. By amended pleadings, other questions are raised, which will be noticed after a while.

The second, third, and fifth clauses of the will, which control its construction, are as follows:

"(2) All my property, of every description, is to be held together, and not divided, until my youngest child shall become twenty-one years of age; my wife, Susan B. Curd, to live upon my farm, and manage my property for the benefit of my children and herself, and she to raise, provide for, and school my children in a manner suitable to their condition in life.

"(3) When my and my wife's youngest child by me shall arrive at the age of twenty-one years, then they have the privilege of making an equal division of my said property, if they desire to do so, among themselves; my said wife Susan to take a child's part at the time of division."

"(5) Should my said wife, Susan, again marry, then I will and provide that her said child's part shall be allotted to her, and to be hers only during her life, and at her death to revert to my said children, to be held together and managed as aforesaid; some one being appointed by the proper court, and required to give bond with good security for the application of the interest and proceeds of my property as aforesaid."

The third clause of the will gives to the appellee Susan B. Curd a child's part of the testator's estate at the time of its division among the devisees, which division is not to be made until the youngest devisee shall have arrived at the age of twenty-one years. By this clause Susan B. takes, at the time of the division, a child's part of the estate absolutely. But by the fifth clause of the will, if she marries again, her interest in the part willed to her by the third clause is reduced from a fee-simple estate to that of a life-estate only. By the third clause of the will, if Susan B. still remains a widow, the estate is not to be divided until the youngest child shall have arrived at the age of twenty-one years. It may then be divided among the devisees, but a division is not even then enjoined. Any of the devisees, then, has the right to require a division. Unless a division is demanded, the estate is to be

still kept together for the purposes set forth in the second clause of the will. Upon the marriage of Susan B., however, then her interest in the estate, a child's part for life, is to be set apart to her, which she has the exclusive right to the use of during her life. But the balance of the estate is to be held together as before, and, in the event of her death, then the life-interest of Susan B., she having married again, is to revert to the children, and, if no division has been made among them at the time of the reversion, then said interest is to be held as a part of the whole estate for the purposes mentioned in the second clause of the will. The will also appoints Susan B. trustee of the estate, for the purposes mentioned in the second clause of the will, which trusteeship continues until the youngest child arrives at the age of 21, and as much longer as the estate may be held together, and her second marriage does not supersede her powers as trustee. In the event of her death, however, then, by the provisions of the will, if the estate is not yet divided, the proper court is authorized to appoint a trustee to carry out the trust.

As we understand the decision of the lower court, it accords with the foregoing views, and to that extent is affirmed. But we cannot agree with that part of the lower court's construction of the will which denies the appellant equal right to a support and education out of the proceeds of the estate with the other devisees, simply because she did not live upon the estate with her step-mother. The proof clearly shows that, down to the time of the death of the testator, the appellant and the appellee Susan B. did not get along well together, and it was evidently thought by the appellant that it would be more agreeable to her to live elsewhere. But it is not necessary to decide which one was in fault because, as we understand the provisions of the will, the appellant, notwithstanding she is living away from the place and her step-mother, is entitled to her *pro rata* of the proceeds of the estate for a support and education; she has an equal interest in the estate with the other devisees. Her interest in the estate helps to make up the yield of the estate; and it would evidently be unjust to deprive her of the yield of her property, because it is more agreeable to her, and perhaps the best for her, to live with more agreeable kinspeople.

The court, however, in fixing the allowance of the appellant, should take into account, if the proof justifies it, any increase of the proceeds of the estate caused by the labor of the other devisees, and deduct that sum, and then allow the appellant her *pro rata* of the balance.

The judgment of the lower court rejecting this allowance is reversed. In every other respect it is affirmed. In affirming we have not overlooked the various items of account allowed and disallowed by the lower court, notably, that for building a house on the farm by Susan B.; that of allowing Susan B. the insurance money, and rejecting her claim to interest thereon, etc. Upon the return of the case, the lower court will also amend its decree so as to reserve the right to require the appellee Susan B., at any time the interest of the appellant or any of the other devisees may require it, to give bond, with sufficient surety, for the faithful management of said estate, and the preservation thereof, and the application of the proceeds according to the provisions of the will.

DUNCAN, Trustee, and others v. CENTRAL PASSENGER R. Co.

(Court of Appeals of Kentucky. April 30, 1887.)

1. DEED—BUILDING RESTRICTION—SUBSEQUENT GRANTEE—NOTICE.

J. owned a tract of suburban land, which he divided into lots bordering on a wide avenue, and sold two of the lots to A., stipulating in the deed that no building for business purposes or other than a dwelling should be erected on the land. A. afterwards sold to appellee (a street-railway company) without inserting in the

deed the restriction as to building. *Held*, as the deed from J. to A. was of record, the railway company was charged with notice of the restriction, and could occupy no better position than A. did.

2. SAME—WAIVER—INJUNCTION.

The evidence showed that the restriction in the deed to A. was inserted in pursuance of a plan on J.'s part to confine building on the entire tract to residences, but that he afterwards sold or mortgaged the other lots without inserting in any of the deeds any such restriction. *Held*, this constituted an abandonment or waiver of the plan, and he could not afterwards enforce the restriction in A.'s deed, or have an injunction to restrain the railway from erecting stables on the lots purchased of A.

3. INJUNCTION—WHEN IT LIES.

To authorize the issuing of an injunction there must be a clear case of impending injury, and an urgent necessity for the writ. If the cause of action be continuous, and the nature of the impending damage such as not to be susceptible of proper assessment by a jury, but a matter of conjecture merely, an injunction will lie.

Appeal from Louisville chancery court.

Alcw. P. Humphrey, for appellants. *John Mason Brown* and *Geo. M. Davie*, for appellee.

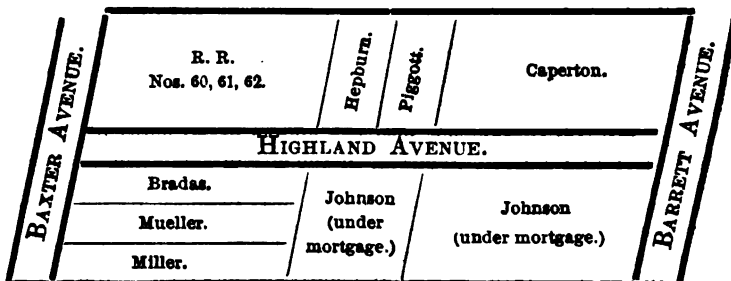
HOLT, J. William C. Johnson was the owner of 20 acres of land lying between Baxter and Barrett avenues, in the city of Louisville. In 1870 he made a plat of it, in which it was laid out in lots, with a wide avenue running through the middle of it, from Baxter avenue to Barrett avenue, known as "Highland Avenue." The owner believed that the lots would sell best for residences, and the purpose was to confine them to this use. This was the plan. In October, 1873, he sold and conveyed lots 60, 61, and 62, which lie at the corner of Baxter and Highland avenues, to one Allman. He had previously declined to sell them to the appellee, the Central Passenger Railroad Company. Allman conveyed them to it in December, 1873, for the price at which he had purchased. The deed from Johnson to Allman contained this restriction: "It is hereby agreed between the first and second parties that no business, manufacturing, or other than dwelling-houses shall be built upon said property, and no alley shall run through said property, and no building of any kind shall be put thereon fronting any other way than on Highland avenue, or the said twenty-four feet alley." The deed from Allman to the railroad company, however, embraced no such condition; but the one to him was of record, and the company, moreover, had actual notice of the restriction in the grant to him. It occupies no better attitude, therefore, than it would if it had been embraced in its own deed.

Such negative easements, or predial servitudes as they were called in the Roman law, are valid. They qualify the estate granted. The limitation on the use enters into the consideration for the contract and should, therefore, by common justice, be upheld, if not unlawful. It is not void as in restraint of trade, because it is not a contract in general restraint of it, but merely prevents the use of a particular piece of property in a certain way. No undue but a limited restriction upon the use merely is imposed. Conditions forbidding alienation to particular persons, or for a limited time, or to particular uses, are not in violation of law. *Stines v. Dorman*, 25 Ohio St. 580; *Trustees v. Lynch*, 70 N. Y. 440; *Cowell v. Springs Co.*, 100 U. S. 55; *Tulk v. Moxhay*, 11 Beav. 571.

The appellee, in 1881, began the erection of a brick building upon its lots, thus acquired, to be used as a station for its street railway, which extends along Baxter avenue, and also to shelter its cars, and as a stable for its stock. The appellant Johnson, relying upon the restriction in the deed to Allman, enjoined the appellee from building it. There is no question of laches upon his part, because he acted *in limine* as to the work, and enjoined it as soon as it was begun.

But the inquiry is presented whether there has been such a change in the condition of the property, or such conduct upon his part, as prevents him from asking the aid of a court of equity. There are, as yet, no buildings upon any of the lots. In fact, Highland avenue has never been improved, or in fact made a street. It must be recollected that the sale to Allman was in October, 1873. Prior to that time, Johnson had sold a lot to one Miller; also one to a man by the name of Mueller, and had mortgaged a portion of the land. He sold a lot to one Bradas in 1874; another to Susan Hepburn in 1876; another to one Piggott in 1880; and in 1881 he sold a large portion of the land to John M. Caperton, and mortgaged all the balance of it, which he still owned, and which was not already incumbered by mortgage.

The location and different sales will be best understood from the following plat:



None of the deeds or mortgages made by the appellant Johnson contained any restriction whatever as to use, save that to Allman. The Hepburn lot has changed ownership several times since its sale by Johnson, and now belongs to the appellee.

The parties now complaining own no land adjoining the lots of the railroad company, or any upon that side of Highland avenue. They have no interest in any, save that yet belonging to Johnson, and which is under mortgage. Indeed, he is the only complainant in interest, because the other appellants are his wife and his trustee. The owners of the lots adjacent to those owned by the company are not complaining, and have the right to erect anything they please on their lots short of a nuisance. Indeed, the company have a right to build a stable, or any other structure, upon the Hepburn lot, as it now belongs to it, and is not subject to any restriction.

It is urged that the conduct of Johnson, in thus selling the other lots without any restriction, should be held to be an abandonment or waiver of the restriction in the Allman deed; and that, by so doing, he has produced such a state of circumstances or condition as to the property that no such injury can accrue to him as authorizes its prevention by injunction. This writ is an extraordinary remedy. Its aid cannot be invoked save in a clear case of impending injury. There must be an urgent necessity, and this must be clearly shown. A mere possibility of injury does not authorize it. *Dumesnil v. Dupont*, 18 B. Mon. 804. The mere fact that there is a contract between parties does not authorize it, because there is a remedy for a breach of it by an action at common law for damages; and, if every contract could be enforced in equity, the chancellor would be overburdened. Our Code of Practice authorizes its issuance where great or irreparable injury is about to accrue. This, however, is not to be confined to cases of heavy pecuniary loss. If so, the person who has but little would often be comparatively remediless. If the cause of action be continuous, and the nature of the impending

ing damage such as not to be susceptible of proper assessment by a jury, but a matter of conjecture merely, then an injunction will lie, otherwise the remedy would often be inadequate; and it is in such cases that equity aids the poverty of the law, and rather regards the right of the party than the amount of damage which may accrue. *Stines v. Dorman, supra.*

Cases in support of this rule might be cited without number. Indeed, there is high authority, holding that no damage whatever need be shown; but that the right existing by virtue of the contract may be enforced without regard to the question of resulting damages. *Dickenson v. Canal Co.*, 15 Beav. 260; *Com. v. Railroad Co.*, 24 Pa. St. 160; *Trustees v. Lynch*, 70 N. Y. 440. We need not, however, determine the extent of the rule, because there is another question which is fatal to the appellant's claim.

It is evident that the restriction in the Allman deed was inserted to enable the appellant Johnson to carry out his plan of selling the property for residences. The then design was to have no buildings erected there save for residential purposes. This was a general plan, and to prevent its symmetry from being marred the covenant in the Allman deed was inserted. The evidence is conclusive that this plan was abandoned. Johnson subsequently sold the most of the property without any restrictions whatever. The grantees have the right to erect any character of building, and use it for any purpose, save a nuisance, which the law, and not the conveyances to them, inhibits. They may build stables, tan-yards, soap-factories, or structures of any other character, save those within the ban of the law. This is the result of Johnson's own conduct. He has put it out of his power to carry out his plan or general scheme of using the property for residential purposes only. He can no longer prevent others from destroying the plan, and by his own acts even the appellee has a perfect right to build a car-stable upon the Hepburn lot, now owned by it, and which adjoins the lot as to which the restriction was made in the Allman deed, years before this action was instituted. It is impossible, therefore, to carry out the theory or general plan which led to the insertion of the restriction named; and Johnson himself has produced this state of case. It is true that no other buildings have yet been erected, but they may be at any time, and a court of equity should not lend its aid to one looking to a certain end, when it may be defeated at any time by reason of the previous conduct of that person. Its action, under such circumstances, would be futile and barren of results.

It is urged, however, that Johnson had a right to suppose that other vendees would not erect any objectionable buildings, if the owner of the lot at the entrance to the avenue was restricted from doing so. It, however, appears that the year following the sale to Allman the appellant sold the lot immediately opposite, and which fronts on both Baxter and Highland avenues, to Bradas without any restriction whatever as to its use; and the conclusion is irresistible that the plan existing in his mind, and which led to the insertion of the restriction now in question in the Allman deed, was abandoned. The general scheme has, by the appellant's own permission and conduct, been so changed, and the condition of the property so altered, that it is liable to be defeated at the pleasure of others, and may in fact be regarded as impossible of fulfillment. The original plan, owing to his own action, is no longer practicable. The restriction has been thus rendered inapplicable in its true intent and meaning,—as much so as if the plaintiff had himself erected buildings destructive of the object of the covenant; and in such a case a court of equity will not interfere. In support of these views we refer to *Hil. Inj.* 711; *High. Inj.* § 1158; *Roper v. Williams*, 1 Turn. & R. 18; and *Duke of Bedford v. Trustees of British Museum*, 2 Mylne & K. 552.

A contract, the fulfillment of which becomes unreasonable, will not be enforced at the instance of a party who by his own conduct has produced such a result. After treating it as void, he cannot appeal to a court of equity to

treat it otherwise. We must regard the present state of the property; and, viewing it in this light, ought a court of conscience to interfere? The power of Johnson to control the premises is now gone. He has voluntarily let the matter pass out of his hands; and, having done so, it is no longer consonant with the principles of equity to interfere, and he cannot, to the prejudice of others, now ask a court of equity to aid him. Great injury would likely result to others, and no correlative benefit to him.

The most of the cases cited by his distinguished counsel did not turn upon the question of waiver or abandonment; while some of them are exceptional in fact but not in law. Indeed, the rule above indicated appears to be admitted, but it is denied that this case falls within it. We think otherwise, and the judgment is affirmed.

GREER and others v. WINTERSMITH and others.

(Court of Appeals of Kentucky. April 30, 1887.)

1. EXECUTION—SALE—PRIORITY.

Land was levied on under execution, and sold in 1863, but a deed was not made to the purchaser until 1877. In the mean time the land had been levied on again and sold under another execution, and a deed made to the purchaser in 1872. *Held*, that the purchaser at the sale in 1863 is entitled to hold the land as against the purchaser at the sale in 1872, although the latter obtained his deed first.

2. SAME—PRESUMPTION—LEVY—RETURN.

Where the sheriff has sold land under execution, the law presumes that, with the execution in his hands, he did his duty by levying it while it was still in full force, unless his return shows that he did not. The silence of his return upon that subject is not sufficient to rebut this presumption.

3. SAME—WAIVER—EFFECT.

An execution defendant may waive a levy upon property to be sold thereunder, and an advertisement of the sale, and, in such case, the sale will pass title as effectually as if made in the usual way.

4. SAME—DEED—TITLE.

A purchaser at an execution sale not only acquires by his purchase the lien created by virtue of the execution, but an inchoate or equitable title to the land, and the deed subsequently made to him by the sheriff relates back to the time of the creation of the lien by virtue of the execution, and perfects his title from that date.

5. CHAMPERTY—EXECUTORY CONTRACT—DEEDS.

The law against champerty does not apply to deeds made to carry into effect a contract for the sale of land of which there was no adverse possession at the time the contract was entered into, although the land be held adversely when the deed is made. This rule applies to an executory verbal contract of sale.

Appeal from circuit court, Hardin county.

W. P. D. Bush and J. P. Hobson, for appellants. *Montgomery & Poston*, for appellees.

BENNETT, J. Charlton D. Shean was the owner, and in the possession, of two tracts of land in Hardin county, Kentucky,—one known as the Pearman tract, situated on the old road about one mile from West Point, containing about 130 acres; the other known as the Carrico tract, situated on the turnpike about four and a half miles from West Point. About 100 acres of this tract were on the west side of the turnpike. While an execution, which issued from the Hardin circuit court against Charlton D. Shean, was in the hands of the sheriff of that county for collection, and which was in full force, said Shean surrendered 60 acres of the Pearman tract of land to the sheriff, to sell for the purpose of satisfying said execution. The surrender of said land was evidenced by a written indorsement on the execution, as follows:

"I give up to the sheriff of Hardin county, to sell to satisfy this execution, 60 acres of land at the south-west corner of my tract of land, on the old road, about one mile from West Point, known as the Pearman tract, and agree that he may sell without advertising.

C. D. SHEAN.

"May 21, 1863."

At the same time the sheriff received another execution against Charlton D. Shean for collection, which issued from the Hardin circuit court, and said Shean surrendered to the sheriff 100 acres of the Carrico tract of land to sell for the purpose of satisfying said execution. The surrender was by written indorsement on the execution, as follows:

"I give up to the sheriff of Hardin county one hundred acres of land lying on the west side of the turnpike, and in Hardin county, about four and one-half miles from West Point, to be sold to satisfy this execution, and agree that it may be sold without advertising. C. D. SHEAN.

"May 21, 1863."

The sheriff's written indorsements on these executions show that, after having these two parcels of land appraised by two disinterested housekeepers of the county, he sold, at public outcry, the two parcels of land, at the courthouse door in Elizabethtown, on the eighth day of June, 1863, and that Charles Greer, the father of the appellants, became the purchaser of both parcels at a less price than two-thirds of their appraised value. Several years after the purchase Charles Greer died intestate, and, no one having redeemed said parcels of land, the sheriff of Hardin county, on the second of July, 1877, conveyed by deed said two parcels of land to the children of Charles Greer. They, after said conveyance, instituted two actions of ejectment,—one against Charles G. Wintersmith and others, for the purpose of recovering the 60-acre tract of land, and the other against William Grimes and others, for the purpose of recovering the 100-acre tract of land. The issues having been made up in each case, they were transferred to the equity side of the docket, and consolidated. The lower court, upon final hearing of the cases, dismissed them absolutely. The appellants have appealed to this court.

At the time Charlton D. Shean surrendered said parcels of land to the sheriff, to be sold to satisfy said executions, he was the owner and in the possession of both parcels. Therefore they were subject to levy and sale to satisfy said executions.

The contention of the appellees, Wintersmith and others, as to the 60-acre tract of land, is—*First*, that the appellee, Wintersmith, purchased said tract of land at a sale made by the sheriff of Hardin county, Kentucky, by virtue of an execution which issued from the Hardin circuit court in his favor, and against Charlton D. Shean, and that he received a deed from the sheriff for said land in 1872, whereby he obtained a title to said land superior to that of the appellants. This contention cannot be sustained, because, first, the levy of Wintersmith's execution upon this land, and the sale thereof, occurred in the summer of 1863, after the land had been surrendered by Shean to the sheriff, and the sale thereof to satisfy the other execution; and it is well settled that "execution liens attach to the defendant's real, instead of his apparent, interest in property. It follows from this that the sale made under such a lien can ordinarily transfer no interest beyond that in fact held by the defendant when the lien attached, or acquired by him subsequently thereto, and before the sale." See *Freem. Ex'ns*, § 335. "Sales under execution always assume to be of all the title and interest of the defendant in the writ." Nothing more or less than the defendant's title or interest in the property is presumed to be sold. That title or interest the purchaser gets. If it turns out that the defendant has no title or interest in the property sold, then the purchaser acquires nothing by his purchase. There is no warranty of title by the sheriff at an execution sale. The purchaser takes just what title the defendant in the execution has. He buys at his peril. The rule of *caveat emptor* applies to him. See *Freem. Ex'ns*, § 301.

The land having been surrendered by Shean to the sheriff on the twenty-first of May, 1863, and a sale thereof having been made by the sheriff on the eighth of June, 1863, to satisfy the execution in favor of McMillan, at which sale Charles Greer became the purchaser of the land, and all of which occurred

prior to the levy of Wintersmith's execution upon the same land, and the purchase thereof by him at the execution sale, he, for the reasons above indicated, acquired no title to the land by his purchase.

Second. The fact that the sheriff's deed to Wintersmith is prior in date to that of the appellants can give to the appellees no advantage over the appellants, because the sheriff's deed must be "given such an effect as will presume and make effectual the lien under which the execution sale was made;" and, in order that the deed may have such an effect, "it takes precedence over subsequent liens and transfers; and a sale and conveyance, based upon such lien, transfer to the purchaser all the title which the defendant held when such original lien attached. To this extent, the deed, when executed, takes effect by relation, and must be treated as though made on the day when the lien was created." See *Freem. Ex'ns*, § 383; *Millon v. Riley*, 1 Dana, 360.

The appellees also contend that the sheriff did not levy the executions, under which Charles Greer bought said parcels of land, upon them or either of them, and for that reason Greer acquired no title to either parcel of land. As a matter of fact, both executions are silent upon the subject of a levy, and there is nothing in the record showing that the sheriff did not levy the executions upon said parcels of land. The sheriff, having sold said parcels of land by virtue of said executions, the law, in such a state of case, presumes, in the absence of all testimony to the contrary, that he, with the executions in his hands, did his duty by levying them while they were in full force upon said parcels of land. It was his official duty so to do, and the presumption must be indulged that he discharged that duty, unless his return shows that he did not. The silence of his return upon that subject is not sufficient to refute the presumption that the levy was in fact made. See *Freem. Ex'ns*, § 274; *Evans v. Davis*, 8 B. Mon. 346.

It is also well settled that the defendant in an execution may waive a levy upon the property, and an advertisement of it by the sheriff, and that his waiver of the levy or advertisement of the property will estop him from objecting to the sale. The waiver will also estop him from setting the sale aside after it has been made. See *Freem. Ex'ns*, § 274, and the authorities there cited. This waiver on the part of the execution defendant does not convert the sheriff into the mere private agent of the defendant. The sheriff, notwithstanding the waiver, still acts in making the sale in his official capacity, and the sale passes the title to the property as effectually as if a levy and advertisement had been actually made. If, however, the interest of the execution plaintiff should be affected by the failure of the sheriff to levy or advertise, then the question as to the sheriff's liability to him in damages would arise.

The contention of the appellees that said parcels of land were held by them adversely to the appellants at the time they received the conveyances from the sheriff is not an available defense. There was no adverse holding of said parcels of land at the time the sheriff sold them, and it is well settled that the law of champerty does not apply to deeds made to carry into effect a contract for the sale of land of which there was no adverse possession at the time the contract was entered into, although the land be held adversely when the deed is made, and this rule applies to an executory verbal contract of sale. See *Simon v. Gouge*, 12 B. Mon. 164; *Hopkins v. Paxton*, 4 Dana, 36; *Cardwell v. Sprigg*, 1 B. Mon. 372.

It is also well settled that a purchaser at an execution sale not only acquires, by his purchase, the lien created by virtue of the execution, but an inchoate or equitable title to the land, and the deed of conveyance subsequently made to him by the sheriff relates back to the time of the creation of the lien by virtue of the execution, and perfects his title from that date.

It appears that in 1853 said parcels of land were sold by the sheriff of Hardin county by virtue of an execution against Kelly, Charlton D. Shean, and

others, and that Kelly was the principal debtor in this execution, Shean being his surety; that, at the execution sale, Kelly bought these parcels of land for a nominal sum; that he never claimed the benefit of his bid, nor was any conveyance ever made to him. It also appears that he never intended to claim the benefit of his bids, and that he had been repaid the sums of money that he had paid on his bids; also, he being the principal in the execution, and Shean being his surety, as between him and Shean it was his duty to have paid off and discharged said execution, and his purchase of the property at the execution sale inured to the benefit of Shean, because the property was taken to pay the debt that he, as between him and Shean, was primarily bound to pay, and which he was morally bound to pay. Therefore the purchase by Winteramith of Kelly's bid, after this controversy about this land commenced, for the nominal sum of "a dollar or two," did not give the appellee a superior title to said parcels of land.

The judgment of the lower court is reversed, and the cause is remanded, with directions to render judgment for the appellants for both parcels of land.

SCHILDNECHT and another v. ROMPF'S EX'X.

(Court of Appeals of Kentucky. May 5, 1887.)

1. WILLS—TESTAMENTARY CAPACITY—UNDUE INFLUENCE—INSANE DELUSION.

A testator devised his estate to his widow, with power to divide it at her death equally between their children, to the exclusion of a son and daughter, to whom he gave only \$500 each. The daughter contested the probate of the will on the grounds of want of mental capacity, undue influence of the widow, and an insane delusion of testator towards contestant. The evidence showed that the testator had accumulated his estate by his own industry and thrift, with the aid of his wife; that he had mental capacity, at the time of executing the will, sufficient to enable him to know his estate, and the objects of his bounty; that his wife influenced him in making the will, but did not control him; that he acted in pursuance of a purpose of his own; that all of his children had been obedient, except the two discriminated against; that of these two the son was dissipated, and the daughter, the contestant, had been seduced; that he believed in witchcraft, and thought the contestant a witch, but this idea did not take possession of him until after the execution of the will. *Held*, that there was not sufficient evidence for setting the will aside upon any of the grounds of contest, mental incapacity, undue influence, or insane delusion.¹

2. SAME—INSTRUCTION.

The fact that a testator believed in the exercise of unnatural powers by others does not justify an assumption that he was insane, and incompetent to make a will; and an instruction to the jury on the question of mental capacity, which makes that fact more prominent than the other facts relied upon, is erroneous.

Appeal from Jefferson common pleas court.

M. A. & D. A. Sachs and *J. G. Sachs*, for appellant. *O'Neal, Jackson & Phelps*, for appellee.

PRYOR, C. J. The testator, Conrad Rompf, had several children at the date of the execution of his last will. By that instrument he gave his estate to his widow, with the power to dispose of the same as she deemed best, but directed that in the final division it was to be distributed in equal portions between his children, save Mrs. Juliana Schildnecht and George Rompf. To each one of these two children he devised \$500. Mrs. Schildnecht contests the validity of the will on these grounds: *First*, the want of mental capacity to execute the paper; *secondly*, the undue influence exercised over the testator

¹ As to what is competent evidence of undue influence, and what amounts to undue influence, see *Bledsoe v. Bledsoe*, (Ky.) 18 W. Rep. 10, and note; *Thompson v. Hawks*, 14 Fed. Rep. 906, and note; *Saunders's Appeal*, (Conn.) 6 Atl. Rep. 198, and note; *Rockwell's Appeal*, Id. 198; *Pemberton v. Pemberton*, (N. J.) 7 Atl. Rep. 642; *Blume v. Hartman*, (Pa.) 8 Atl. Rep. 219.

by his widow in its execution; and, *lastly*, that the will was the product of an insane delusion in so far as it affected the contestant.

The testator had been a laborious and an economical man during his whole life; beginning in abject poverty, and ending life with an estate worth fifteen or twenty thousand dollars. The entire testimony, both on the part of the propounders and contestants of the paper, shows a mental capacity on the part of the testator that enabled him to fully comprehend the character of his estate, and the objects of his bounty. He procured a business man to prepare the will, and gave to the draughtsman, in plain language, the mode in which he desired to dispose of his property. No one seems to have been present when the application to write the will was made; nor was any one present when it was finally executed but the draughtsman and the subscribing witnesses. That he seemed to have a purpose of his own with reference to the disposition of his property when the will was written, is manifest; but whether that purpose was the result of an improper influence previously exercised over him by the wife, and such as he was compelled to follow, it seems to us is the principal question involved in the case.

When, looking to the question of undue influence, or the facts conducing to establish its exercise by the wife, there is but slight evidence upon which to base the belief that the will was the offspring of the wife's improper suggestions, instead of a fixed purpose on the part of the husband. The two had struggled together for years in raising a large family, and in accumulating the estate disposed of; the wife being as instrumental in acquiring the property as her husband. The children all seem to have been obedient and faithful to their parents but George and his sister Juliana, the present contestant; and, when looking to their conduct, there is nothing unnatural or unreasonable in the provisions of the will by which they are given less than the other children. George was a reckless, dissipated man. His father was often compelled to pay out money to relieve him from trouble. Juliana had been seduced by one who was at the time, as the proof conduces to show, the husband of another. She left her home with this man, who is now her husband, and had by him several children, and the only positive proof of any marriage was its consummation after the death of the testator. She says they were married in Jeffersonville shortly after she left her home, and this may be assumed as a fact for the purposes of this case, although it is involved in much doubt. It does appear that the father made up with his daughter, and had her children christened. Still it also appears that he was trying to induce her to leave her husband, and return to her home. Under such circumstances, this paper was executed, and the property, or its absolute control, devised to the wife, who had aided the husband, who was a mere rag-gatherer in the beginning, to become the owner of much real estate in the city, and to occupy an influential position with his friends and neighbors.

It is said, however, that his wife caused him to execute this paper, and that he, as well as his wife, was a believer in witchcraft and spiritualism, and that he believed his daughter Juliana was a witch, because her grandmother had gone to live with her, whose powers as a sorceress were not doubted by the family. It is attempted to be shown that this operated on the mind of the testator through the influence of his wife, and caused him to give to Juliana only the sum of \$500. That these two people, who had the mental capacity to transact any character of business they had undertaken in life with success, had, by reason of their belief that Juliana was a witch, disinherited her and George, and given the estate to the other children, is attempted to be established by the contestant. There is some proof conducing to show that the family were inclined to believe that certain persons possessed unnatural powers; but there is nothing in this case leading to the conclusion that the act of the testator in making this will was prompted by any evil spirit, or that he made it under the delusion that his daughter was a witch; when the

daughter, too, is insisting that her father had made up with her, and exhibited, prior to his death, much affection for both herself and children. There is testimony, of a slight character, showing that the wife may have attempted to influence the husband; but, in looking to the whole testimony, his character for resolution and self-will negatives any such conclusion. Besides, the question of undue influence was submitted to the jury under proper instructions, and the verdict has resulted in sustaining the probate in the county court.

The contestant asked the court to say to the jury that if the testator believed in witchcraft, and that his mind could not be disabused of that belief by argument or persuasion, then he was laboring under an insane delusion; and if the paper, to any extent, was the offspring of such a delusion, it is not his last will. The court had no right to assume that because the testator believed in the exercise of unnatural powers by others, that he was insane, or incompetent to make a will. Nor should the court have singled out the proof in regard to his belief in witchcraft, that was permitted to go to the jury on the question of mental capacity alone, and thereby make it more prominent than any other part. *Stokes v. Shippen*, 13 Bush, 180. The court, however, was asked to go still further in this case, and say to the jury that it was an insane delusion. The effort to show that this belief operated on the mind of the testator when he made the will was in the fact that the mother of the testator went to live with Juliana, and for that reason he concluded that Juliana would be controlled by her, when it appears that the mother of the testator did not remove to the home of her granddaughter until after the will was executed; and whether so or not, there is no proof in this case to show an insane delusion towards the daughter that operated on the mind of the testator, or controlled the execution of the paper; and therefore the judgment below is affirmed.

WINNEGAR'S ADM'R v. CENTRAL PASSENGER RY. CO.

(Court of Appeals of Kentucky. May 7, 1887.)

1. MASTER AND SERVANT—LIABILITY OF MASTER—WILLFUL ACT OF SERVANT.

A passenger on a street car who is assaulted by the driver, thrown off the car, and run over, may maintain an action against the company to recover for his injuries, although the act of the driver was willful and wanton.

2. NEGLIGENCE—DAMAGES FOR DEATH—WILLFUL ACT.

Under Gen. St. Ky. c. 57, giving to an administrator a right of action for the death of his intestate, when caused by "neglect" of servants or agents of a corporation, an action cannot be maintained against a street-railroad company for the death of a passenger, caused by the driver willfully assaulting him, and throwing him off the car.¹

3. SURVIVAL OF ACTION—ASSAULT—CARRIER.

A right of action against a railroad company for injuries sustained by a passenger, by reason of an assault committed on him by a servant of the company, will survive in favor of the passenger's administrator, if the plaintiff counts upon the injury as a breach of the duty arising from the contract relation between carrier and passenger, although Gen. St. Ky. c. 10 excepts, from actions that survive, actions for assault and battery.

4. NEGLIGENCE—EXECUTORS AND ADMINISTRATORS.

The fact that an action does not lie for causing the death of a person in a certain case is no objection to the maintenance of an action by the administrator (if the cause of action is one that survives) for damages for the injury up to the time of death.

Appeal from the Jefferson county common pleas court.

Alpheus Baker and *J. J. McAfee*, for appellant. *Brown, Humphrey & Davis*, for appellee.

¹As to the measure of damages in actions for negligence causing death, see *County of Howard v. Legg*, (Ind.) 11 N. E. Rep. 612, and note.

PRYOR, C. J. A demurrer was sustained to the petition in the court below, and the plaintiff, declining to amend, has brought the case to this court, insisting that the facts alleged constitute a cause of action. The plaintiff is the administrator of William Winnegar, and the defendant is the Central Passenger Railroad Company. At the time of the injury complained of, the defendant was a common carrier of passengers in the city of Louisville, running and operating its street cars, through its employees, upon and between certain designated streets within the city, and the appellant's intestate boarded the cars of the defendant for the purpose of going from Fifteenth to Eighteenth street, on Walnut. It is alleged that his intestate tendered to the employee of the company, who was the driver, the ordinary fare, which was five cents, when the latter refused to receive it, and assaulted and struck his intestate, knocking him off the car on the ground, where he was run over or struck by the car that the employee was then driving, and badly injured, suffering great bodily pain and mental anguish from the fourteenth of June, 1885, continuously, until the twenty-sixth of the same month, at which time his intestate died by reason alone of said injuries; that the driver was at the time in the employ of the defendant, and running the cars for the transportation of passengers, by its authority, and unlawfully, and while acting in the course of his employment, inflicted the alleged injuries on the intestate. The plaintiff, as his administrator, sues, therefore, to recover the damages caused by said injury, resulting in the physical and mental pain as before alleged, from the date of the injury up to the death of the intestate. He prays judgment, etc.

The facts stated are, in substance, those set forth in the petition.

The court below seems to have regarded the action by the personal representative as an action for damages by reason of the death of the intestate, and, if so, the demurrer was properly sustained. If the recovery is sought for the death of the intestate, the latter having no cause of action therefor against the company, none could survive to his administrator, as injuries affecting life were not the subject of a civil action at common law. Our statutes have enlarged the common-law rule, by making railroad companies and other corporations liable when death ensues to one by reason of the willful neglect of the agents or servants of the corporation, and, when the party killed is not in the employ of the corporation, an action may be maintained for a less degree of neglect than either gross or willful neglect. No question can arise under the statute in this case, as it is not alleged that the intestate lost his life or was injured by the negligence of the employee of the company, but, on the contrary, it is averred that the injury was willfully and intentionally inflicted; and in such a state of case, as was decided by this court in *Spring's Adm'r v. Glenn*, 12 Bush, 172, and *Morgan v. Thompson*, 82 Ky. 383, no action can be maintained, under the statute, by the personal representative for the destruction of his intestate's life. An intentional injury, as was said in those cases, cannot be said to have been the result of negligence, nor can an action be maintained for the taking of human life intentionally by the personal representative, on common-law principles. The statute of this state, with reference to causes of action which survive, provides: "No right of action for personal injury, or injury to personal or real estate, shall cease or die with the person injuring, or the person injured, except actions for assault and battery, slander, criminal conversations, and so much of the action for malicious prosecution as is intended to recover for the personal injury; but, for any injury other than those excepted, an action may be brought or revived by or against the personal representative," etc. Chapter 10, Gen. St. 179.

The intestate might have instituted an action of assault and battery against the driver, prior to his death, but, dying before trial, the action under the statute would not survive to his administrator; but if he had sued the present appellee, alleging its existence as a carrier of passengers for hire, and that it had undertaken for a fixed sum to transport him as a passenger

from one part of the city to the other, but, in violation of its contract and its obligations to him as a passenger, the driver had thrown him from the cars, it cannot be said that such an action would die with the injured party, but, on the contrary, it would survive to the administrator, and, if so, the administrator can maintain this action. The action is not for the loss of life, but for a personal injury growing out of the violation of the obligation on the part of the appellee to carry the intestate, while on the cars, to his place of destination, when paid or offered to be paid the regular fare.

The general doctrine with reference to master and servant, employer and employe, is that, when the employe committing the injury is not at the time executing the employer's business, or not acting within the scope of his employment, the employer is not responsible. If one driving the cars for the corporation should leave the car, and beat or abuse one on the sidewalk, the company would not be responsible. Such an assault could not be said to have been authorized by the company, or a part of the driver's employment, nor can it be said that it was done in the course of the employment. In this case the appellant's intestate had entered the appellee's car, tendered his fare, and placed himself under the care and protection of the driver, to be carried as a passenger from one part of the city to another. It then became the duty of the driver to accept the fare, and to carry the intestate from the one street to the other, without offering him personal violence, unless necessary for his own protection, the preservation of order in the car, or the safety of the other passengers. It is a matter of contract, with obligation assumed by the carrier to protect and care for the passengers on his train. Whether that contract is violated willfully and intentionally, or through ignorance on the part of the driver, is immaterial. It is the duty of the carrier to provide competent and careful drivers, that its passengers may be transported without fear or molestation from either the driver or others in the car, if in the power of the driver to prevent it, unless the conduct of the passenger requires violence to be used towards him.

The doctrine is now well established "that the law implies a contract for the protection of the party carried from the insults and wanton interference of strangers, fellow-passengers, and the carrier and his servants, and, for every violation of the implied contract by force or negligence, the carrier is liable in an action of contract or tort." 1 Add. Torts, 83, note, and authorities there cited. The law makes the carrier responsible for the acts of those who are placed in charge of the car, and who for the time have the voluntary custody of the passenger, with the implied obligation that he will exercise the highest degree of diligence to transport him safely.

In *Goddard v. Grand Trunk Ry.*, 57 Me. 202, it was held that the carrier was obliged to protect his passenger from violence or insult, from whatever source it arises. He must use all such reasonable precautions as are necessary for that purpose.

In *Railroad Co. v. Finney*, 10 Wis. 388, it was held that, where the misconduct of the agent causes a breach of the principal's contract, he will be liable whether such conduct be willful, or merely negligent.

In the case of *Sherley v. Billings*, a carefully considered case by this court, reported in 8 Bush, 147, it was said "that every one who commits his person to the custody and control of others has the right to expect from them the highest practicable degree of care and skill." In that case a boy about 15 years of age was assaulted by an officer of the boat, and severely injured. The suit was against Sherley and others, the owners, to recover damages for the injuries sustained. It was urged then, as in this case, that the wrong was not done by any authority from the owners, or in the discharge of any duty imposed upon the agent arising from the terms of his employment; that it was the willful and unauthorized tort of the officer on the boat; but this court held that the compensation the carrier received from the passenger is not only in

consideration that it will transport him from one point to another, as may be agreed on, but further that, during the time he is so transporting him, reasonable diligence will be used to protect the passenger from insult and injury; and, again: "If the officer fail to use reasonable diligence in the protection of the passenger from injuries at the hands of strangers or other passengers, the contract is violated, and the carrier can be made to respond in damages."

Here the agent in charge of the car committed the wrong, and, if the statements contained in the petition are true, and they must be so regarded on demurrer, the tort was of a most aggravated character, and in palpable violation of the duties incumbent on the carrier by reason of its relation to the passenger arising from the implied contract. The moment the appellant's intestate entered the car, and tendered his fare, he became a passenger, and was entitled to be carried to his destination; that is, from the one street to the other. It is argued, however, that in the case of *Sherley v. Billings* the boy injured had himself instituted the action, and obtained a recovery, while in this case the personal representative is seeking to recover for the death of his intestate the loss sustained by his death. Such is not the object of the petition, and the fallacy of the argument consists in the assumption that this is an action for an assault resulting in the death of the injured man. It is not to recover for the death, nor is it an action of assault and battery, but an action in the nature of an action on the case for the injuries resulting from a breach of appellee's contract. The relation the parties occupy, the one to the other, is from the contract, and the failure to discharge the duty imposed by it may be a tort; but nevertheless it springs from the contract, and the action survives to the administrator. Cooley on Torts gives the case of the carrier as an illustration of the rule. "The law," says Mr. Cooley, "requires the carrier to transport with partiality and safety those who offer. If he fails to do so, he is chargeable with a tort." Cooley, Torts, 91.

It is not material whether the violation consists in putting the passenger off at a point before his destination is reached, or by insulting him, or in assaulting him. They are all plain violations of duty, for which a recovery may be had. In this case the administrator is claiming to recover damages for the physical and mental agony from the commission of the wrong up to his death. This is the distinct claim made in the petition, and we perceive no reason why a recovery should not be had, if the case is made out. The fact that the injury finally resulted in the death of the intestate did not destroy the right of action on the contract, or for the tort growing out of it; for without the contract no liability would exist against the company. If Billings had died, in the case against Sherley, the action would have survived, and a recovery been permitted, for his mental and bodily suffering previous to his death. It is true it is said in the opinion that Billings was assaulted, but it is further said that the assault was a violation of the contract between the carrier and the passenger, and for that reason the recovery below was affirmed by this court. At common law, torts to the person survived when the action could be framed in form *ex contractu*.

In the case of *Hansford's Adm'r v. Payne*, reported in 11 Bush, 380, the nature, in regard to the character of actions that survived, was considered, and there held that, although the statements of the petition were not sufficient to authorize a recovery for the death by reason of willful neglect under the statute, still the administrator was entitled to recover for the suffering and mental agony of the intestate caused by taking the poison from the time it was administered up to his death. In our opinion, the facts alleged present a cause of action, and the judgment below is therefore reversed, with directions to overrule the demurrer, and for further proceedings consistent with this opinion.

DOYLE v. HORD.

(Supreme Court of Texas. April 12, 1887.)

1. VENDOR AND VENDEE—DEFICIENCY IN LAND CONVEYED—REMEDY.

A deed was made, with general warranty, of a tract of land "granted to the heirs of Hubertus Maurer." The deed referred to the patent for the tract, which was for a designated number of acres described by metes and bounds. The artificial objects mentioned in the field-notes, however, by which the land could be identified, were never found. The price agreed upon was at the rate of two dollars per acre. The purchaser paid half the consideration in cash, and gave a promissory note for the balance. Before the land was located, other surveys were made on elder and superior patents which embraced a large quantity of the land referred to in the deed. The purchaser thereupon brought suit to cancel the outstanding note which he had given, and to recover back the money paid, allowing credit for the portion of the land not in conflict with the elder titles. *Held*, that he was entitled to the relief sought.¹

2. SAME—WARRANTY—CONSTRUCTION.

There is nothing under such circumstances to call for the application of the rule that an express warranty does not cover an open or known defect with reference to which the parties have contracted.

3. SAME—RETURN OF DEED.

It is not necessary for such a purchaser to offer to surrender the deed made to him and also the land, before he can have relief. He is entitled to hold so much of the land as the deed gives title to, and be protected as to the part the title to which proves defective.

Appeal from Bexar county.

Hancock & Shelley, for appellant. *Simpson & James and Ogden, Ogden & Johnson*, for appellee.

STAYTON, J. The appellant sold and conveyed to the appellee, by deed with general warranty, a tract of land granted to heirs of Hubertus Maurer. The deed referred to the patent, which was for 640 acres, described by metes and bounds, the field-notes of which, however, did not call for natural objects by which the grant could be identified, and the artificial objects, mounds, and stakes were never found. The survey on which the patent issued was made in 1874, but was probably simply an adoption of a location and survey made in 1857 for Phillip Lyon, which had been abandoned. Before the location under which the appellant claimed was made, two other surveys were made which ultimated in patents, and the lands covered by them inclosed at least 380.75 acres of the land located by and patented to the heirs of Hubertus Maurer. The appellee agreed to pay \$1,280 for the 640 acres of land, and of this he paid one-half at the time of the purchase, and for the residue he gave his negotiable promissory note for the same sum, due two years after its date. The deed to the appellee was made on December 7, 1882, and it retained a lien for the purchase money unpaid. This suit was brought February 5, 1883, to cancel the outstanding note alleged to be then still in the hands of the appellant; and to recover the excess of money paid, allowing two dollars per acre for the Maurer grant not in conflict with the elder titles. The appellee also alleged that he had purchased one of the elder titles, and all the south part of the other, which embraced all the land in conflict with the Maurer grant, before he purchased that grant from the appellant. Demurrers to the petition were filed and overruled, and it is urged that this was error.

The deed made by the appellant, in terms, when considered in connection with the patent made a part of it, conveyed 640 acres of land by metes and bounds susceptible of accurate ascertainment. These metes and bounds em-

¹ Where land is sold at a fixed price per acre, and the vendor fraudulently misrepresents the number of acres, the vendee is entitled to an abatement in the purchase price, although the deed contains, after specifying the number of acres, the words "more or less." *Tyler v. Anderson*, (Ind.) 6 N. E. Rep. 603.

braced 640 acres of land; and, if any part of the land so meted and bounded was embraced in an elder and superior grant, then there was a particular breach of the warranty, which entitled the appellee to have the outstanding negotiable promissory note canceled, and to have such part of the purchase money paid returned as would be equal to the excess paid over the value of the land to which the appellee takes title through the conveyance. There is nothing in the petition to indicate that the appellee takes any risk as to the title to any part of the land bought by him. On the contrary, the very purpose of the warranty was to secure him against any such risk. While the boundaries of the land conveyed were capable of accurate ascertainment, this could only be accomplished by surveys to be made from other surveys where locations were fixed by natural or artificial objects found on the grounds, and called for in the patents to them. There is nothing in the case to give application to the rule that an express warranty will not be applied to cover an open or known defect, with reference to which parties have contracted. That the appellee may have owned and been in possession of the superior grants which embraced a part of the land conveyed to him by the appellant is unimportant as the case is presented. It was not necessary that the appellee should have offered to surrender the deed made to him, and to surrender the land before he could have relief. It was his right to hold so much of the land as the deed gave title to, and to be protected as he asked, in so far as it was necessary on account of the defect of title to a part of the land. On the trial the appellee did not show title in himself to so much of the true superior titles as embraced a part of the land conveyed to him by the appellant; but he did show that these were the superior titles, and *prima facie* that they were outstanding as against the appellant at the time and since he made the deed with warranty. This was enough to entitle him to the relief sought; and, if the appellant desired to show that such was not their character, he was at liberty to do so. The evidence of a surveyor who made a survey for the purpose of ascertaining whether the Maurer grant conflicted with the superior titles set up by the appellee, and to ascertain the extent of the conflict, shows very clearly that the conflict was greater than alleged by the appellee; and this was not contradicted by other evidence, but the relief given was in accordance with the averments and prayer of the petition. There is no claim that the part of the land not embraced in the conflict was of any greater value per acre than was the part so embraced.

So standing the case, it cannot be said the appellee was not entitled to the judgment rendered in his favor, and the judgment must be affirmed. It is so ordered.

HEYER and others v. MOODY and others.

(Supreme Court of Texas. April 12, 1887.)

ATTACHMENTS—PRIORITIES—DEPUTY-SHERIFF.

The acts of a deputy-sheriff being regarded as the acts of the sheriff, the doctrine that property *in custodia legis* cannot be attached by another officer has no application to prevent such deputy from levying an attachment in the name of the sheriff upon property which has been already levied upon by the sheriff himself under another writ, subject to such first attachment; and an attachment so levied by the deputy will take precedence of a third attachment levied subsequently thereto by the sheriff himself.

Appeal from Limestone county.

McLemore & Campbell and *G. E. Mann*, for appellants. *Thomas J. Gibson*, for appellees.

WILLIE, C. J. On November 15, 1881, Oliver & Griggs sued out a writ of attachment against Bessling & Roller, which was on the same day levied by T. E. Jackson, sheriff of Limestone county, upon a stock of goods in Groes-

beck, and on the next day on a stock of goods in Mexia. After levying upon the Mexia stock, the sheriff returned to Groesbeck, leaving that stock, the storehouse in which it was contained, and its key, in charge of three persons, with instructions to close the doors, and make an inventory of the goods. Before leaving Mexia the sheriff was told that other attachments would soon be there, to which he replied that J. M. Waller, who was a constable and also Jackson's deputy, could serve any process that could be served by the sheriff. After Jackson had left, a writ of attachment in favor of Gust. Heye & Co., against Bessling & Roller was placed in the hands of Waller, who levied the same on the stock of goods in Mexia. Waller's return showed that the writ was levied by him upon said stock on November 16th, at 11 o'clock, as per inventory filed, subject to the levy of the attachment of Oliver & Griggs, and it was signed: "T. E. JACKSON, Sheriff of Limestone County. J. M. WALLER, Deputy." On the 19th Waller delivered the attachment to the sheriff, who filed it with the papers of the cause. Jackson reached Groesbeck on the 16th, and an attachment in favor of W. L. Moody was on the same day placed in his hands for levy. His return upon this writ showed that he levied it upon the Groesbeck stock at 1 o'clock P. M., and on the Mexia stock at 2:30 P. M. of that day, subject to the Oliver & Griggs attachment. All of the attaching creditors obtained regular judgments upon their claims at the same term of the court. The sheriff sold the two stocks under order of court, and, after paying off the judgment of Oliver & Griggs, returned the balance of the proceeds of the sale, viz., \$1,800, into court; and the present action tests the question as to whether this money shall be paid to Gust. Heye & Co. or to W. L. Moody & Co. The court below held that the goods, when levied upon under the attachment in favor of Oliver & Griggs, were *in custodia legis*, and could not be attached by another officer, though a deputy of the officer by whom the first levy was made; that the sheriff in possession alone could make such a levy; that the acts of the deputy were not by construction the acts of the sheriff, unless adopted and ratified by him; and that there was no such ratification. Upon this view of the law, judgment was rendered for W. L. Moody & Co., and this appeal is taken by the appellant from that judgment.

It is a general principle that goods attached by one officer and in his possession cannot be attached by another officer. The question as to whether it was rightfully applied by the court below in the present case depends upon whether the sheriff and his deputy were different officers.

Our statutes provide that sheriffs shall have power by writing to appoint one or more deputies who shall have power and authority to perform all the acts and duties required of their principals. Rev. St. art. 4520. All writs, including attachments, are directed to the sheriff or any constable, but may be executed by a deputy-sheriff, who makes his returns in the name of his principal. So far as the public is concerned, there is no difference between the persons and duties of the sheriff and his deputy. Either can perform, or can be compelled to perform, the same acts that are required of the other. When a writ reaches the hands of a deputy, it is in fact received by the principal. He is liable for its proper enforcement, and for all acts done by his deputy under its authority. If goods are tortiously seized under it by the deputy, the principal can be sued by the owner. If they are illegally disposed of by the deputy, the principal is responsible. As between the sheriff and the deputy, of course the former can make the latter responsible for such lapses as misconduct, but with this the public has no concern. It follows that, as to the public, whose servants these officers are, the acts of the deputy are the acts of the principal. The possession of the former is the possession of the latter. So far as the responsibilities of the office are concerned, the sheriff is liable for the acts both of himself and his deputy. So far as its rights and duties are concerned, they are in every respect identical. This is

not only the true construction of our statute, but is clearly the rule at common law. Bac. Abr. tit. "Sheriff;" Com. Dig. tit. "Officer;" Gwynne, Sher. 43; Murfree, Sher. § 18. The acts of the deputy are performed in the name of the principal, and they become so essentially the acts of the latter that he may lawfully return that they were done by himself. Freem. Ex'ns, § 384.

From these principles we can but conclude that the act of Waller in making the levy upon the Mexia stock of goods was the act of the sheriff, and amounted to the same thing as if he had made the levy himself. As the goods were in the possession of the sheriff under a former attachment, it was of course proper for him to levy the subsequent writ of Gust. Heye & Co. upon it, subject to the previous levy of Oliver & Griggs.

We are cited to no authorities by the appellees which sustain the ruling of the court below that the sheriff and his deputies are different officers, and that the possession of attached goods by the one is not the possession by the other. In the case of *Vinton v. Bradford*, cited from 13 Mass. 116, it was held that the deputies of the same sheriff were different officers as to each other; but it had been held by the same court, in *Watson v. Todd*, 5 Mass. 273, that the possession of the deputy was the possession of the sheriff. This doctrine of the last-named case was sanctioned by the former; and it was added that, the possession of the deputy being the possession of the sheriff, the latter could levy a second writ upon goods attached by the deputy, the same being constructively in the possession of the sheriff. If the possession of the deputy is the possession of the principal, it is because that in the eye of the law they are identical in so far as the duties of the office of sheriff are concerned. If so, the acts of the former are the acts of the latter. Waller's levy of the attachment of Heye & Co. was therefore the levy of Jackson, and was, under the authority of the law, on goods in the possession of Jackson. It is proper to add that the New England cases differ, as to the position which the sheriff and his deputies occupy towards the public, from the decisions of other states, probably upon the ground that they are there treated in many respects as though they did not hold the same office. A deputy is liable directly to a party aggrieved by his misconduct; and he and the sheriff cannot be sued as joint trespassers; and in at least one of these states process is directed to both the sheriff and his deputy. Murfree, Sher. §§ 907, 938; *Odiorne v. Colley*, 2 N. H. 66.

To hold, as the court below did in this case, that a deputy cannot levy upon goods already attached and in the possession of the sheriff, would be to deprive the public of the benefit of a deputy's services whenever a second attachment was to be levied. The goods already attached being in the possession of the sheriff, no matter whether levied by a deputy or not, could not afterwards be subjected to another levy except by the sheriff himself. Deputies are appointed as well for the benefit of the public as of the principal sheriff, and their powers must not be so construed as to deprive the public of their services in any respect. It may be added that in this case the sheriff ratified the act of his deputy in making the levy for Heye & Co., and adopted it as his own by filing his return as made among the papers of the cause.

We are of the opinion, therefore, that Heye & Co.'s attachment, having come to the hands of Waller, the deputy, prior to the time that Moody & Co.'s writ reached Jackson, the sheriff, and having been levied upon the Mexia stock previous to the latter writ, was entitled to priority out of the proceeds of the goods sold under the Oliver & Griggs attachment. The priority of levy upon the Mexia stock gave Heye & Co. the right to have its proceeds applied to their debts next after Oliver & Griggs were satisfied. Immediately upon the making of their levy, they were entitled to require Oliver & Griggs to exhaust the Groesbeck stock, upon which there was no other writ levied, before levying upon the Mexia stock, upon which they held an attachment lien. This right was not changed by any subsequent levy upon the Groesbeck stock by

Moody & Co. They could not, by acquiring a subsequent lien, impair or interfere in the least with the extent of the right of Heye & Co. to have their lien satisfied out of the Mexia stock. This would, however, be the result if the levy of appellees upon the Groesbeck stock is to affect the previous levy of the appellants upon that in Mexia.

As to the assignments of error made by the appellees, it is sufficient to say that the finding of the court to the effect that there was no fraud in suing out the attachment of Gust. Heye & Co., is fully supported by the evidence. The note sued on was shown to be even less than the balance due Heye and Heidenheimer. It is true, the appellants declined to append to their depositions an itemized statement of their account with Bessling & Roller, because the account had been settled and closed by notes. This might have thrown suspicion upon the account, but the settlement was fully explained upon the trial, and the itemized account upon which the settlement was made produced in evidence by the appellants, and shown to be a true and correct statement of the transactions between Bessling & Roller and the appellants. The appellees had all the benefit they would have derived from full answers to their questions.

For the errors pointed out, the judgment will be reversed, and here rendered for the appellants for the \$1,800 in the hands of the district clerk of Limestone county, less the costs of the attachment suit of Gust. Heye & Co. against Bessling & Roller. It is so ordered.

WHITE, Co. Judge, v. PARKS and others.

(*Supreme Court of Texas. April 8, 1887.*)

APPEAL—STATEMENT—ASSIGNMENT OF ERRORS.

Where an action is brought in the state of Texas upon a liquor dealer's bond, breaches of which are alleged, and leave is given to make and file a statement of facts within 10 days after adjournment of the term of court, which statement is not filed until after the expiration of said time, the supreme court will not, upon appeal, consider the statement so filed; and, there being no facts properly before the court, the assignments of error will not be considered, nor the judgment of the court below reversed.

Appeal from Donley county.

J. G. Murdock, for appellant. *W. H. Grigsby*, for appellees.

STAYTON, J. This action was brought to recover on a liquor dealer's bond, several breaches of which are alleged. Leave to make and file a statement of facts within 10 days after the adjournment of the term was given, but the statement found in the record was not filed until after the expiration of that time, and it, therefore, cannot be considered. The assignments of error relate to the charges given which refer to the facts necessary to be shown to entitle the appellant to a recovery, and to the extent of recovery that might be had were these facts shown to exist. There was a verdict for the defendants. There is no matter presented by the assignments which can be considered in the absence of a statement of facts. Even if it were true that the charges given, as abstract propositions of law, were incorrect,—a matter which we need not consider,—this would be no sufficient reason to authorize a reversal of the judgment unless it appeared from the record that some injury may have resulted therefrom. The answer admits no fact, and we cannot know from the record before us that the appellant offered any evidence to sustain the averments of the petition. This question has been so often ruled upon that it is unnecessary to consider it.

There is no error shown by the record rendering it proper or necessary to reverse the judgment, and it will be affirmed.

MORRIS and others v. BANK OF COMMERCE.

(Supreme Court of Texas. April 8, 1887.)

POWER—OF ATTORNEY TO CONFESS JUDGMENT—NEGOTIABLE INSTRUMENTS.

A power of attorney to confess judgment, contained in a promissory note signed by several persons, did not designate against whom judgment by confession might be entered; a blank space after the word "against" being left unfilled. *Held*, that the power was incomplete, and no judgment by confession could be rendered.

Appeal from Cooke county.

Barrett & Dougherty, for appellants. No counsel for appellee.

WILLIE, C. J. This suit was upon a note made payable to the appellee, and signed by all the appellants except L. S. Williams, who wrote his name upon the back of the note before delivery. The note concluded in the following words: "In case of the non-payment of the above note at maturity, we hereby authorize any licensed attorney at law to appear for us in court, and to accept service, waive process, and confess judgment in favor of the legal holder of said note, against ———, for the amount of said note and interest, with ten per cent. attorney's fees additional." Acting under the authority supposed to be conferred by this language, an attorney at law appeared in the suit, accepted service, waived process, and confessed judgment against all the signers and the indorser of said note, in favor of the appellee, for the amount of the principal and interest due thereon, as well as for 10 per cent. attorney's fees. Judgment having been rendered accordingly, an appeal therefrom is prosecuted by the appellants to this court.

It is very clear that the power contained in the note is incomplete. The blank must be filled in order to authorize the attorney to confess judgment against any particular person or persons. This blank may be filled with the names of all the parties bound by the note, or with the word "us," which would have the same effect, or it might be filled with the names of one or more of the parties. The authority of the attorney would be different in one case from what it would in the other. The attorney did confess the judgment against all the parties bound by the note; and the court, in allowing him to do so, construed the power as if the blank were to be filled with a word or words descriptive of all the parties. If these words were absolutely necessary to give the power any effect, and none other could be supplied consistent with the language of the instrument, there might be some reason for the construction given by the court. But the makers of the note could certainly authorize the attorney to confess judgment against one or more of themselves. If so, words calculated to give the power this effect might be inserted in the blank.

As it was not absolutely necessary to construe the note so as to authorize a confession of judgment against all the makers, must it be so construed if such was the reasonable intentment of the parties? Without pausing to consider what would be the rule in case of an ordinary power of attorney, it is sufficient to say that the instrument under discussion has nothing in it which entitles it to any presumption in its favor. The remedy given in the note for its enforcement is harsh and stringent; and while it was permissible, at the time it was made, for a party to thus submit himself to the tender mercies of a creditor, yet it must clearly appear from his own words that such was his intention. The law will not step in and supply words or indulge presumptions for the purpose of making such a contract for him. The language of the instrument will be strictly construed in favor of the makers, and the creditor allowed no benefit from it further than he has bargained for in express terms. This has been the invariable ruling of the court in such cases. *Grubbs v. Blum*, 62 Tex. 426; *Strasburger v. Heidenheimer*, 63 Tex. 5.

The contract in question does not in terms authorize a confession of judg-

ment against all the makers of the note, or any specified portion of them, and the court erred in allowing judgment to be taken against them in manner as stated.

For this error the judgment must be reversed, and the cause remanded.

QUINN and another v. LOGAN and others.

(Supreme Court of Texas. April 8, 1887.)

MECHANIC'S LIEN—RECORDING—MORTGAGES.

Rev. St. Tex. art. 4304, requiring the county clerk to record deeds of trust, mortgages, judgments, or other instruments of writing intended to create a lien, in a book or books separate from those in which deeds or other conveyances are recorded, does not contemplate that liens shall be recorded separately from each other. The registration, therefore, of a mechanic's lien in a book in which mortgages are recorded, is proper.

Appeal from Clay county.

Davis & Garnett, for appellants. *Barrett & Stine*, for appellees.

WILLIE, C. J. The entry of the judgment below recites that the exceptions of the defendants to the plaintiffs' petition were sustained, but in this court only one of these exceptions is relied on as sufficient to justify this ruling of the district judge. It is here contended that the mechanic's lien claimed by the appellants had not been fixed upon the property described in the petition; and this, for the reason that no proper record of the bill of particulars had been made by the county clerk. The certificate of the clerk to the bill of particulars, made an exhibit to the petition, shows that it was a copy taken from the book in which mortgages were recorded. The appellees claim that the law does not contemplate that the record of mechanics' liens shall be made in such a book, but that it must be made in a book kept specially for the record of such liens, and for no other purpose. But this is not the language of the statute regulating these liens. They must be recorded in a book to be kept by the clerk for that purpose; but that the record of other liens may not be kept in the same book is not declared, nor is it to be deduced from any of our statutes bearing upon the question. On the contrary, the county clerk is required to record deeds of trusts, mortgages, judgments recorded for the purpose of creating a lien, or other instruments of writing intended to create a lien in a book or books separate from those in which deeds or other conveyances are recorded. Rev. St. art. 4304. This statute contemplates that liens shall be recorded separately from absolute conveyances, but not from each other. The book in which they are registered is kept for the purpose of recording every instrument intended to create a lien; and the contract of a mechanic, or his bill of particulars, are intended, when recorded, to have that effect. There may be no objection to registering mechanics' liens in a book by themselves; but, if the clerk habitually records them in the same book with mortgages, he keeps that book for the purpose of recording such liens, and complies literally with the statute.

It is alleged in the present petition that the record was made in a book kept for recording mechanics' liens, which allegation, taken in connection with the fact that the record was actually made in the Book of Mortgages, makes a case where the clerk kept the book in which mortgages were recorded for the purpose, also, of recording therein liens of the character claimed by the plaintiffs in the present suit. In this he fulfilled the requirements of the statute, and we think the petition was good against the objections urged to it in this court.

The other exceptions, not being insisted upon or supported by the record, will not be considered.

For the error pointed out, the judgment will be reversed, and the cause remanded.

GILLESPIE, Tax Collector, v. GASTON and another.

(Supreme Court of Texas. April 8, 1887.)

TAXATION—WHAT IS TAXABLE—BANK STOCK.

Under Rev. St. Tex. art. 4682, exempting corporation stock from taxation against the owner when the capital and property of the corporation are required to be taxed, the owner of stock in a state bank is not taxable therewith while the property of the bank is, under the law, taxable, although the bank does not return its property for taxation, as it should do.

Appeal from Dallas county.

Jeff. Word and Slemmons & Field, for appellants. *H. G. Robertson*, for appellees.

STAYTON, J. The appellees were the owners of shares of stock in a bank incorporated under the laws of this state, and these, not having been rendered by their owners, were assessed. The tax collector was proceeding to collect the taxes so claimed, and the owners of the shares, after tendering all other taxes assessed against them, brought this suit to restrain him from collecting the taxes assessed on the shares of stock. The injunction was perpetuated, and this appeal is presented from the final judgment through which this was done. The tax was claimed for the year 1883. Article 4682, Rev. St., provides that no person shall be required * * * to include in his statement, as a part of his personal property which is required to be listed, any share or portion of the capital stock or property of any company or corporation which is required to list or return its capital and property for taxation. Article 4684, Rev. St., requires banks to list for taxation all property, both real and personal, owned by them; thus imposing a tax upon everything which gives value to shares of capital stock. Such taxation taxes everything upon which, under the fundamental rules regulating taxation, taxes ought to be or may be imposed. To tax the shares of a stockholder in a corporation, where all the property which gives value to such shares is taxed against the corporation, would be, in effect, double taxation of the same thing; for the certificate and ownership of shares are but evidence, and give to the shareholder the right to participate in the profits to be derived from the business to be conducted by the corporation so long as it continues in business, and to share in the proceeds of its property on distribution. If a bank fails to render for taxation any property which ought to be rendered, this does not authorize an assessor to list for taxation something which the law does not require to be listed. Instead of taxing the property of a bank, it would doubtless be competent, under existing federal legislation, for the legislature, as it has done by the act of March 13, 1885, to impose a tax on shares in any banking corporation, whether organized under a law of the general government or of the state. In such case the actual value of the shares would depend on the value of everything that can be classed as property, real or personal, owned by the corporation; and that this may in part consist in assets not liable to taxation directly is a matter of no importance. The law in force when the assessment before us was made providing for the taxation of the property of banks incorporated under the law of this state, and not upon the shares of stock, the court below properly perpetuated the injunction, and its judgment is affirmed.

OVERSTREET v. MANNING and others.

(Supreme Court of Texas. April 19, 1887.)

1. NEGOTIABLE INSTRUMENTS—BONA FIDE PURCHASER.

One who buys at a voluntary sale from his debtor, and pays no money, but merely credits the amount of the purchase money upon a pre-existing debt, is not a bona fide purchaser for value.

2. CHATTEL MORTGAGES—RECORDING—CREDITORS.

Under the Texas chattel mortgage act, which avoids unrecorded mortgages and conveyances as against creditors with or without notice, "creditors," as used in the act, means those who have acquired some lien on the property by attachment or otherwise.

3. EVIDENCE—ADMISSIONS—THIRD PARTIES.

In an action between mortgagees, each claiming a prior lien upon the mortgaged property, admissions of the mortgagor, made to one of the mortgagees, are not admissible to affect the rights of the other, who was not present when such admissions were made.

Appeal from Shackelford county.

L. W. Campbell and Fleming, Moore & Maloney, for appellant. *A. A. Clarke and J. A. McCall*, for appellees.

WILLIE, C. J. The appellant, Mrs. Overstreet, brought this suit against R. E. Watts, E. R. Manning, A. P. Root, and G. L. Price, to recover from Watts the amount due her from him on three promissory notes, and to foreclose a lien given by Watts to secure these notes, upon a flock of sheep, which it was alleged belonged to Watts, but to which the other defendants set up some kind of a claim. Watts made no defense, and judgment was taken against him. Root and Price pleaded, claiming a half interest in the sheep by purchase from Watts; and Manning set up a conveyance to him by Watts of the other half of said sheep, together with other property, in payment of a debt due Manning from Watts, and for the further consideration that Manning would assume and pay off two debts from Watts to other persons, which were liens upon said property. Manning averred the payment of one of these debts by himself, and the assumption of the other in a manner to make it a binding obligation upon him. The conveyance to Root and Price was alleged to have been made before the execution of the note sued on, and the conveyance to Manning subsequent to the date of said note, but without notice to Manning; and it was further averred that the lien of said notes had never been recorded. The plaintiff abandoned all right to recover against Root and Price, and the issues between herself and Manning were submitted to a jury, who found in favor of the latter, and she has appealed to this court from the judgment rendered upon that verdict.

The evidence made it apparent that the lien of appellant was prior in date to the conveyance to Manning, but that it had never been recorded, and Manning had no notice whatever of its existence when he purchased the property. It was also shown that the consideration for the purchase was paid by the extinguishment of a debt claimed by Manning against Watts, and the assumption by Manning of debts due from Watts to other parties. One of these debts, a mortgage to one Hogan, was paid after this suit was commenced. The other seems to have been an obligation by which Manning and J. C. Lynch guarantied a note executed by Watts to Mrs. Pressler previous to the purchase of the sheep by Manning from Watts. Watts had been a book-keeper for Manning; and the latter, upon examination of his balance sheet, found that there was a deficit in the account of cash, merchandise, etc., on hand, and charged Watts with embezzlement of his property to the extent of eleven or twelve thousand dollars. Watts admitted that the books were against him, and showed him to be behind to about that extent, and offered to convey to Manning his entire property in satisfaction of the amount. The deed from Watts to Manning was accordingly made, and the former released from all indebtedness growing out of the supposed embezzlement. The plaintiff objected to the proof of this indebtedness by the admissions of Watts, but the objection was overruled, and the evidence received. A number of errors are assigned, but the three principal questions are: (1) Is Manning protected against the plaintiff's recorded lien as a *bona fide* purchaser for value? (2)

Is he protected as a purchaser within the meaning of the chattel mortgage act? (3) Was it competent to prove an indebtedness from Watts to Manning by the admissions of the latter?

1. It is settled in this state that one who buys at a voluntary sale from his debtor, and pays no money, but credits the amount of the consideration upon a pre-existing debt, is not a *bona fide* purchaser for value. *McKamey v. Thorp*, 61 Tex. 648. Some distinction is sought to be drawn between the case cited and the one in hand, on the ground that here a release in full of the indebtedness was given, and a new consideration was paid in the assumption of debts due from Watts to other parties, and the subsequent payment of one of these debts. The principle upon which the purchaser who pays the purchase money in a pre-existing debt is not protected against secret claims and equities is, he does not advance anything on the faith of his purchase, and loses nothing if the apparent title of his vendor should prove worthless. This principle, of course, cannot be affected by the amount of the indebtedness canceled by the purchase, if it is sufficient to repel any presumption of fraud. Whether a part or the whole of the debt is extinguished, the position of the creditor is not changed unless he parts with some valid security, such as a mortgage or judgment lien, or advances a new consideration, or incurs new liabilities. Manning had no securities for the payment of Watts' debt, and, in our opinion, he incurred no new liabilities. As to the Pressler debt, he was already liable for that as a guarantor of the note. His assumption of the debt, if binding, would doubtless have caused a change of position in the parties bound by the note. As to each other, Manning would have been liable to Watts had the latter been compelled to pay the debt; whereas, but for the assumption Watts would have been liable to Manning in case he had paid the note to Mrs. Pressler. To change the liabilities of the parties in this respect, a valid contract binding upon both parties was necessary. This agreement, however, could have been avoided by Manning for fraud and failure of consideration; for Watts had already conveyed an interest in the property to another before selling to Manning, of which the latter was wholly ignorant. Watts had no new or other right against him by reason of the assumption which he could enforce at law. Mrs. Pressler's right to hold him primarily liable was wholly dependant upon the agreement between Watts and Manning. She was no party to this agreement. It was necessary that it should be binding upon those who were parties to it in order to be enforced by her. She was in no better position by reason of the assumption than was Watts; and, deriving all her right to make Manning liable as maker of the note, and not guarantor through Watts, his right to do so having failed, she had none. The appellee had therefore assumed no new liability to Mrs. Pressler, and his agreement as to her claim formed no valuable consideration for the purchase. The Hogan mortgage was no lien upon the sheep in controversy, but upon a tract of land. Manning was necessarily bound to pay off this lien to protect his title. His payment of it could hardly be considered as made as a consideration for the sheep; but, if so, it was made after the commencement of this suit, and of course after full notice of the appellant's lien. He was under no obligation to pay off this mortgage as part of the purchase money of the sheep; and, the payment having been made after notice of Mrs. Overstreet's lien, the appellee cannot be protected as an innocent purchaser, though the contract for the payment had been previously made. The agreement as to this debt, and its subsequent payment, were not a valuable consideration for the purchase of the property in controversy.

2. It has been heretofore held by this court that a chattel mortgage, not filed for record as required by law, is void as to a creditor, though he may have had notice of the instrument. *Brothers v. Mundell*, 60 Tex. 240. It was not expressly held in that case that the creditor must have acquired some

right in the mortgaged property by attachment, execution, or otherwise; for the creditors whose rights were protected by the decision had levied an attachment upon the property, and there was no question made upon this point. In the case of *Grace v. Wade*, 45 Tex. 527, it was held under the act of February 5, 1840, which protected creditors and subsequent purchasers without notice against prior unrecorded mortgages and conveyances of property, that by the word "creditors" was meant creditors who had acquired some character of lien upon the property. This is still the recognized law of our state. While our statute as to chattel mortgages differs from the act of 1840 in that it avoids these instruments as against creditors whether with or without notice, it makes no change as to the nature of the debt to be thus protected. The language of the two statutes being in this respect identical, and the act in reference to chattel mortgages having been passed after the decision in *Grace v. Wade*, *supra*, was made, and the subject-matter to which it was applied being similar to that of the act of 1840, we must conclude that the word "creditors," so far as the character of indebtedness held by them is concerned, was intended to have the same meaning as it had received in construing the former act. This, too, is the meaning attached to it by the decisions of other states having chattel mortgage acts similar to our own. *Jones v. Graham*, 77 N. Y. 628; *Stewart v. Beale*, 7 Hun, 411; *Ransom v. Schmela*, 13 Neb. 77, 12 N. W. Rep. 926. It is also laid down by an eminent writer that, as against general creditors who have no lien by attachment, an unrecorded mortgage is valid and conclusive, unless it be impeached for fraud or violation of law. *Jones*, Chat. Mortg. § 245. To be entitled to protection, a party must have acquired rights of which he would otherwise be defrauded. *Id.* 247. The statute puts mortgagors and other lienholders by contract or act of the parties upon the same footing. Other creditors, to come within its protection, must have acquired a lien by proceedings at law. These are the creditors whose debts, whether *bona fide* or not, are protected by the chattel mortgage act, and there is no reason why its words should be extended beyond the meaning given them in like statutes. As the appellee did not acquire a lien by process of law upon the sheep in controversy, he was not a creditor within the meaning of the statute, and not entitled to protection as such.

3. We do not think the court should have admitted evidence as to what Watts said about the indebtedness to Manning. This evidence was competent upon a question of indebtedness between these parties, but not as to a third person not present, whose rights were to be affected by it. It is never competent to prove a consideration by recitals in a deed when the rights of some other person claiming the property in opposition to the deed are to be affected by the proof. Thus, when a subsequent purchaser seeks to set aside a former deed for want of notice of its execution, he must prove that he paid the consideration, and this he cannot do by the recitals of the deed, because they are the mere admissions of the grantor. *Watkins v. Edwards*, 23 Tex. 448. A party may bind himself by his own admissions, but he can bind others only in exceptional cases, of which this is not one. Had this been a bill in chancery brought by Manning to set aside or cancel Mrs. Overstreet's lien, to which she and Watts were made parties defendant, upon the plainest principles no admission of Watts could bind his co-respondent; and it is well settled that any admission by a grantor, to affect his grantee, must be made prior to the grant. *Redfield v. Buck*, 35 Conn. 328; *Hitt v. Ormsbes*, 12 Ill. 166.

The rulings and charges of the court below upon the questions we have discussed were in conflict with these views, and, in our opinion, were erroneous. We cannot revise the ruling upon the rejection of evidence complained of in the fifth and sixth assignments of error, because the bill of exceptions does not inform us what the witnesses would have stated in answer to the

questions propounded to them. *Milliken v. Smoot*, 64 Tex. 171; *Reddin v. Smith*, 65 Tex. 26.

For the errors pointed out, the judgment will be reversed, and the cause remanded.

PRATHER v. WILKINS.

(Supreme Court of Texas. April 22, 1887.)

1. EVIDENCE—CONTENTS OF TELEGRAM.

It is error to admit the testimony of a witness as to the contents of a telegram, in the absence of proof that the telegram has been lost or destroyed.

2. SAME—PREPONDERANCE—INSTRUCTION—MORTGAGE.

An instruction that a deed absolute on its face should be regarded as an absolute deed "unless the preponderance of evidence clearly shows" it to have been intended as a mortgage, and directing the jury to find so "unless you are so satisfied from the evidence that it was intended" as a mortgage, is erroneous, the use of the word "clearly" being calculated to lead the jury to believe that more than a preponderance of evidence is requisite.

3. TRIAL—INSTRUCTION—PRINCIPAL AND AGENT.

A party held entitled to an instruction that, if a principal ratified the act of his agent in part, this would be a ratification of the whole transaction, there being evidence to which the instruction was applicable, and it not having been embraced in the general charge.

4. SAME—MORTGAGE.

An instruction that, if the jury find that a certain deed was intended to secure a debt, it is a mortgage, and the grantors have the right to pay the debt within one year, and have the property reconveyed to them, *held* misleading, as tending to convey the idea that a failure to pay within the year worked a forfeiture.

Appeal from Bosque county.

O. L. Lockett, for appellant. No counsel for appellee.

GAINES, J. The court erred in admitting the evidence of appellee's witness Watson that he notified Focke, Wilkins & Lange by telegraph of his having made the contract with Prather, and that they replied disapproving his action, and ordering the contract canceled. The telegram was the best evidence of its contents; and, in the absence of proof showing its loss or destruction, the testimony should not have been admitted.

Appellee, who was plaintiff below, having disclaimed any interest under the deed from Prather and wife to him, dated November 19, 1883, it was not error for the court to charge the jury that they should not regard that deed as conferring any title upon plaintiff to the property. Besides, it is not seen how appellants, who were defendants below, were prejudiced by this instruction.

The fourth assignment of error is that "the court erred in its charge in paragraph 11, which was as follows: 'The instrument executed by defendant and wife to plaintiff being a deed of conveyance of the lot described in plaintiff's petition, it will be so regarded by you, unless the preponderance of evidence clearly shows that the same was intended by the parties, at the time of execution, to operate as a mortgage, and, unless you are so satisfied from the evidence that it was intended by the parties to said deed, you will find for plaintiff.'" We think this assignment well taken. If the contract which was executed at the date of the deed did not clearly show whether it was a mortgage or not,—and this we cannot determine because it is not copied into the record,—it was sufficient for defendant to show that it was intended as such by a preponderance of evidence. The use of the word "clearly" was calculated to induce the jury to believe that more than this was requisite. The error is more pronounced in the latter part of the instruction, which in effect tells them to find for plaintiff unless they are clearly satisfied by a preponderance of evidence that a mortgage was intended.

The fifth assignment complains of the refusal of the court to give certain

special instructions asked by appellant, to the effect that, if appellee ratified the act of Watson, his alleged agent, in part, this was a ratification of the whole transaction. There was evidence tending to show that appellee accepted and recorded the deed after being notified of the settlement which had taken place between appellant and Watson. If so, this was a ratification also of the accompanying contract, and estops him from denying the authority of the alleged agent. This proposition is not submitted in the general charge, and therefore a special instruction upon the point should have been given.

Paragraph 10 of the charge of the court complained of in appellant's seventh assignment of error is clearly misleading. In that paragraph the jury are told, in effect, that if they found that the deed of Prather and wife dated November 19th was intended to secure a debt, that it was a mortgage, and that they had the right to pay the debt within one year, and to have the property reconveyed to them. From this the jury may have been led to infer that, if they failed to pay within the year, their rights under the deed and contemporaneous contract were forfeited. That the court did not intend this is evident from the twelfth paragraph of the charge; but, taking both together, we cannot say that the jury may not have been confused by these instructions.

The witness Watson testified that he was not authorized to make the contract which was signed by him as agent of the appellee. If there had been no evidence tending to a different conclusion, nor any of a ratification on the part of appellee, the judgment would be affirmed, notwithstanding the errors pointed out, upon the ground that no other result could have been lawfully reached under the proof. But the witness testified he was the agent of Focke, Wilkins & Lange to sell goods; went to Clifton, where the house and lot in controversy are situated, to get possession of it at their instance; that he notified them of the transaction, and they disapproved it. He testified also that he was not authorized to sign appellee's name to the contract. But it appears in evidence that he went with a deed already prepared for the signature of appellant and wife; and there is evidence tending to show that it had been drawn by the attorneys who represented Wilkins in the suit. Two attorneys who were present when the deed and contract were signed by appellant and Watson testified that, upon being asked, he stated that he had authority to make the contract. Besides, it appeared that although the witness gave immediate notice by telegram of the transaction, and he received, as he says, a reply repudiating it, the deed was retained, and was placed upon record. The evidence of appellee himself, who best knew the scope of Watson's authority, was not introduced. Under these circumstances, we cannot say that there was no evidence which would have warranted the jury in finding that Watson was authorized to consummate the agreement, or in finding that it had been ratified. The errors, therefore, are material, and the judgment must be reversed, and the cause remanded.

WILLIS and another v. WHITSITT.

(Supreme Court of Texas. April 22, 1887.)

1. TRIAL—ISSUE—FRAUDULENT TRANSFER.

In an action for wrongfully attaching the property of A. upon a claim against B., defendant pleaded that the goods were the property of B.; that no transfer had been made to A., or, if so, that it was fraudulent. A written transfer being shown in evidence, and its execution, and plaintiff's possession under it, not being disputed, *held*, that it was not error for the court to submit to the jury only or mainly the question of fraud.

2. SAME—INSTRUCTIONS—EVIDENCE.

Upon an issue of fraudulent transfer of a stock of goods, an instruction evidently intended to prevent the jury from estimating the goods at their retail price in determining whether the transfer was for an adequate consideration is not erroneous, although there is no explicit evidence of what was the market value of the goods.

3. SAME—CREDIBILITY OF WITNESS.

It is improper for the court to charge the jury that they are authorized to consider the interest that witnesses have in a controversy in determining their credibility, and the weight to be given to their testimony.

4. FRAUDULENT CONVEYANCE—PRESUMPTION—INDEBTEDNESS.

Where a transfer of property is made for a valuable consideration, it will not be presumed to be fraudulent as to creditors, from the mere fact that the grantor was indebted to another person at the time.

5. APPEAL—REVIEW—CONFLICT OF EVIDENCE.

Where there is a conflict of testimony, but there is sufficient evidence to support the conclusions reached by a jury, an appellate court will not reverse because the jury believed some of the witnesses in preference to others.

6. SAME—HARMLESS ERROR.

An appellate court will not reverse for an error of the court below in wrongly requiring a party to prove a certain fact, if the fact was actually proved.

7. PLEADING—DAMAGES.

A suitor is not entitled to recover a larger sum than he has claimed in his petition, although he might recover more if he had claimed it.

Appeal from Bell county.

Harris & Saunders, for appellants. *Monteth & Furman*, for appellee.

WILLIE, C. J. Willis & Bro., being creditors of E. P. Kellam, sued out an attachment against his property, and caused it to be levied by W. S. Blanton, sheriff of Bell county, upon a stock of goods in the possession of the appellee. This suit was brought by the appellee against Willis & Bro., and the said sheriff, and the sureties upon his bond, for damages alleged to have been incurred by reason of the seizure and conversion of said property. The defense was a general denial, and a justification of the levy on the ground that the goods were the property of Kellam; and, if they had been conveyed by him to Whitsitt, the conveyance was in fraud of the former's creditors. A verdict was rendered in favor of Whitsitt for \$2,583.91, with 8 per cent. interest from date of levy, and judgment was entered for the above amount, to bear interest at 10 per cent. from its date. From this judgment the present appeal is prosecuted. In this court the appellee remits all interest above 8 per cent. per annum, and offers to remit all such as accrued before the first of January, 1882, should this court hold that he was not entitled to recover interest from an earlier day.

The first, second, fourth, and sixth assignments of error relate to the charge of the court upon the subject of fraudulent transfer to Whitsitt of the goods in controversy by Kellam, the defendant in attachment. It is complained that the court made the case to turn solely upon the question whether or not this transfer was fraudulent as to creditors, when the defendant had pleaded that no transfer of any kind had passed between those parties. It is true that the pleadings raised such an issue; but they also distinctly averred that, if such a transfer took place, it was made with intent to defraud the creditors of Kellam. They set up the defense that the goods were the property of Kellam, because no transfer had been made; and further, if one was made, it was void as to P. J. Willis & Bro., being in fraud of their rights as creditors of Kellam. The court charged that the defendants denied that the goods seized were the property of plaintiff, and they averred that the same were fraudulently transferred by Kellam for the purpose of hindering, delaying, and defrauding his creditors. This would seem to include both issues; but, if not, it is a sufficient answer to all the assignments on this point to say that the uncontradicted proof showed that the transfer had been made, and there was really no issue before the jury except as to its fraudulent character. It was proved by a written instrument signed and acknowledged by Kellam, whose execution was not disputed; it was further proved by the testimony of Whitsitt; and none of the evidence of the appellants was inconsistent with the existence of the transfer. Their evidence tended to show that Whitsitt was in

possession of the goods by fraudulent means, but did not negative the idea that the possession was obtained through a conveyance to him by Kellam. Had this been a controversy between Kellam and Whitsitt as to the ownership of the goods under the evidence produced on this trial, the court should have charged the jury to find for Whitsitt under the proven transfer, there being no evidence to disprove it. When an issue made by the pleadings has no evidence to justify its consideration, it is the duty of the court to withdraw it from the jury; and the court by its charge made that disposition of the issue as to Whitsitt's ownership of the goods as against the defendant in attachment. It was the province of the judge to construe the written instrument, and, having rightly construed it, to pass the goods as between the parties; and, there being no evidence to the contrary, he could not properly submit any issue to the jury as to the title, except such as arose between Whitsitt and the appellants upon the *bona fide* or fraudulent character of the transfer. Neither of the foregoing assignments are well taken.

It is further complained that the court erred in its eighth charge to the jury, because it required the appellants, in order to obtain a verdict, to prove against Kellam an indebtedness greater than the value of the goods at the date of seizure. As an abstract principle, the charge was undoubtedly erroneous. If the amount of indebtedness was reasonably proportionate to the value of the goods seized, though it may have been less, this would not of itself entitle the appellee to recover. But the error was harmless, for it was abundantly proved that the debt was in fact greater in amount than the value of the goods. The defendants in their answer alleged that their claim against Kellam was \$6,560. They read in evidence their judgment in the attachment suit, and this was for \$3,868.91. The evidence of Ray and Whitsitt, taken in connection, showed the total value of the goods to be about \$3,000, and the sheriff valued them at \$2,583.91. The defendants were not, therefore, prejudiced by the charge.

It is further complained that the court should not have charged the jury that, in determining whether there was a valuable and adequate consideration paid by Whitsitt to Kellam for the goods, they would inquire as to the condition of said goods,—their value as a whole in said market,—and whether the price asked and paid was such as a reasonable man, who desired such a stock of goods for merchandising purposes, would be willing to give as their full value. The charge is not objected to as incorrect in the abstract, but because there was no evidence as to the condition of the goods, or their value as a whole in the market. It is true that no witness stated in so many words what was the condition and market value of the goods; but the evidence tended to show that they consisted of groceries, dry goods, hardware, etc., and that they were in a store in a condition to be sold in the usual course of trade; that their cost price was marked upon them; and that this was their fair wholesale value. The clear object of the charge was to prevent the jury from estimating the goods at their retail price, by adding anything to their original cost. We think the court did not err in giving the charge.

The eleventh assignment of error complains that the court erred in refusing two distinct charges upon different questions asked by the appellants. Thus far the assignment is not in accordance with the rulings of this court; and, if either charge was not law, the assignment is not well taken. But it specified its ground of error, and in that confines the objections to the ruling of the court upon the third charge, which is as follows: "In determining the credibility of the witnesses, and the weight you should give their evidence, you are authorized to consider the interest which such witnesses have in the matter in controversy, and their demeanor and manner of testifying upon the stand." This court has reversed a judgment because a charge similar to the above was given to the jury. *Dwyer v. Bassett*, 63 Tex. 277. The appellee's was the only witness examined who had any real pecuniary interest in

the suit. By giving the charge the court would have said, in effect, that the jury should take into consideration the appellee's interest in determining whether or not they should believe his testimony. Such a charge is virtually upon the weight of evidence, tending to make the jury believe that, in the opinion of the judge, the testimony of a particular witness is not entitled to much weight in making up their verdict. Such a charge is inconsistent with the freedom allowed to the jury in passing upon the weight of testimony and the credibility of witnesses.

Though not bound to notice the other charge mentioned in the assignment, it is sufficient to dispose of it to say that it is not a presumption of law, in every case of a transfer of property, that it is presumed to be made with fraudulent intent if the grantor is at the time indebted to another party. Such a principle has been announced by courts in cases of voluntary transfers or gifts, but never where a valuable and adequate consideration had been paid by the purchaser. *Gilmore v. North American Land Co.*, Pet. C. C. 460. In such cases much depends upon the amount of indebtedness, and the circumstances under which the transfer is made. No general rule, such as the charge lays down, can be drawn from the cases cited by the appellants, or from the other authorities upon the subject.

We cannot enter into an analysis of the testimony produced upon this trial to ascertain whether or not the verdict is contrary to the evidence, because the assignment of error to that effect is not in accordance with the rules. We think, however, if the jury believed the witnesses for the plaintiff, there is testimony to support their verdict. They were the judges of the credibility of these witnesses, and we cannot reverse because they have believed those whose evidence sustained the transfer under which the appellee claimed.

The petition claimed interest from January 1, 1882. The verdict gave interest from the levy of the attachment, which was December 3, 1881. The appellee could not recover more than he claimed, and for this reason is entitled to interest no further back than January 1, 1882, though under the proper measure of damages he might, had he claimed it, have recovered from the date of the levy. The judgment is made to bear interest at 10 instead of 8 per cent., which is error. The appellee remits all interest on both accounts over and above what he is entitled to under his pleadings and the finding of the jury. The judgment will be so reformed as to allow the appellee interest, on the principal sum recovered, at 8 per cent. from January 1, 1882, and to make the judgment bear interest at 8 per cent. from its rendition below; the appellee to pay the costs of this court. Thus reformed, the judgment will be affirmed.

GERALD v. FREEMAN and others.

(*Supreme Court of Texas. April 26, 1887.*)

BOUNDARIES—SURVEYS—COURSES AND DISTANCES.

In arriving at the bounds of a survey, courses and distances yield to natural or artificial objects of demarkation; but the former will not be made subordinate to an unmarked prairie line, which could not itself be ascertained except by running the boundaries of another survey according to course and distance.

Appeal from McLennan county.

Anderson, Flint & Anderson, for appellant. *Battle & Battle*, for appellees.

WILLIE, C. J. The main question for decision in this case was determined in *Freeman v. Gerald*, reported in 2 Tex. Law J. 744. The parties to this cause were in that case, as in this, contending as to the true location of the east boundary line of the Maxwell grant, and this court fixed it by the course and distance called for from its beginning corner, and not by the west bound-

ary of the Chambers survey, with which it purported to run. The west line of the Chambers was wholly within the prairie, without natural or artificial objects by which it could be identified. Recognizing the principle that course and distance ordinarily yield to natural or artificial objects in arriving at the boundaries of a survey, this court declined to make them subordinate to an unmarked prairie line, which could not itself be ascertained except by running the boundaries of another survey according to course and distance. It construed the act of October 10, 1866, and held that it did not apply to a survey whose lines were in reality run; for it was never the intention of the act to give to the locator more land than he was entitled to by the survey actually made for him. With this construction placed upon the act, the legislature, at none of the several sessions held since that decision was made, has thought proper to change the law, and hence the construction given it by this court must be regarded as the one intended by the legislature.

But the appellant says that the agreed statement in the former suit admitted that the lines of the Maxwell grant had actually been run; whereas, in the present case, there was no proof of that fact. The evidence on that subject is as follows: W. W. Oxshen, who in 1849 was a deputy surveyor of Milam land-district, stated that he made the original survey of the Maxwell grant; that at the time of making it, the west or south-west line of the Chambers grant was not marked, or could not be recognized, it being in the prairie, and nothing to mark, and that he was guided by the maps in the general land-office, and tried to keep off the Chambers survey; that he ran a portion of the T. J. Chambers, or what he supposed to be the line, from the best information he could get from the map of the county. The law presumes that every officer does his duty. It is the duty of the surveyor to run around the land located and intended to be embraced by the survey and patent, and the law presumes that he has done so unless the contrary appears by satisfactory proof. *Stafford v. King*, 30 Tex. 269; *Boon v. Hunter*, 62 Tex. 582. No proof to the contrary was produced in this case; but, on the other hand, the legal presumption was aided and strengthened by the testimony of the officer who made the survey. He testifies positively that he made the survey; and to do this means to run its lines in accordance with the requirements of the law; in other words, to do exactly what his report of the survey says he had done. He strengthens this further by showing that he actually ran the line in dispute between the parties to this cause. He had, according to his field-notes, started at the north-east corner of the Bullock grant, which appears to have been well defined; then north, 60 east, 2,975 varas. Supposing that he was on the Chambers west boundary line, which supposition he arrived at, not by running out that survey, but by the maps in the land-office, he ran a portion of that line of the Chambers, for the east boundary of the Maxwell, survey. Here, then, we have ample proof from the report of the survey, corroborated by the surveyor's evidence, that the survey was actually made, and direct testimony of how the second line, which is the one in dispute, was ran, showing that this officer was acting upon a mere assumption that he had reached the west boundary of the Chambers at 2,975 varas from his beginning corner. That this was not so is also shown; this line being 505 varas further from the beginning corner than he supposed. In our opinion, this evidence fulfills all the requirements of satisfactory proof that the Maxwell tract was actually surveyed, and that its east boundary fell short of the Chambers 505 varas, which brings the case within the principles laid down in *Freeman v. Gerald*, *supra*. Upon this state of case the court below was justified in rendering judgment for the appellees.

We express no opinion as to whether the federal court judgment was a bar to this suit, as it is not necessary to do so in the determination of the present appeal.

There is no error in the judgment, and it is affirmed.

HIGBEE v. ELLISON.

(Supreme Court of Missouri. May 16, 1887.)

ELECTIONS—OF JUDGES—CONTEST.

Under Rev. St. Mo. § 5554, requiring all contested elections for judge of the circuit court to be heard and determined "before the circuit judge of an adjoining circuit," and section 5555, providing that the provisions of preceding sections, relating to the supreme court, "shall govern contests for the office of circuit judge, and proceedings therein in the circuit courts, and before the judges thereof," a circuit judge can hear such a contest when sitting as a court; and the contestant's petition, if presented to the court, must be presented, as prescribed by section 5550 in reference to supreme court contests, at the first term held in the circuit after the election.

Appeal from circuit court, Linn county.

Shanklin, Lander, Harber, Linneus, and D. H. McIntyre, for appellant.
John W. Henry and J. Hagerman, for respondent.

BLACK, J. At the general election held on the second November, 1886, the appellant and respondent were candidates for judge of the circuit court for the Twenty-seventh judicial circuit. Mr. Ellison received a majority of 491 votes. Mr. Higbee endeavored to contest the election on the ground of alleged illegality in the form of the ballots; and to that end presented his petition to the Hon. GAVON D. BURGESS, judge of the Eleventh judicial circuit, at the court-room in the town of Linneus, in Linn county, on the tenth December, 1886, during the noon recess of the circuit court which was then being held in said county. A copy of the petition, and notice that the same would be presented to Judge BURGESS at the time and place before stated, was served on the contestee on the twenty-ninth November, 1886. On the presentation of the petition, the contestee moved to quash the notice and dismiss the petition, which was sustained, and from that ruling this appeal was taken. On argument of the motion below, it was agreed that the Sullivan county circuit court, which is in the Eleventh judicial circuit, met in regular session on the fifteenth of November, 1886, and remained in session from day to day until the twenty-fourth day of the same month; and that the Linn circuit court, which is also in the Eleventh judicial circuit, commenced its regular session on the sixth December, 1886, and had continued from day to day to the presentation of the petition, and that the business of the term was not then concluded. Respondent contends that the petition could only be heard by the court at the first term after the election, no matter in what county of the circuit it was held, or by the judge in vacation, within 40 days after the election. The appellant insists that the contest is never heard by the court, but always by the judge, whether a court be in session or not.

Section 5549, Rev. St. 1879, provides: "All contested elections for judge of the supreme court * * * shall be heard and determined by the supreme court, or any three judges in vacation." Section 5550: "If any person contest the election of any officer named in the preceding sections, he shall present a petition to the supreme court at the first term held next after the election, or to any three judges thereof in vacation, within forty days after such election." This and the succeeding sections, to and including section 5553, provide what the petition shall state; that a copy of the petition and a notice shall be served on the contestee 10 days before the presentation of the petition; that the supreme court, or any three judges thereof to whom the petition may be presented in vacation, shall appoint a commissioner to take testimony; that the commissioner shall make his report to the court, or to the three judges in vacation; and further provisions are made in respect of the practice and procedure. Section 5554: "All contested elections for judge of the circuit court shall be heard and determined before the circuit judge of an adjoining circuit whose place of residence is nearest to the contestee." Section 5555: "The provisions of sections 5550-5553, concerning contests

and proceedings therein in the supreme court, and before the judges thereof, shall be applicable to and shall govern contests for the office of circuit judge, and proceedings therein in the circuit courts, and before the judges thereof."

From these sections it is clear that jurisdiction to hear a contest of the election of any of the officers mentioned in the first of them is given to the supreme court, or to the three judges in vacation. If the contest be commenced before the court, it must be at the first term held next after the election, and will be concluded in the court. If commenced before the three judges in vacation, it will proceed to termination before them. By force of section 5555, the prior sections, and hence the propositions just stated, are made applicable to contests of circuit judge in the adjoining circuit; so that the petition must be presented to the court at the first term held in the circuit next after the election, or, if not, then to the judge of that circuit in vacation.

It is said that section 5554 is the one which fixes the jurisdiction, and by it the power to hear these contests is given to the circuit judge of the adjoining circuit, and that he cannot hear the contest when sitting as a court. But there are several reasons why this cannot be the true construction. Such a construction is inconsistent with the next succeeding section, which makes the previous section relating to contests in the supreme court, and before the judges thereof, applicable to and govern contests for office of circuit judge "in the circuit courts, and before the judges thereof." If the contest must in all cases be heard by the judge not sitting as a court, there could be no proceedings in the circuit court. The use of the words last quoted become more significant when we consider the law as it stood just prior to the revision of 1879. Section 5554 is the same as the first section of the act of 1872. 1 Wag. St. 1872, § 79, p. 576. The second section of the same act provided that, "if any person contest the election for circuit judge, he shall present a petition to the circuit court, as provided in the next preceding section, at the first term held next after the election, or to the judge thereof in vacation, within forty days after such election," etc. Then follow provisions for the appointment of a commissioner to take testimony. By the act of April 26, 1877, these sections, now numbered as sections 5549 to 5553, were first enacted; so that at the revision of 1879 the legislature found these sections relating to contests in the supreme court, and before the judges thereof, and subsequently the same sections relating to contests of circuit judges in the circuit courts. The latter were dropped out, and in lieu of them we now have section 5555, the language of which shows that it was not designed to change the law, but simply to leave the law in a more compact form, avoiding repetition. The office of the first section of the act of 1872 was to determine in what judicial circuit the contest should be had and determined; nothing more. It performs the same function now, and nothing more. The second section of that act determined when the petition should be presented to the court, and when to the judge in vacation. Section 5555 accomplishes this purpose now by its reference to section 5550.

The petition in this case was not presented to the court at the first term held in the Eleventh judicial circuit next after the election; nor was it presented to the judge of that circuit in vacation, for the court was in session when it was presented. It follows that the petition was properly dismissed. The proceeding is statutory, and we can do no more than follow the law as it is written. The judgment is therefore affirmed.

(All concur.)

FOSTER v. MULLANPHY PLANING-MILL CO.

(Supreme Court of Missouri. May 16, 1887.)

1. ATTACHMENT—FRAUD—CORPORATIONS.

The fact that an insolvent corporation makes a deed preferring some creditors, including some of its directors, does not give an unpreferred creditor the right to take out an attachment at law charging the corporation with attempting to defraud its general creditors.

2. CORPORATIONS—BY-LAW—CONSTRUCTION.

Where a by-law of a corporation provides that a majority vote of the directors shall determine the action of the body, *held*, that a majority of the whole number of the directors must be present; but, if a majority of those present concur in a resolution, it is binding.

Appeal from St. Louis court of appeals.

A. M. Berry, C. B. Stark, and J. L. Torrey, for appellant. *H. J. Grover*, for respondent.

SHERWOOD, J. Action brought August 9, 1883, on four promissory notes for \$1,600 each, dated September 14, 1881, and maturing in two, three, four, and five years after date. At the time of filing his petition, plaintiff sued out an attachment, based on the grounds that the defendant had fraudulently conveyed and assigned, and had fraudulently disposed of, its property and effects, so as to hinder and delay its creditors. Schureman and Gibson were summoned as garnishees. Defendant, in usual form, pleaded in abatement of the attachment. The issues thus raised were submitted on the following agreed statement of facts:

"(1) That the defendant is a corporation duly organized under the laws of the state of Missouri.

"(2) That on the fifth day of May, 1883, the defendant executed and delivered the deed of trust, hereinafter mentioned, to Jos. P. Schureman, to secure certain indebtedness in said deed of trust described, which deed of trust was executed under authority of a resolution of the defendant's board of directors, passed April 30, 1883.

"(3) The number of directors of defendant company was fixed at thirteen persons, and on the said thirtieth day of April, 1883, the following persons constituted the board of directors of the defendant: F. Lohse, H. Richter, H. Sunderman, F. Rose, H. H. Bruning, J. Nieman, F. Germer, Wm. Nolkemper, L. G. Twiehaus, W. A. Stender, C. H. Meyer, Henry Giese, and William Piel,—all of whom, except Giese and Piel, the two last named, were present when the said resolution authorizing the execution of said deed of trust was adopted. All of said directors, so present, voted in favor of said resolution, except J. Nieman, who voted against it.

"(4) That defendant's note for \$2,500, due May 21, 1883, mentioned in said deed of trust, was indorsed jointly by F. Germer, Meyer & Stip, William Leori, and John Stoeppelworth, for the accommodation of said defendant, and discounted by the defendant at the Mullanphy Savings Bank, and that the defendant received the entire net proceeds, in cash, of said note so discounted, and used the same in carrying on its business; that this note, at the time said deed of trust was executed and delivered, was held and owned by the Mullanphy Savings Bank.

"(5) That, at the maturity of said note, on or about May 21, 1883, the said accommodation indorsers, their liability having become fixed by protest, took up and paid said note by substituting therefor their own note, which was accepted by said bank in payment thereof; and defendant, failing to pay its note when due, the indorsers aforesaid paid it, and became, and ever since have been, the owners and holders thereof.

"(6) That the note mentioned in said deed of trust for \$674.70, due May

30, 1883, and payable to Meyer & Stip, was given for money loaned to defendant by said Meyer & Stip.

"(7) That the said C. H. Meyer, who was one of the aforesaid directors of the defendant, was a member of the firm of Meyer & Stip, to whom said last-mentioned note was payable, and who were indorsers on said \$2,500 note.

"(8) That F. Germer, having an open account against the defendant for \$236, William Nolkemper, having an open account against the defendant for \$47.35, and W. A. Stender, having an open account against the defendant for \$33.15, all of which accounts were included in and secured by said deed of trust, are the same persons who were members of said board of directors aforesaid, and the said Germer is the same person of that name who was also indorser on said \$2,500 note.

"(9) That all the indebtedness mentioned in and secured by said deed of trust was a *bona fide* liability of said defendant to the persons and in the amount therein named, and as therein expressed, existing at the time said deed was executed.

"(10) That section 5 of article 3 of the by-laws of the defendant is as follows: 'A majority vote of the board of directors shall, at all times, determine the action of that body.'

"(11) The deed of trust aforesaid is hereby offered in evidence, and shall be considered a part of this agreed statement of facts. All questions of competency and relevancy of said deed are reserved, but its execution is admitted.

"(12) That the said claims of said F. Germer for \$236, of W. A. Stender for \$33.15, and of said William Nolkemper for \$47.35, mentioned in the said deed of trust, were for labor done and performed by said persons, respectively, for said defendant, at its request, for which demand was made by them of defendant, on the day said deed of trust was executed, and said indebtedness accrued within three months next immediately preceding the day on which said demand was made.

"(13) That the notes sued on were executed on the fourteenth day of September, 1881, and matured as stated in the affidavit to attachment herein by the defendant, and the plaintiff is the legal holder for collection thereof.

"(14) [Unimportant.]

"(15) That, on the day when the said deed of trust was executed, said defendant was insolvent, but said deed was not fraudulent in fact, nor was it executed or received for the purpose, or with any actual fraudulent intent on the part of the parties thereto, or any of them, or on the part of the board of directors, or either of them, of hindering or delaying any creditor or creditors of said defendant, but said deed was executed and received by said parties in good faith, and for the *bona fide* purpose of securing the claims therein mentioned."

The deed of trust also formed a part of the agreed statement, but it is unnecessary to insert it here.

On this agreed statement the circuit court found the issues for the defendant, and gave judgment accordingly, and the plaintiff appealed to the St. Louis court of appeals, where the judgment was affirmed, and the plaintiff appeals here.

A corporation, within the scope of the purposes for which it was incorporated, may do any act in furtherance of those purposes which an individual in similar circumstances might do, and, though insolvent, may prefer some creditors to others, even though such creditors are among the directors of the corporation. This doctrine, first announced in this state in the separate opinion of Judge RYLAND in *City of St. Louis v. Alexander*, 28 Mo. 527, with that of *Twin-Lick Oil Co. v. Marbury*, 91 U. S. 587, was fully approved by this court in *Kitchen v. Railroad Co.*, 69 Mo. 243, to the extent of holding that

such transactions, while sometimes voidable on timely and direct application to set them aside, were not absolutely void as to such participating directors. And it has been held that the insolvency of a corporation does not *per se* abrogate its power to continue the management of its assets, but that it may continue in its due course of business so long as there is a fair and honest prospect of redeeming its fortunes, and may pay off debts in regular course of business, though a part of the creditors are thereby deprived of their security. 2 Mor. Corp. § 786, and cases cited.

In this case the conveyance attacked as fraudulent, by the proceeding in attachment, was, as already seen, made under a resolution authorized by the directors, April 30, 1883, and was carried into execution on the fifth of May next thereafter. It is insisted that this deed was fraudulent as against the general creditors of the corporation. That it was made in good faith, that it was for honest debts, the agreed case concedes. That a corporation may prefer its creditors must be also conceded, both from the authorities cited, and from numerous others to be found in defendant's brief. Indeed, such a concession is but a necessary corollary from the premises that a corporation, speaking in general terms, may do all that, in like circumstances, an individual may do, and that an individual may do this; and that his conveyance, if made *bona fide*, will be successful, even against an attachment by the creditors of the debtor, is abundantly settled by our own reports. *Shelley v. Boothe*, 73 Mo. 74, and cases cited; *Dougherty v. Cooper*, 77 Mo. 528, and cases cited. And the fact that the effect of such conveyance is to hinder or delay other creditors goes for nothing in the eye of the law. *Id.*

But the further contention is made that the deed was fraudulent, as against the plaintiff and other creditors, because it gave a preference to and secured the debts of four of the directors who participated in the resolution which authorized its execution. As already seen, the by-laws declared that "a majority vote of the directors shall at all times determine the action of that body." There were present, at the time of the adoption of the resolution of April 30th, eleven persons, four of whom were directors of the company, interested in the adoption of the resolution, and who participated in its passage. In this case, as the directors were thirteen in number, seven would constitute a majority of the directors, and authorized by the by-laws to act.

Treating on this subject, Chancellor Kent says: "There is a distinction taken between a corporate act to be done by a select and definite body, as by a board of directors, and one to be performed by the constituent members. In the latter case a majority of those who appear may act; but in the former a majority of the definite body must be present, and then a majority of the quorum may decide." Here a majority of the definite body were present, and a quorum of those present, to-wit, six, did act, and they were sufficient for the passage of the resolution, regardless of the four interested directors who also voted in its favor, and of the other director who voted against it. Thus it has been held that, if there are nine directors, five constitute a quorum, and a resolve passed by the majority at a meeting where at least five are present is binding on the company. 1 Mor. Corp. (2d Ed.) § 531, and cases cited; *Field, Corp.* §§ 238, 239. And it will be presumed that the words "the majority vote," as employed in the by-laws, were intended to bear the above-mentioned signification, since that, according to the authorities, is the ordinary import of those words.

But, aside from the authority of precedent, it is provided by section 730, Rev. St., that a majority of the directors shall constitute a quorum, and that every decision of a majority of the persons assembled as a quorum should be valid as a corporate act. Looking at the matter, then, from any point of view, the passage of the resolution must be regarded as the act of the corporation. But there is much force in the point made by the defendant that two of the four directors said to be interested when voting for the resolution had claims

which, being for labor and services performed by them for the corporation, were already preferred by operation of law, and as such had "preference to any other claim, debts, or demands whatsoever," etc. Rev. St. § 761. So that eight disinterested directors really voted for the resolution, and gained neither preference nor priority thereby.

In passing to another point, it may be well enough to remark, in reference to the case of *Eppright v. Nickerson*, 78 Mo. 482, that the power of the directors of a corporation to dispose of its assets without the consent of, or even despite the objections of, the shareholders, was recently affirmed by two decisions of this court. *Chew v. Ellingwood*, 86 Mo. 273; *Hutchinson v. Green*, 1 S. W. Rep. 853.

Much has been said, and very ingeniously said, by counsel for plaintiff that the directors of the company, it being insolvent, were trustees, and that the assets of the corporation were a trust fund, etc. These premises will readily be admitted. But grant them. Grant, further, for argument's sake, that a breach of trust has been committed by these directors in manner as aforesaid. How is such official dereliction to be reached? Is it a constructive fraud, within the meaning of the attachment act? Certainly no case has gone to that length. The corporate assets being a trust fund, the forum for its enforcement is a court of equity. 2 Mor. Corp. (2d Ed.) §§ 789, 796, and cases cited. Moreover, if, in consequence of the insolvency of the defendant company, its assets became a trust fund, it certainly was a *joint trust* for all its creditors, and, of course, could not be enforced at law. In this connection it is not to be forgotten that, of the beneficiaries named in the deed of trust, some 25 of the beneficiaries were general creditors, whose claims were certainly capable of being preferred. Is it possible that these parties can be shorn of their rights in an action at law against the company *alone*? All that the plaintiff would be entitled to in any event, even in an equitable proceeding, would be a *pro rata* share of the corporate assets. Can he by the present proceedings gain more at law than he could *in equity*? Even the participating directors, their claims being *bona fide*, could not be deprived of their ratable share of the corporate assets to be applied to the satisfaction of their debts.

Being fully satisfied with the result reached, we affirm the judgment.
(All concur.)

STATE *ex rel.* CAREY v. ANDRIANO.

(Supreme Court of Missouri. May 16, 1887.)

ALIENS—NATURALIZATION—FOREIGN-BORN CHILDREN.

The act of congress of April 14, 1802, § 4, (2 St. U. S. 154,) provides that the children of persons duly naturalized under any law of the United States, who may have become citizens of any one of the states, being under 21 years of age at the time of their parents being naturalized, shall, if dwelling in the United States, be considered citizens thereof. *Held*, under this provision, that infant children of aliens, though born out of the United States, yet, if dwelling in the United States at the time of their parent's naturalization, become citizens thereof; and the section is prospective, and intended to embrace the children of those who should thereafter be, as well as those who had already been, naturalized.

Appeal from circuit court, Buchanan county.

Musser & Grubb and B. R. Vineyard, for respondent. Ramey & Brown and Green & Burns, for appellant.

NORTON, C. J. This is a proceeding by *quo warranto*, instituted in the circuit court of Buchanan county, challenging the right of defendant, Andriano, to exercise the functions and perform the duties of sheriff of Buchanan county. The circuit court sustained the challenge, and rendered its judgment of ouster, on the sole ground that defendant was not, and never had

been, a citizen of the United States, and was therefore, under our constitution, disqualified from holding the office of sheriff. From this judgment defendant appealed.

The record before us discloses the following undisputed facts, viz.: That at the general election held in Buchanan county, in 1886, defendant was, by a majority of votes cast at said election, elected sheriff of said county; that he was duly commissioned, gave the required statutory bond, took the requisite oath of office, and on the twenty-third of November, 1886, entered upon the discharge of the duties of the office. It further appears that defendant was born in the foreign country of Baden in the year 1841, while his parents were citizens of and residing in that country; that in 1849 his parents removed to the United States, bringing the defendant, then an infant about eight years old, with them; and that they resided in said Buchanan county from that time till their respective deaths, which did not occur till long after 1855; that the father of defendant was duly naturalized in 1854, in the circuit court of Buchanan county; and that defendant has also resided in said county ever since 1849.

Defendant's claim to citizenship is based on the facts above stated, and the question as to whether or not it is well founded is to be determined by a construction of the fourth section of an act of congress approved on the fourteenth of April, 1802, entitled "An act to establish a uniform rule of naturalization," etc. 2 St. U. S. 154. So much of said section as has a bearing on the question before us is as follows:

"Sec. 4. And be it further enacted that the children of persons duly naturalized under any of the laws of the United States, or who, previous to the passing of any law on that subject by the government of the United States, may have become citizens of any one of the said states, under the laws thereof, being under the age of twenty-one years, at the time of their parents being so naturalized or admitted to the rights of citizenship, shall, *if dwelling in the United States*, be considered as citizens of the United States."

Considering this section with reference to its grammatical construction, and in connection with the fact that it is incorporated in an act providing a uniform rule for the naturalization of such aliens as might thereafter desire to be naturalized as therein provided, and in connection with the previous legislation of congress on the subject, we have no hesitation in saying that it was intended to be prospective in its operation as to all aliens who might become naturalized under the provisions of the act of 1802, of which said section 4 is a part, together with all the incidents flowing from such naturalization to the children of aliens so naturalized as set forth in said section, and that, giving to it such operation, the defendant, under the undisputed facts in the case, became a citizen of the United States, and was therefore, under the constitution of this state, eligible to the office of sheriff at the time of his election.

The precise question under consideration has been adjudicated and passed upon by the highest courts of several of the states, and it has been uniformly held by them that said section 4 operated prospectively, and that, under the naturalization act of 1802, the infant children of aliens, though born out of the United States, if dwelling within the United States at the time of the naturalization of their parents, become citizens by such naturalization, and that the provisions of that act on this subject are prospective, and intended to embrace the children of those who should thereafter be, as well as those who had already been, duly naturalized under any of the laws of the United States. The cases in which this is held are as follows: *State v. Penney*, 10 Ark. 621; *O'Connor v. State*, 9 Fla. 215; *West v. West*, 8 Paige, 433; *U. S. v. Kellar*, 13 Fed. Rep. 82.

But while counsel for plaintiff concede that it has been so held by the state courts, it is earnestly contended by them that the supreme court of the United States in the case of *Campbell v. Gordon*, 6 Cranch, 176, has placed a differ-

ent construction on the section in question, and that, the section being a statute of the United States, we are bound to follow the construction thus put upon it. While we recognize the correctness of the proposition that where the supreme court of the United States has construed an act of congress the state courts will adopt such construction, we do not understand the court in the case of *Campbell v. Gordon*, *supra*, to have construed section 4 of the act of 1802 so as to make it operative retrospectively only, and not prospectively; nor was it so understood by HARLAN, justice of the supreme court, in the case of *U. S. v. Kellar*, *supra*, in which he uses the following language: "It was suggested that the act of 1802, from which, as we have seen, section 2172 is taken, was intended to be temporary in its operation, and to apply to cases arising previous to its passage. In support of that proposition reference was made by counsel to *Campbell v. Gordon*, 6 Cranch, 176. But the court does not perceive that that case maintains, or that the language of the act of 1802 in any degree justifies, any such interpretation of the statute."

It is further stated by him in his opinion "that it was held in the case of *Campbell v. Gordon* that under the act of 1802, that the naturalization of a father at the time his daughter was an infant resident of this country conferred upon her full rights of citizenship, although she had taken none of the steps required by the naturalization laws." While the criticism of counsel as to the inaccuracy of the statement made in the sentence last above quoted, that the daughter was an infant resident of this country at the time her father was naturalized, is justified by the facts of that case, the fact being that the daughter at the time of her father's naturalization was a minor residing in Scotland, and came to this country after he was naturalized, and before the act of 1802 was passed, and was a resident of this country at the time it passed, such inaccuracy neither impairs the force, nor demonstrates the incorrectness, of the conclusion announced in what is previously said in the opinion with reference to the proper construction of the act of 1802.

In the case of *Campbell v. Gordon* there were but two points before the court for determination. The first was as to whether the father of Mrs. Gordon had been duly naturalized under an act of congress passed in 1795, and the second was as to whether his daughter, Mrs. Gordon, who at the time of her father's naturalization was a minor residing in Scotland, but who came to this country before the act of 1802 was passed, and was a resident at the time it passed, became a citizen in virtue of the naturalization of her father. The court, after passing on the first point, and holding that the father had been duly naturalized, proceeded in its opinion as follows: "The next question to be decided is whether the naturalization of William Currie conferred upon his daughter the rights of a citizen after her coming to and residing within the United States, she having been a resident in a foreign country at the time her father was naturalized. Whatever difficulty might exist as to the construction of the third section of the act of the twenty-ninth of January, 1795, in relation to this point, it is conceived that the rights of citizenship were clearly conferred upon the female appellee by the fourth section of the act of fourteenth of April, 1802. This act declares that the children of persons duly naturalized under any of the laws of the United States, being under the age of 21 years at the time of their parent's being so naturalized, shall, if dwelling in the United States, be considered as citizens of the United States. This is precisely the case of Mrs. Gordon. Her father was duly naturalized, at which time she was an infant; but she came to the United States before the year 1802, and was, at the time the law passed, dwelling within the United States. It is therefore the unanimous opinion of the court that, at the time of the death of James Currie, Mrs. Gordon was entitled to all the right and privilege of a citizen."

We are of the opinion that it cannot fairly be claimed that in the above case the court either held, or intended to hold, that a parent who might be duly

naturalized under the act of 1802, having minor children at the time of such naturalization residing in the United States, that such minor children did not thereby, under section 4 of said act, become citizens. The facts of the case before the court did not call for a ruling on such point, and we do not understand it to have been ruled upon either in fact or as a logical result of the ruling actually made. The father of Mrs. Gordon was naturalized, under the act of 1795, at a time when she was a minor residing in Scotland, and notwithstanding that fact the court held that the naturalization of the father was effectual in conferring upon her the right and privilege of a citizen, the further fact appearing that she afterwards became a resident, and was a resident of this country at the time the act of 1802 became a law.

If section 4 of the act of 1802, as held in that case, was operative in conferring the rights of a citizen upon the minor child of a parent who had been duly naturalized under the act of 1795, although at the time of the naturalization of such parent such child resided in a foreign country, and did not become a resident of this country till or before the act of 1802 became a law, we can perceive no reason why said section 4 should not be held to be operative in conferring the right of citizenship on the minor child of a father duly naturalized under the law of 1802, when such minor child at the time of the naturalization of the father was residing with him, and a resident of this country. We can perceive no reason why it should be operative in the one case and not in the other. In *Campbell v. Gordon* it was held to be operative in the case first put, and we are of the opinion, and so hold, that it is likewise operative in the second case put.

For the reasons given, the judgment is reversed, and defendant restored to all that he has lost thereby, and the suit is dismissed, with the concurrence of the other judges.

SHIELDS v. MCGREGOR.

(*Supreme Court of Missouri. May 16, 1887.*)

1. ELECTIONS—FORM OF BALLOTS.

A., a Republican, was an independent candidate for circuit judge, and his candidacy was indorsed by the Republican committee, and by a mass convention composed of persons of different parties, which met to nominate county officers. At the election ballots were used headed "Democratic State, Congressional, and Senatorial, and Independent Judicial and County, Ticket," and which contained the names of the regular Democratic nominees for state and senatorial offices, of A., and of the nominees of the mass convention. Another form of ballot used was identical with this one, except that it contained the words "Greenback-Labor" in place of "Democratic," and the names of the Greenback-Labor nominees in place of the Democratic nominees. Held, in a contest over A.'s election, that these ballots did not violate Rev. St. Mo. § 5493, providing that the caption of every ballot shall express its political character, and shall not be designed to mislead.

2. SAME—CONTEST—COUNTING BALLOTS.

The facts herein stated being admitted, or appearing in evidence, held, that a counting of the ballots, under such circumstances, was useless, and a refusal of the court below to order it was not error.

3. SAME—PLEADING.

Under the provision of the statute requiring the petition to set forth the points on which the contestor will contest the election, and the facts which he will prove in support of such points, an allegation that the contestee received only 110 legal votes, while 784 were counted for him, will be considered as referring to the preceding specifications of illegality.

4. SAME—HARMLESS ERROR.

A charge of illegality as to a number of ballots too small to affect the result, although not investigated by the court below, will not be ground for remanding the case for further proofs.

Appeal from circuit court, Vernon county.

Geo. Hubbard and A. L. Thomas, for appellant. H. H. Harding and F. C. Brown, for respondent.

BLACK, J. Mr. Shields, who is the plaintiff or contestor and the appellant here, and Mr. McGregor, were the candidates, and the only candidates, for judge of the Fifteenth judicial circuit at the general election held on the third November, 1886. The circuit is composed of the counties of Lawrence, Newton, Jasper, and McDonald. In the entire circuit the defendant received, and there were counted for him, 68 more votes than were cast or counted for the plaintiff. Mr. Shields contested the election, and this is an appeal from a judgment adverse to him.

The main controversy in the case arises from the circulation and use at the election in McDonald county of printed tickets upon which the contestee's name appeared, and which tickets, it is alleged, bore caption or head-lines designed to, and which did, it is said, mislead the voters as to the names thereunder, and were therefore fraudulent, and should not have been counted.

The facts, as they appear from the admissions of the parties and the evidence reported by the commissioner, are as follows: The contestor was the regular and only nominee of the Democratic party for circuit judge. That party made its nominations in all of the counties for all of the offices voted for at the election, and the name of the contestor appeared upon all of the tickets which were authorized to be printed by the party organization. These tickets in McDonald and the other counties were simply headed "Democratic Ticket." The contestee is a Republican in his political proclivities. It appears that the judicial executive committee of the Republican party, at a meeting held on the seventh September, 1886, resolved that it was not advisable to call a convention to nominate a circuit judge, but the committee in the same resolution indorsed the candidacy of the contestee, who had announced himself as an independent candidate, and authorized his name to be printed on the party tickets, which was done in all of the counties. In McDonald county the Republican party and the Greenback Labor party made their nominations for state, congressional, and senatorial offices, but made no nominations for persons to be voted for for the various county offices. Candidates for the county offices were, in that county, put before the electors by a mass convention, composed of persons previously identified with the different political parties. The persons thus nominated were known and called the "Independent County Ticket." This mass convention, it seems, also indorsed the candidacy of the contestee.

It is admitted that there were circulated and voted tickets which bore a caption in form and in type as follows:

"DEMOCRATIC
State, Congressional, and Senatorial,
and
INDEPENDENT
Judicial and County, Ticket."

Under this caption were printed, first, the names of the Democratic candidates for judge of supreme court, railroad commissioner, superintendent of public schools, and state senator. Then followed the name of the contestee as a candidate for circuit judge, and the names of the candidates for the county offices who had been put in nomination by the mass convention, and were known as the "Independent Ticket." It also appears that tickets were circulated and voted having the following caption: "Greenback-Labor, State, Congressional, and Senatorial, and Independent Judicial and County, Ticket," in form and type the same as the preceding one. The candidates upon this ticket were those nominated by that party for state, congressional, and senatorial offices, and then followed the name of contestee, and the names of the persons composing the "Independent County Ticket."

The contestor states that the contestee received, and there were counted for him, 300 of the first of these ballots, and 67 of the second. The proof shows

that a number of each kind were voted and counted, and the allegation as to number will be taken as true. These are the ballots alleged to be fraudulent because designed to mislead the voters. It may be stated, as a part of the history of the election, that the Republican tickets had a like caption, save the word "Republican" was used as the first word of the caption. The candidates for circuit judge and county officers are the same as on the two tickets just described. These three tickets, and the ticket headed "Democratic Ticket," were the only printed ballots used at the election.

Section 5493, Rev. St. 1879, after stating that the ballot shall be a piece of white paper on which shall be written or printed the names of the persons voted for, provides: "Said ballot shall not bear upon it any device whatever, nor shall there be any writing or printing thereon, except the names of persons, and the designation of the offices to be filled, leaving a margin on either side of the printed matter for substituting names. Each ballot may bear a plain written or printed caption thereon expressing its political character, but on all such ballots the caption or head-lines shall not, in any manner, be designed to mislead the voter as to the name or names thereunder. Any ballot not conforming to the provisions of this chapter shall be considered fraudulent, and the same shall not be counted."

This statute was passed in view of the well-known fact that ballots are, in general, previously printed and circulated on election day by committees or persons appointed by the respective political parties, or by those who advocate the election of certain persons. The evident purpose of the law is to prohibit the use of a caption calculated to induce the elector to conclude, from an inspection of the caption or head-lines only, that the persons thereunder named are of his political persuasion, when they or any of them are not. The caption is not limited to one word, nor to three words, as in former years. Head-lines are not prohibited by the law, but are permitted. When used, however, they must tell the truth. The law is stringent, fixes an absolute rule of evidence, and declares the prohibited ballots fraudulent without regard to the fact whether they did in reality deceive the elector or not. But great care must be taken lest we step beyond the true intent of the law. It is clear, also, that we cannot, as a matter of law, declare the ballots here in question fraudulent on their face. It is necessary to first determine by evidence whether the political character of the persons whose names are in the body of the ballots is or is not truly indicated by the caption. *Turner v. Drake*, 71 Mo. 286. The words "political character" as here used, and as used in the statute, apply as well to independent candidates as they do to those who are the nominees of regular party organizations.

Now, we may apply these general observations to the exact case in hand. The first words of the caption are "Democratic State, Congressional, and Senatorial." That the candidates appearing upon the ballots for these offices were all Democrats is conceded, and thus far there can be no objection to the ballots. We then have, "And Independent Judicial, and County Ticket." These words truly and accurately express the political character of the remainder of the candidates on the ballots. Nor can it be fairly said there is anything misleading in the form of the head-lines, for the words "Democratic" and "Independent" are both in bold type, and each makes a separate line. We think the head-lines to these ballots clearly and truthfully indicate the political character of every name below them. To hold otherwise is to say that the elector had the right to read the word "Democratic," and then shut his eyes as to the residue of the caption, and that, too, when the law does not limit it to one or any number of words. The Independent candidates, including the contestee, held their attitude before the public, that was as well known and defined as was that of the candidates of the other political organization. When it is remembered that this independent movement was composed in part of persons affiliating with the Democratic party, we

think there is no foundation for the complaint made by the contestor. What has been said applies with equal force to the ballot headed "Greenback-Labor," etc.

The commissioner properly excluded the expert evidence offered to show that the captions were designed to mislead. The issue of fact was whether these persons whose names appeared as candidates for circuit judge and county officers were Independent candidates. If they were, then the caption truly expressed their political standing before the electors. Nor can the fact that the previous custom in McDonald county was for each party to print its tickets with the party name only as a caption change the conclusion before expressed. These tickets seem to have been prepared by persons affiliating with all parties, to meet the changed state of affairs, by reason of the independent movement, as to the county and circuit judge candidates, and if it be true, as we hold, that the head-lines were not designed to mislead, then the former customs, under different circumstances, can have no bearing upon the case.

2. It appears the county clerk of McDonald county refused to open and produce the ballots to be counted unless he had an express order so to do from the court or judge. Upon the incoming of the commissioners' report, the contestor asked for the proper orders, and a new commission, all of which was refused. The form of the ballots and many other facts having been admitted, and the evidence as to the political standing of the various candidates being before the judge, he declined to order a counting of the ballots unless it should appear that they were illegal, and, being of the opinion that the ballots complained of were not fraudulent, ruled as first stated, and we see no error in this. The counting of the ballots, under such circumstances, would have been wholly useless.

3. In the fourth subdivision of the petition it is stated that contestee received only 110 legal votes in McDonald county, notwithstanding which there were counted for him 784 votes. This allegation is accompanied with no statement of facts or particular charges. The law provides that the petition should set forth "the point on which he (the contestor) will contest the same, (the election,) and the facts which he will prove in support of such points, and shall pray for leave to produce his proof." In view of this statute, we can only regard this general statement as having reference to the preceding specifications, and to relate alone to the votes alleged to be fraudulent because of the head-lines upon the tickets. There could then be no use of a further reference because of anything stated in the fourth subdivision of the petition.

4. The supplemental petition states that the contestee received 38 fraudulent ballots in Newton county; that they were fraudulent because his name appeared on that number of ballots headed "National State Ticket." Full admissions were not made as to this charge, nor were the proofs taken because of a refusal of the clerk of that county to produce the ballots until specially directed so to do by the court or judge. But conceding these ballots, 38 in number, to have been fraudulent for the reason assigned, the result of the election would not be changed, and this cause ought not to be remanded for further proof on that charge.

We see no reason for interfering with the judgment in this case, and it is therefore affirmed.

SHERWOOD, J., did not participate in the consideration of this case. The other judges concur.

SMITH and others v. ENOS.

(*Supreme Court of Missouri. May 16, 1887.*)

HOMESTEAD—EXCHANGE OF—CLAIMS.

Under Rev. St. Mo. § 2695, providing that a homestead shall be subject to claims existing at the time of acquiring it, the date of recording the deed to be considered

such time, and section 2696, providing, in substance, that, when a new homestead is acquired in place of a former one, such new one shall not be subject to claims to which the original homestead was not subject, a homestead obtained by exchange for a former one is not subject to claims arising between the time of the execution of the deed of such new homestead and the recording of it.

Appeal from circuit court, Holt county.

C. W. Thomas and T. C. Dungan, for respondents. *Zook & Stokes and T. H. Parish*, for appellant.

NORTON, C. J. This is a suit in ejectment to recover possession of certain land in Holt county. On the trial plaintiffs obtained judgment, from which the defendant has appealed. It is conceded that both plaintiff and defendant claim through one Eppler as the common source of title. The following facts appear in the record, viz.: That said Eppler acquired a homestead on 40 acres of land in Atchison county by deed dated April 2, 1870, which was duly recorded on that day; that he, with his family, occupied said land as his homestead from that time until the fifteenth October, 1874, at which time he exchanged said homestead to one Walkup for the land in controversy, and executed a deed to said Walkup, conveying his homestead in Atchison, receiving at the same time from said Walkup, in exchange, a deed conveying to said Eppler the land in question, who moved with his family on the land thus conveyed, and resided continuously thereon till he sold and conveyed it to defendant, on the twenty-fifth January, 1881. It further appears that Eppler did not file for record the deed he received from Walkup till the fourth day of January, 1878; that previous to the filing of said deed for record said Eppler, on the fourth of September, 1875, became indebted to one Smith on two promissory notes, upon which judgment was rendered by the circuit court of Holt county on twenty-fifth April, 1878, in favor of one Roecker, to whom they had been assigned; that on the thirty-first January, 1881, execution was issued on said judgment, and levied upon said land, under which it was sold to plaintiff Fannie Smith, who received a sheriff's deed therefor.

Notwithstanding the undisputed fact that Eppler has acquired a complete homestead right to the land in Atchison county, and notwithstanding the fact that he exchanged with Walkup said homestead for the land in controversy, which he immediately moved onto with his family, and occupied continuously as his homestead till he sold and conveyed the same to defendant, in 1881, the plaintiffs claim that such homestead was nevertheless liable to seizure and sale under execution issued on a judgment rendered on a debt contracted by Eppler after such exchange, and before he filed the deed from Walkup to him for record. In other words, it is insisted that, under our statute, if a person having acquired a homestead exchange it for another which he occupies as such with his family, that the land so taken in exchange is liable to be seized and sold for the payment of any debt contracted by him after such exchange, and before he filed his deed for record, although the homestead given by him in exchange could not have been subjected to the payment of such debt. The circuit court sustained this contention, and held that the homestead was liable to be so sold, and the sole question raised by the record is as to whether that ruling is correct; and that question is to be determined by the following sections of the Revised Statutes, viz.:

"Sec. 2695. Such homestead shall be subject to attachment and levy of execution upon all causes of action existing at the time of the acquiring such homestead, except as herein otherwise provided; and for this purpose such time shall be the date of the filing in the proper office for the record of deeds the deed of such homestead, and, in case of existing estates, such homestead shall not be subject to attachment or levy of execution upon any liability hereafter created.

"Sec. 2696. Whenever such housekeeper or head of a family shall acquire another homestead in the manner provided in section 2695, the prior home-

stead shall thenceforth be liable for his debts, but such other homestead shall not be liable for causes of action against him to which such prior homestead would not have been liable: provided, that such other homestead shall have been acquired with the consideration derived from the sale or other disposition of such prior homestead, or with other means not derived from the property of such housekeeper or head of a family."

These sections were before this court for construction in the cases of *Farra v. Quigly*, 57 Mo. 284, and *Creath v. Dale*, 84 Mo. 349.

In the first of these cited cases, Judge NAPTUN, speaking for the court, after quoting the above sections, observes "that the phraseology of these sections is singularly unhappy; but I conjecture that the meaning is that a homestead is not exempt from being taken for a debt contracted before its purchase, and the filing of the deed for it, unless such homestead is acquired by the sale of a previous one."

In the case of *Creath v. Dale*, *supra*, Dale had exchanged a homestead previously acquired for another homestead. The point was made by counsel for the plaintiff that, before Dale filed his deed for record for the homestead acquired by the exchange, he contracted a debt for the payment of which such homestead was liable to be sold, because of such failure to file the deed. This point was resisted by counsel on the other side, on the ground that the statute fixing the date of filing the deed for the homestead for record, by which to determine whether it was liable for the payment of any given debt, refers only to the inception of the first homestead right. In the disposition of the case the following language is used by Judge SHERWOOD in the opinion: "Section 2696, Rev. St., provides that when another homestead is acquired by one who was possessed of a former homestead such prior homestead shall thereupon be liable for his debts, but that the subsequently acquired homestead shall not be liable for causes of action against him to which such prior homestead would not have been liable; 'provided, that such other homestead shall have been acquired with the consideration derived from the sale or other disposition of such prior homestead.'" After stating the facts in the case, it is then said: "No doubt is entertained from these facts that, under the statute, whatever original rights Dale possessed in the Piedmont property were transferred, by the successive exchanges, to the farm last acquired by Dale."

The ruling in these cases being adverse to that by the circuit court, the judgment is reversed, and cause remanded.

WEBER, Adm'r, etc., v. ORTON and others.

(*Supreme Court of Missouri*. May 16, 1887.)

NEGOTIABLE INSTRUMENTS—TRANSFER WITHOUT INDORSEMENT.

A negotiable promissory note that is transferred to a third party without indorsement, is in his hands, to all intents and purposes, a non-negotiable instrument, and subject to all the equities to which it would have been subject had it been a non-negotiable instrument in form, or had remained in the hands of the original payee; and such party has constructive notice of a defeasance, though not recorded, providing that, if the patent for the purchase price of which the note was given should prove a failure, the note and deed of trust securing it should be surrendered, in so far as to preclude him from pleading ignorance thereof.

Appeal from circuit court, St. Francois county.

J. L. Smith and Bush & Weber, for plaintiff in error. *Carter & Clardy*, for defendants in error.

SHERWOOD, J. This proceeding in the court below was one of equitable garnishment, whereby the original plaintiff, John A. Weber, now deceased, sought to subject a certain promissory note and deed of trust to the payment of certain indebtedness due by one of the defendants, Felix G. Harrison, to the original plaintiff, on the ground that Harrison owned one moiety of the

promissory note, although the same was made payable to W. H. McDaniels or order. Harrison had become non-resident prior to the institution of this suit. The answer of Orton, the maker of the note and deed of trust, pleaded failure of consideration, fraud in obtaining the note and deed of trust, and an agreement in writing in the nature of a defeasance, though not recorded, for their surrender upon the happening of certain contingencies. The deed of trust was given to secure the payment of a debt contracted for a certain interest in a bee-hive patent, and the defeasance was to accomplish the cancellation or release of the debt and the deed of trust, in the event that expectations in regard to the patent aforesaid should not be realized. The testimony of Orton went to sustain the averments of his answer, and there was testimony of a contrary effect. Orton denies having executed the note to W. H. McDaniels, and handing the same to John A. Weber, deceased, with the intention that it should operate as collateral security for Harrison's debt, and there was rebutting testimony.

The above gives a sufficient outline of the salient points of this case, and affords sufficient basis for the rulings necessary to be made herein. It does not appear that John A. Weber, deceased, had actual notice of the terms and conditions upon which Orton bought the bee-hive patent, and incurred the indebtedness secured by the deed of trust; nor is it material that notice of such a character should have been brought home to him, and this is the reason of it: The note, as already seen, was, it is true, a negotiable note, being made payable to W. H. McDaniels or order; but, inasmuch as he had not indorsed it, the lack of such indorsement rendered the note, to all intents and purposes, the same in the hands of John A. Weber as if it were a non-negotiable instrument, and it was therefore subject to all the equities to which it would have been subject had it been non-negotiable in form, or had remained in the hands of the original payee. This rule of commercial law is firmly established. *Patterson v. Cave*, 61 Mo. 439, and cases cited; 1 Daniel, Neg. Inst. §§ 321, 578, 644a, 741; *Quigley v. Bank*, 80 Mo. 289.

In consequence of the foregoing, plaintiff's intestate took, not a legal, but only an equitable, title to the note. This being the case, the law of constructive notice carried home to John A. Weber knowledge of the defeasance aforesaid, in so far as to preclude him from pleading ignorance of the defeasance. These considerations settle the main point in this case.

In relation to the other points of this case, as, *ex. gr.*, the failure of consideration, fraud, etc., seeing no reason in this instance for departing from our custom of deferring somewhat to the trial court in its determination of questions of fact, we shall observe the rule now, and affirm the judgment which the defendants recovered in the lower court.

(All concur.)

LOVE v. VAN EVERY.

(Supreme Court of Missouri. May 16, 1887.)

ACCORD AND SATISFACTION—COMPROMISE—PERFORMANCE.

Where a creditor makes a compromise of his claim with his debtor, by which the latter agrees to do certain things in discharge of the debt, and the debtor does some of them, but fails to do others, the creditor cannot abandon the compromise agreement, and sue to recover the original debt; his proper action is for breach of the agreement.¹

Appeal from circuit court, Greene county.

Goode & Cravens, for appellant *Massey & McAfee*, for respondent.

¹Where an agreement constituting an accord and satisfaction has been made upon sufficient consideration, the new contract must be relied on, whether performed or not. *Hitchcock v. Hassler*, (Neb.) 20 N. W. Rep. 396.

BRACE, J. This action was commenced in a justice's court, upon an account, as follows:

Geo. S. Van Every, in Account with T. C. Love.

Dec. 21, 1882. To 1408 R. R. ties, 25c each, - - - \$352 00

" " " " 128 " " 11c " - - - 18 58

\$365 58

By cash, - - - - - 809 70

Balance due, - - - - - \$ 55 88

Plaintiff recovered judgment in the justice's court. Defendant appealed to the circuit court, where, upon the trial, the defendant demurred to plaintiff's evidence, demurrer was sustained, and the jury, under the instructions of the court, returned a verdict for the defendant, and judgment was accordingly rendered in his favor, from which plaintiff, after an unsuccessful effort for a new trial, appeals to this court. The only question before us on the record is whether the action of the court in sustaining the demurrer to the evidence was erroneous.

The material facts, as they appear on the record in the evidence of the plaintiff, are substantially as follows. Plaintiff testified: "I had a contract with the defendant to buy ties and sell them to him. Defendant had a contract with the railroad company. The lot of ties involved in this suit was bought by me of Samuel Adams, and put in my tie-yard near my store. I paid Adams \$212. This was his account at my store. Mr. Van Every claimed that he had bought these ties himself of Adams; that he owed Adams, and not me; that they were his ties, and not mine; and that he had paid Adams for them. He finally proposed that if I would pay him the money he had paid Adams I might take them. I told him, if he would pay me back the \$212 I had paid Adams, and \$55 profit, I would let him have them. He refused to do it."

The controversy was afterwards settled by the following written contract entered into between the parties:

"I have this day released to G. S. Van Every all claims on 1,843 ties and 118 culls, upon which I have advanced cash and merchandise to the amount of \$212.71, which said Van Every has paid me, and I have accepted said settlement of Adams' account, and given up my claim on said ties, upon the agreement of said Van Every that he is to advance or loan \$500 to Mr. Long, of Seymour, or Messrs. Matney & Crabb, of same place, to enable them to purchase my stock of goods and tie contract at Cedar Gap, Wright county, Missouri, and that he will recognize either of these parties with whom I may consummate a trade, in my stead, in the tie contract now in existence between me and said Van Every, which contract gives me the right to buy ties in the territory known as 'Cedar Gap;' said Van Every not to be held to this agreement of advancing \$500 to said Long, unless said Long gives a lien or mortgage upon his store-house in Seymour to secure the payment of said advancement, in connection with a balance of \$700 that may be due him, said security to be satisfactory to all parties. Price of ties to be 25 cents each, and culls 11 cents each.

T. C. LOVE.

"This December 30, 1882.

GEO. S. VAN EVERY."

The plaintiff admitted that the defendant had done everything required of him by the contract, except advancing the \$500 to Matney & Crabb; that he recognized Matney & Crabb in his stead in the tie contract; that plaintiff sold his goods to Matney & Crabb, who paid him \$200 advanced to them by defendant, and gave their notes for the balance. His evidence, admitting that Matney & Crabb had paid these notes, plaintiff's counsel objected to, and on his motion it was ruled out; and then his evidence in regard to the contents of the written contract was, on motion of defendant, excluded.

There was no error in sustaining the demurrer to the evidence. (The matter

in controversy was compromised and settled by the written contract. That contract was partially performed by the defendant in the payment of the \$212.70, the amount plaintiff claimed he had paid Adams on the ties. In the recognition and acceptance of Matney & Crabb in plaintiff's stead in the tie contract, and in advancing them \$200 of the \$500 he had agreed to advance, this partial performance by the defendant, and acceptance of its benefits by the plaintiff, placed it out of the power of the plaintiff to abandon the contract, and sue for the original consideration, as he attempted to do in this case. He must resort to his action for damages on the contract, if any he hath sustained, for the part not performed. There is no merit in this action. The plaintiff by his own showing has obtained the substance of everything stipulated for in the contract, and it would seem that, conscious that his action on the contract could only result in nominal damages, he sought to avoid such an undesirable consummation by resorting to this form of action.

Judgment of the circuit court affirmed.

(All concur.)

STATE v. WASHBURN.

(*Supreme Court of Missouri. May 16, 1887.*)

1. CRIMINAL PRACTICE—NEW TRIAL—GROUND FOR.

A juror on a jury which was out, who was to be a witness in a subsequent case, was brought into the court-room and questioned about the former case, in order to determine whether the prosecuting attorney could go on with the latter case. *Held*, that such proceeding was not ground for setting aside the verdict in the former case.¹

2. SAME—MISCONDUCT OF JURY.

Rev. St. Mo. § 1910 provides that the jury may retire to deliberate on their verdict in charge of an officer, who, in felony cases, shall be sworn to keep them together in some private room, and not permit any person to speak or communicate with them, unless by order of court. *Held*, that the mere separation of a juror from his fellows, to answer a call of nature, after the jury have retired to consider of their verdict, the juror being in charge of an officer, is not violative of this section; especially where it appears that the separation was by permission of court. Nor is it material that the officer procured a glass of beer for the juror while he was out, it not appearing that the juror's mind was affected thereby, or that intoxication resulted.

Appeal from circuit court, Jefferson county.

The Attorney General, for defendant in error.

BLACK, J. The defendant was indicted under section 1264 for a felonious assault. He was found guilty, and his punishment assessed at two years' imprisonment. He has filed no brief, and we only have the motion for a new trial as indicating his complaint which leads to this appeal. The evidence of a number of witnesses for the state shows that the defendant entered a saloon, and at once, without any provocation or excuse, began cursing and abusing Shaeffer, the bar-keeper, who directed him to desist from the use of such language and boisterous conduct. Thereupon the defendant threw a beer-glass at Shaeffer, while the latter had his back towards defendant, and was in the act of drawing a glass of beer from the cooler for another person who had just stepped into the saloon. The glass thrown by defendant hit the bar-keeper on the head, knocked him down, and rendered him unconscious for a time. For the defense there was evidence to the effect that Shaeffer made some demonstrations as if to strike the defendant, and that the latter had

¹ Respecting the misconduct of the jury that is ground for a new trial, see *Pellitier v. Milford Land & Lumber Co.*, (Me.) 5 Atl. Rep. 263, and note. In a trial for murder it was held, when part of the jury could not speak English, and another part could not understand Spanish, that prejudice to the defendant would not be presumed from the fact that the court, at the request of the jury, sent the official interpreter, specially sworn for the purpose, into the jury-room to enable the jury to communicate with each other. *Thomason v. Territory*, (N. M.) 13 Pac. Rep. 223.

reasonable cause to believe that he was in danger of personal violence, and threw the glass by way of self-preservation. The point made in the motion for a new trial, that the verdict is against the evidence, it is plain to be seen, is not well taken.

We see no objection to the instructions given by the court of its own motion. They present every theory of the case disclosed by the evidence, and further instructions were not asked.

We infer from the record that a reversal is asked mainly upon alleged misconduct of the prosecuting attorney, and of two of the jurors. From the affidavits and the statement of the presiding judge, it appears that, after the jurors in this case had retired to consider of their verdict, another case, of *State v. Rogge*, was called for trial. The prosecuting attorney stated, in open court, that he could not announce until he saw one of the jurors in this case; that the juror and another person, both of whom lived in the same neighborhood, were witnesses in the case then called; and that he would have to speak to the juror to ascertain whether the other witness was or would be in attendance. Thereupon the judge had the juror brought into the court-room, and the prosecuting attorney made inquiry as to the whereabouts of the other witness, but said nothing as to this case. All this took place under the eye of the court, and in the presence of the defendant and his attorney, though it is to be inferred they did not hear what was said. Surely all this does not furnish even a shadow of a ground for interfering with the verdict.

As to the misconduct of the jurors, it appears that two of them informed the court that they desired to retire to a water-closet. The court directed the deputy-sheriff to accompany them. In going out of the court-house, the deputy remarked that it was nearest to go to a closet in the rear of a saloon, directly across the street from the court-house, and they followed him. In returning, the jurors and the deputy-sheriff passed into the saloon, where the deputy procured a glass of beer for one and a cigar for the other juror. They then returned to the jury-room. The whole occupied a very brief space of time, and it is affirmatively shown that the jurors spoke to no one save the deputy-sheriff, and that nothing was said to him in respect of the case.

Section 1910 is as follows: "When the argument is concluded, the jury may either decide in court or retire for deliberation. They may retire under the charge of an officer, who, in case of felony, shall be sworn to keep them together in some private or convenient room or place, and not permit any person to speak or communicate with them, nor do so himself, unless by order of the court, or to ask them whether they have agreed upon their verdict." This and the preceding sections appear for the first time in the Revision of 1879. Since then it has been twice held, in capital cases, that the mere separation of a juror from his fellows during the progress of the trial to answer a call of nature, the juror being under the charge of an officer, constituted no ground for a reversal of the judgment. *State v. Collins*, 86 Mo. 246; *State v. Payton*, 2 S. W. Rep. 394. In the last case, and in one instance considered in the first, the separations were without the consent or directions of the court, but allowed by the officer in charge of the jurors. There is nothing inconsistent between those cases and the more recent one of *State v. Murray*, 3 S. W. Rep. 397; for in the last case the doctrine is clearly asserted that, even in capital cases, section 1909 must have accorded to it a reasonable interpretation; and that the withdrawal of a juror from urgent necessity, under the supervision of an officer, would, in spirit and reason, be a compliance with the law. The fact that the jurors had retired to consider of their verdict does not change the rule of the *Collins* and *Payton* Cases. But in this case the record shows that the deputy-sheriff had taken the special oath prescribed by section 1910, and the withdrawal of the jurors was with the approval and by the directions of the court; and thus far there can be no reason for interfering with the verdict.

It is not shown, nor in reason can it be claimed, that the mind of the juror was the least affected by the glass of beer which he drank. In the absence of any proof of intoxication, the verdict would not be set aside had the juror drank whisky instead of beer. *State v. West*, 69 Mo. 401. To affect the verdict, the circumstances must, at least, be such as to create a reasonable suspicion that the drinking may have improperly influenced it. *Thomp. & M. Jur.* § 878.

The judgment is therefore affirmed.

(All concur.)

CHOWNING, Adm'r, v. STANFIELD.

(*Supreme Court of Arkansas. April 23, 1887.*)

1. EJECTMENT—PARTIES—EXECUTORS—HEIRS.

A personal representative is entitled to the possession of lands belonging to his decedent for the purposes of administration, and may maintain ejectment to recover such possession. But he is not concerned with title except in so far as it affects his possessory rights, and is not authorized to represent the heirs, or to stand for them, when the title is in question. So where, in an action of ejectment brought by an administrator, defendant files a cross-bill, claiming that the decedent held the legal title in trust for him, and praying that the trust be declared, and his title be perfected, the heirs are necessary parties.

2. PUBLIC LANDS—ENTRY OF LANDS—EFFECT OF WAR.

Where defendant duly entered certain land in controversy at the land-office in Little Rock, paid the purchase money, and received a certificate of his application to the United States land-office at Washington, *held*, that he is unaffected by the subsequent breaking out of the war, and interruption of intercourse between the land-office at Little Rock and the authorities of Washington, owing to which the register at Little Rock failed to report his application to Washington, and to enter it on the tract books and plats.

Appeal from circuit court, Cleveland county.

J. M. & J. G. Taylor, for appellant. *M. P. Stephens*, for appellee.

COCKRILL, C. J. On February 1, 1878, Nathaniel B. Chowning entered the W. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of section 17, in township 9 S., range 10 W., in the United States land-office at Little Rock, and received a patent therefor in the following year. He subsequently sold the land to Thomas M. Chowning. Thomas W. Chowning is administrator of the estate of Thomas M., and brought this action of ejectment against the appellee, Stanfield, who was in possession of the land described, setting out his intestate's title, and alleging in his complaint that the latter died seized of the land; that it was required to be administered as assets by him, and that the defendant wrongfully withheld the possession from him. Stanfield answered that on the ninth day of January, 1861, long before Chowning's entry, he had entered the same tract at the local land-office at Little Rock, and he exhibited with his answer a certified copy of his application to the register of the United States land-office to purchase the same; the register's certificate to the receiver that the lands were subject to entry, and the price thereof; and also the receiver's receipt in full payment of the purchase price of the tract,—all bearing date of January 9, 1861. He alleged that he had complied with all the requirements of the law in making his entry, and that soon thereafter he took possession of the land, and has continuously maintained it, either in person or by others holding for him, by erecting houses on it, and by clearing and cultivating the land, and paying the taxes. He further alleged that the entry made by him had never been canceled or set aside; that Chowning's entry was without authority of law; that he had actual knowledge of the prior entry at the time he purchased; and, in substance, that it was made as a speculation by Nathaniel Chowning, who, it was alleged, was a clerk in the land-office at the time. He made his answer a cross-complaint, and prayed that he be invested

with the legal title. The cause was transferred to equity, and, after proof was taken, the plaintiff's complaint was dismissed, the defendant was declared the owner of the land, and his title quieted.

It was obvious that the appellee could have no relief under his cross-bill. Thomas M. Chowning was seized of the legal estate at least in the land, and upon his death it descended to his heirs. The administrator's right to the possession of lands as assets for the purpose of administration is exclusive of that of the heirs, and he can maintain ejectment to gain the possession, but he is not concerned with title except in so far as it affects his possessory right, and he is not authorized to represent the heirs, or to stand for them when the title is in question. They are indispensable parties in a controversy where relief is asked which will affect the title. *Sisk v. Almon*, 84 Ark. 391; *Theurer v. Brogan*, 41 Ark. 88.

The theory of the appellee's cross-bill was that the patentee, and those claiming through him, took the naked legal title in trust for his benefit, and its object was to perfect his title; but the parties in whom the legal title was vested were not parties to the litigation, and it was therefore improper for the court to undertake, as it did, to grant him the relief sought.

But the administrator urges, and it is the only point he has pressed, that his right to the possession is established by the record. The determination of this point draws the consideration of the title into question incidentally, but it can settle nothing more than the right of possession between the parties before the court. It cannot affect the real question of title, and it seems almost futile for parties to litigate where the litigation will be so meager of results. But the administrator may have his right to the possession determined without joining the heirs as parties, (see *Theurer v. Brogan*, 41 Ark. 92,) and the appellee, in neglecting to bring them in, has thereby elected simply to defend against the administrator's possessory right. The case of *Sisk v. Almon*, *supra*, is not inconsistent with the right of the administrator to proceed in his suit for possession, even where his intestate's title is disputed, when the defendant refuses to bring the proper parties in. In that case the administrator attempted to have title vested in the heirs for the benefit of the estate, without first bringing them before the court, and all that was ruled was that no decree could be made in favor of persons not parties to the cause. An administrator is not entitled to the possession of lands unless they are needed to pay the intestate's debts. *Stewart v. Smiley*, 46 Ark. 373; *Theurer v. Brogan*, *supra*. As a naked legal title bears none of the substantial fruits of real estate, it could be of no benefit to the administrator in paying debts, and cannot, therefore, be regarded as assets in his hands. He is not, then, entitled to the possession of such an estate. The heir takes it in trust for the party beneficially interested. And, moreover, an entry of lands before the proper officers in the United States land office vests in the enterer the right to possession, under our statutes, which may be asserted at law before the patent issues. *Mansf. Dig.* § 2628; *Gatther v. Lawson*, 81 Ark. 279; *Brummett v. Pearle*, 36 Ark. 471; *Hill v. Plunkett*, 49 Ark. 465. It would follow that the defense set up by the answer in the case might have been successfully made at law. But no error is predicated here upon the transfer to equity, and it is not necessary to consider whether the equitable nature of the estate claimed by the appellee justified the transfer to equity, independent of the allegations of the cross-bill.

It is not contended that Stanfield's entry of January, 1861, has ever been formally canceled or annulled by any officer of the land department. The argument is that in January, 1861, the register and receiver of the United States land-office at Little Rock, Arkansas, had become hostile to the United States government, and had ceased to act for it. No proof is offered to establish this proposition. On the contrary, it is shown that, at the time Stanfield made his entry, the register and receiver were acting for and on behalf

of the United States government. But the register and receiver who held office when the proof was taken, in 1884, were called as witnesses, and testified that the records of their offices showed that there were no official returns made to or business transacted with the commissioner of the general land-office and United States treasurer at Washington during the years 1861 and 1862 by the register and receiver of the Little Rock office; and that for these reasons, and because the entries purporting to have been made were not posted on the land-office records, and not reported to the department at Washington, as the law required, the secretary of the interior had ruled, and they had been instructed, that all business done in the office in the years 1861 and 1862 should be disregarded. Evidence was found in the files and records of the office of Stanfield's application to purchase, but no entry of it was found on the tract books and plats. The entry was disregarded by the officials, and the land was subsequently resold to Chowning, as set forth in the complaint.

We take judicial notice of the fact that the ordinance of secession in this state was passed in May, 1861, some four months after Stanfield's entry of the land in question, and there is nothing in the record to show that prior to that time there was any cause for the interruption of the official business in any of the governmental departments. The register and the receiver of the land-office held their commissions from the president of the United States, and were performing the usual duties of their offices for and on behalf of the United States government at the time Stanfield's application and money for the purchase of the tract of public land was received. His duties terminated with the payment of the price of the land to the receiver. He was not responsible for what was done or neglected to be done by the agents whom his vendor, the government, had intrusted to carry out its regulations. Few propositions are better settled than that the rights of one who has done all that the law requires of him cannot be impaired by the subsequent neglect or want of fidelity of a public officer. *Lyle v. State*, 9 How. 333; *Coleman v. Hill*, 44 Ark. 452, 12 Amer. Dec. 567, note; *Nelson v. Sims*, 23 Miss. 383. If the government has not received the purchase money that Stanfield paid for the land, it is no fault of his. The receiver was a bonded officer, and his sureties could have been made to account for his default, just as Bevins, who was receiver of the Batesville land-office (which has since been abolished, and the business transferred to the Little Rock office) during the same period, was forced to account for moneys received by him in his official capacity as late as April, 1861. See *Bevins v. U. S.*, 18 Wall. 56; *Halliburton v. U. S.*, Id. 63.

Stanfield's receipt from the receiver is *prima facie* evidence that he had complied with the law in making the entry, (*Gaither v. Lawson*, *supra*), and his testimony is to the effect that he did comply with all the requirements. This gave him a vested right to a patent, which could be divested only according to law. *Johnson v. Towsley*, 13 Wall. 72, 85, 20 Amer. Dec. 273, note. The subsequent issue of the patent to Chowning, under the circumstances mentioned, vested in him no substantial interest in the land, but only the naked legal title. Authorities *supra*; *Coleman v. Hill*, *supra*. His vendee took no greater interest than he had, and his administrator was not entitled to the possession as against Stanfield.

The decree will be set aside, and a decree entered here dismissing the appellee's cross-bill, but maintaining his right of possession against Chowning's administrator.

FLUTY and others v. SCHOOL-DISTRICT No. 11.

(Supreme Court of Arkansas. April 23, 1887.)

1. SCHOOLS AND SCHOOL-DISTRICTS—CONTRACT—ULTRA VIRES.

Where the law fixed a certain time and place for transacting the annual business of a school-district, and a meeting was held on a different day, and authority was

voted to the school directors to make a contract for building a school-house, *held*, that a contract made in pursuance of this vote was void, and no action could be maintained against the contractor for breach thereof.

2. PLEADING—PROOFS.

In such action, the school-district, having sued for damages for breach of the contract, cannot recover the money paid the contractor on account of the contract.

Appeal from circuit court, Baxter county.

Z. M. Horton, for appellants.

SMITH, J. Fluty, in August, 1883, entered into a written contract with the directors of the school-district, by the terms of which he undertook to build a school-house according to a certain plan and specifications agreed upon, at such point as the directors should designate. He was paid \$190 in advance, and was to be paid the further sum of \$307.50 on the first of February, 1885; the builder to retain a lien on the house for the deferred payment. The building was to be completed before June 1, 1884. For the due performance of this contract, Fluty executed a bond, with sureties, in the sum of \$1,000. He laid the foundations of the building, and hauled some materials to the place designated. But, some dissatisfaction existing among the inhabitants of the district about the location of the school-house site, he quit work and referred the matter to the annual school-meeting of May, 1884, offering to go forward with his contract if the meeting should approve the selection of the site, and vote a tax for building. But the meeting took no action in the premises. The school-district now brought an action on the bond against Fluty and his sureties. The defenses were: (1) That the directors, in locating the school-house site, in making the contract, and in taking the bond, had transcended their powers; that these proceedings were had in pursuance of an authority conferred at a special school-meeting held on a certain day of June, 1883, whereas such authority could be lawfully given only at the regular annual school-meeting, the time for which is fixed by law for the third Saturday in May; and (2) that the land, upon which the contractor was directed to erect the house, was not the property of the school-district; so that, if he had built the house, he would have no security for his outlay. To the defendant's answer the court sustained a general demurrer. The cause was then submitted to the court, for the purpose, as we suppose, of assessing the plaintiff's damages by reason of the breach of the covenants contained in the bond; and there were a finding and judgment against the principal and sureties for \$190, with lawful interest from the date that Fluty received that sum.

It is probable that a mechanic who builds a public school-house has no lien for his work and materials, even though he may contract for one, as in this case. Such a lien can be enforced only by judgment, execution, and sale of the property. But a school-district is a public corporation, and its property is not liable to seizure and sale. *Manst. Dig. § 2999; Leonard v. City of Brooklyn*, 71 N. Y. 498, 27 Amer. Rep. 80; *Loring v. Small*, 50 Iowa, 271, 32 Amer. Rep. 136; *Charnock v. District Tp. of Colfax*, 51 Iowa, 70, 33 Amer. Rep. 116; *Board Ed. v. Neidenberger*, 78 Ill. 58; *Quinn v. Allen*, 85 Ill. 39. But this matter of lien or no lien is unimportant in the present case. At the utmost it amounts only to a mutual mistake of law, not going to the essence of the contract, and furnishes no sufficient reason why Fluty should not be held to perform his contract, if it was valid.

But had the contract any validity or obligatory force upon the parties whom it purported to bind? Corporations possess only the powers that are specifically granted to them, and such as are necessary to carry into effect the powers so granted; and those powers must be exercised in the mode pointed out by the charter or constituent act. An executory contract, made without authority, cannot be enforced. *Argenti v. San Francisco*, 16 Cal. 255; *Field, Ultra Vires*, 352. Now, the annual school-meeting, on the third Saturday in

May, is the time and place fixed by law for transacting the business of the district. And it is not lawful, even at the annual meeting, to fix a site for the school-house, or to raise money for building or purchasing a school-house, unless the directors shall have previously advertised that such matters will come before the meeting for its determination. The law makes no provision for called meetings, except for the single purpose of filling a vacancy in the office of director. The directors have charge of the school affairs and educational interests of their district, and the care and custody of the school-houses, grounds, and other property belonging to the district. But they have no power to purchase or lease in the corporate name a school-house site, or to hire, purchase, or build a school-house with funds provided or to be provided by the district, unless thereunto authorized by a majority vote at the district meeting. Mansf. Dig. §§ 6197, 6199, 6210, 6213, 6223. So the law is written. And the reason is not far to seek. The qualified electors of the district are the corporators. They are also commonly the owners of the property, by the taxation of which a fund is to be raised for the support and maintenance of free schools. No burden can be imposed on the district without their concurrence. For convenience the law names a particular day for the transaction of such business. All are at liberty to attend and participate in the business. The meeting, when once assembled, may adjourn to another day. But, if no meeting is held at the appointed time, none can be held afterwards, except for the election of a director. The purpose is to insure the attendance of all who are interested either in the cause of education, or in the matter of taxation; and also to prevent the inhabitants of the district from being harassed by frequent meetings, of which, by accident or design, some of them might have no notice. It appears from the record that the annual school-meeting was not held in this district on the third Saturday in May, 1888, on account of a freshet and high water. But the meeting which attempted to confer authority for contracting for the building of the house was held in June, pursuant to a call of the directors, of which notice was given, specifying the purpose of the meeting, and the nature of the business to be transacted. It follows from what has already been said that the proceedings of this special meeting, so far as they relate to the selection of a school-house site, and the building of a school-house, were void; that the directors, in contracting with Fluty, were not the authorized agents of the school-district; and that no recovery can be had upon the undertaking of Fluty and his sureties to build the house.

Nor can the judgment be affirmed against Fluty alone, although it happens that the amount of recovery is the sum for which he is legally liable, on the theory that he has received money in advance on a contract which the directors had no authority to make with him. Under the code practice, a plaintiff may have any relief which the proof shows he is entitled to, provided it be consistent with the case made by his complaint, and be included in the issue that was tried. By this action the school-district seeks to recover damages for the breach of the contract. It therefore affirms that there was a contract, and that it was binding. This is the theory upon which it recovered below. Now, when it turns out that there was no valid contract, the plaintiff cannot claim the damages awarded for the violation of the supposed contract, because it might have rescinded or disregarded that contract, and have recovered a similar sum in an action for money had and received. This relief was inconsistent with the remedy adopted. And no such issue was litigated below. Bliss, Code Pl. §§ 122, 164; *Wright v. Delafield*, 25 N. Y. 266; *Bowen v. Mandeville*, 95 N. Y. 237; *Storrs v. Flint*, 14 Jones & S. 498.

Reversed, and remanded for further proceedings.

SORRELLS v. TRANTHAM.

(Supreme Court of Arkansas. April 23, 1837.)

1. LIMITATION OF ACTIONS—PERSONAL REPRESENTATIVE—INFANCY.

Where an infant dies, leaving a cause of action, which passes, not to his heirs, but to his personal representative, the statute of limitations, which had not begun to run in his life-time, owing to his minority, does not begin to run after his death until the qualification of the personal representative.

2. HUSBAND AND WIFE—HUSBAND'S RIGHTS IN WIFE'S PROPERTY.

Even before the Arkansas constitution of 1838, marriage did not operate to transfer to the husband the wife's personal property absolutely. The gift was subject to the condition that the property should be reduced to possession, and if the wife died before the husband had recovered it, it descended to her next of kin, and not to him.

Appeal from circuit court, Drew county. In chancery.

Supplemental opinion on motion to modify the decree. For original opinion, see 3 S. W. Rep. 198.

The object of this bill was to reopen the accounts of Sorrells, as administrator of England, for false and fraudulent credits therein taken, which were particularly specified, and for a further accounting.

Harrison & Harrison and *Sam. W. Williams*, for appellant. *Wells & Williamson*, for appellee.

SMITH, J. Sorrells' account as administrator was confirmed in the year 1870. A cause of action then arose to the distributees of England's estate, to impeach it for fraud. The sole distributee was a minor, who died in 1873, still in her minority. The statute never began to run against her in her life-time. *Mansf. Dig.* § 4489; *Vaughan v. Parr*, 20 Ark. 600; *Drennen v. Walker*, 21 Ark. 589; *Brinkley v. Willis*, 22 Ark. 1; *Jones v. Freed*, 42 Ark. 357. But counsel for Sorrells say that her death set the statute in motion, and that this suit was barred, not having been instituted within eight years thereafter. But there was no administration upon her estate until in the year 1883.

The case of *Hanf v. Whittington*, 42 Ark. 491, did not introduce a new rule in this state, but was merely a reiteration and application of the principle announced in *McCustian v. Ramey*, 33 Ark. 141, and *Word v. West*, 38 Ark. 243. That principle is that, when an action accrues to the estate of a deceased person, the statute of limitations does not begin to run until the qualification of a personal representative. This is understood to be the general rule everywhere. *Ang. Lim. (6th Ed.)* c. 7, and cases cited; *Wood, Lim.* § 117, and cases cited; *Goodhue v. Barnwell*, *Rice*, Eq. 198, 238.

Thus, in *Murray v. East India Co.*, 5 Barn. & Ald. 204, 7 E. C. L. 118, which was an action by an administrator upon a bill of exchange, payable to the testator, but accepted after his death, and where the bill had matured more than six years before the commencement of the action, but the grant of administration was less than six years before, it was ruled that the limitation ran from the date of the letters of administration, and not from the maturity of the bill; it being considered that no cause of action could be said to exist until there was a party competent to sue. Compare *Benjamin v. De Groot*, 1 Denio, 151; *Davis v. Garr*, 6 N. Y. 124.

Lytle v. State, 17 Ark. 603, 661, stands upon a different ground. That was a suit by heirs for the recovery of lands. The limitation of such suits was then 10 years; and it ran, in favor of the adverse holder, against all persons, except that persons laboring under disabilities were allowed five years after removal of their disabilities within which to sue. The cause of action accrued to the plaintiffs, all of whom were infants, in 1834. One of these heirs died in 1840, being still an infant; and it was held that those claiming under him were barred at the expiration of five years from his death. But,

observe, the statute had begun to run against the infant while he was yet alive. It was not suspended, as it is in other cases; but the infant was only given the privilege of suing for his land within five years after reaching his majority. Both the Revised Statutes of 1838, prescribing the limitation in actions to recover realty, and the act of January 4, 1851, make this distinction. *Chandler v. Neighbors*, 6 N. Y. 479.

If the infant died, the right of action went to his heirs, and they must sue within the time privileged, without regard to the fact whether they themselves were under any disability; for cumulative disabilities are forbidden. The death of the infant had the same effect to put the statute in motion as his arrival at full age; for he must have left heirs, to whom his right would descend, and there would be in existence parties capable of suing. But not so of a right of action which could only be prosecuted by a personal representative.

Again, it is insisted that Georgianna's distributive share in her father's estate became, upon her marriage, vested in her husband, who could have brought his action at once; that the constitution of 1868 had no effect on the marital rights of the husband, as it only provided that the property of the female should remain her separate estate so long as she might choose; and, now that she was dead, no one could make that election for her. If it be conceded that the case is not affected by the constitution of 1868, yet the conclusion that is contended for does not follow. Whatsoever may be the rule elsewhere, yet, even before the adoption of that instrument, marriage did not operate in this state to transfer to the husband the wife's personal property as an absolute gift. The gift was subject to the condition of a reduction into possession during coverture; and, if the wife died before the husband had recovered it, it descended to her next of kin, and not to him. It was, of course, subject to the payment of her debts, contracted *dum sola*; and, if it consisted of choses in action, an administration was necessary to recover them. But the husband, if he administered, could not retain the property for his own benefit. After payment of her debts, the surplus went to her kindred, to all of whom the husband was postponed. *Cox v. Morrow*, 14 Ark. 603, 618; *Carter v. Cantrell*, 16 Ark. 154.

SMITH, Trustee, etc., v. MOORE, Trustee, etc.

(*Supreme Court of Arkansas*. April 23, 1887.)

CHATTEL MORTGAGE—ACTION—PARTIES.

Under a statute providing that where, in an action for the recovery of real or personal property, any person having an interest in the property applies to be made a party, the court may order it to be done, *held*, in an action by a trustee under a mortgage to obtain possession of the mortgaged property, that a trustee claiming under a prior mortgage, who was also surety for the mortgagor upon a forthcoming bond executed by the latter to retain possession of the mortgaged property, was entitled to be admitted as a party.

Appeal from circuit court, Lee county.

Tappan & Hornor, for appellant. *James P. Clarke*, for appellee.

BATTLE, J. On the seventeenth of April, 1885, one J. F. Asher executed and delivered to the appellant, Smith, a deed of trust whereby he conveyed certain personal property and crops to secure an indebtedness owing to one L. A. Fitzpatrick, and payable on the fifteenth of October, 1885. On the same day he also executed and delivered to the appellee, Frierson Moore, a deed of trust whereby he conveyed the same property to secure an indebtedness due and payable to John P. Moore on the first of November, 1885. The deed to Smith was first filed for record in the county wherein the grantor resided, and the lien thereof became prior in law to that of the deed to Moore. Asher made default in the payments secured by these deeds, and was per-

mitted to remain in possession of the property thereby conveyed. This default continued until the twenty-second of February, 1886, when Frierson Moore brought this action against Asher, in the Lee circuit court, to recover possession of certain of the property conveyed in trust to him. He executed to the proper officer the bond required by law, and the officer, in accordance with the order of delivery in his hands, took from the possession of the defendant Asher seven mules and one thousand bushels of corn, and upon the execution of a bond to the plaintiff, by John C. O. Smith and L. A. Fitzpatrick, sureties, "to the effect that the defendant shall perform the judgment of the court in the action," the property was released from the custody of the officer, and delivered to Smith by the direction of the defendant Asher. On the twenty-eighth of March, 1886, Smith filed an application to be made a party, and therein alleged that on the seventeenth of April, 1885, the defendant Asher executed to him a trust deed of the property seized by the sheriff under the order of delivery issued in this action; that the lien of the conveyance to him was prior to that under which plaintiff claimed the right of recovery; that, by virtue of the deed to him, he was the owner of the property in controversy, and entitled to the possession of the same; and that there was at that time pending in the Phillips circuit court another suit for the same cause of action, and between the same parties. On the twenty-eighth of April, 1886, the application of Smith came on for hearing, and, on the objection of the plaintiff, the court refused to make him a party and struck his application from the files of the court. Thereupon judgment by default was rendered against the defendant in favor of plaintiff for the return of the property restored to him by the officer, and against him and Smith and Fitzpatrick on his retaining bond for the value of each of the articles of property so restored, to be collected in the event defendant failed to deliver the same to the sheriff. Smith filed a motion for new trial, saved exceptions, and appealed to this court.

There is no question raised here as to the right of Smith to appeal from the judgment of the court refusing to make him a party to this action, and striking from the files of the court his application to be made a party. The only question is, ought the court to have made Smith a party? The statutes of this state provide that "the court may determine any controversy between parties before it when it can be done without prejudice to the rights of others," and that "where, in an action for the recovery of real or personal property, any person having an interest in the property applies to be made a party, the court may order it to be done." From these provisions of the statute it is clear that it is within the discretion of the court, in an action for the recovery of real or personal property, to order any person having an interest in the property to be made a party when he applies and asks that it be done. But this discretion is limited by the right to determine the controversy between the parties already before the court. The obvious intention of the statute is to require all persons to be made parties to an action who will be necessarily and materially affected by its result, and to forbid the court from determining any controversy between the parties before it, when it cannot be done without prejudice to the rights of others, or by saving their rights. In such cases it is the duty of the court to allow such persons to be made parties, to the end that they may protect their interests. Could the court in this action have determined the controversy between the parties before it, without injury to the rights of Smith? Smith and Moore claimed possession of the property in controversy under Asher. As between these parties, Smith was entitled to the possession. He was a surety on the bond of Asher, which was given to retain possession of the property. After the execution of the bond, the sheriff, at the request of Asher, delivered the property to him. He was entitled to retain that possession. But what was the necessary result of not making him a party? It was, Moore recovered judgment against him

and Asher upon the bond for the value of the property not delivered according to the judgment of the court. He will be compelled, if this judgment be permitted to stand, to surrender the possession he is entitled to, or, in the event the property has perished or been consumed, to pay its value as ascertained by the court, notwithstanding his lien on it is prior and superior to that under which plaintiff claims. It was necessary, then, for Smith to have been made a party in order to protect his rights.

The judgment of the court below is therefore reversed, and this cause is remanded, with instructions to the court to make Smith a party, and for other proceedings.

McGEE v. RUSSELL.

(Supreme Court of Arkansas. April 23, 1887.)

1. PRINCIPAL AND SURETY—RIGHTS OF SURETY—INTEREST.

Mansf. Dig. Ark. § 8401, providing that when any bond, bill, or note for the payment of money shall not be paid by the principal debtor, but shall be paid by the surety, the principal debtor shall refund to the surety the amount, with 10 per cent. interest per annum, does not apply to a case where two purchase land jointly, and give their joint notes, and one makes default in paying his share of the purchase money, and the other pays the entire amount.

2. PARTITION—COMMISSIONER'S REPORT.

Where, in a suit for the partition of land, the commissioners report that the land is incapable of being divided without great prejudice to both parties, they should state the facts upon which their opinion is based.

Appeal from circuit court, La Fayette county. In chancery.
Jones & Battle, for appellant. *Scott & Jones*, for appellee.

FLETCHER, Special Judge. In October, 1878, George W. Russell and Thomas T. McGee purchased the land in controversy, for which they agreed to pay \$6,000, and jointly executed six promissory notes therefor, bearing interest at the rate of 10 per cent. per annum from date until paid. Both parties moved upon, improved, and cultivated the land. Most of the improvements were made and most of the land was cultivated by Russell, who also paid the taxes, and three of the notes first falling due, after their maturity. In May, 1881, Russell filed the complaint in this case against McGee, in which he asked for a partition of the land; that an account be taken of the amounts paid by him for purchase money, taxes, and improvements, and of the rents of the land cultivated by him and McGee; and that whatever might be found due him be declared a lien on McGee's interest in the land. McGee filed an answer and cross-complaint, in which he denied many of the charges of Russell for improvements, and set up counter-claims for improvements made, work done, and money expended for the benefit of the land, and also for money had and received on his account by Russell, which he claimed as a credit on the amounts paid out by Russell, and asked relief similar to that prayed in Russell's complaint. The master to whom the cause was referred by the court stated an account between the parties, and reported a balance in favor of Russell. To this report numerous exceptions were filed by both parties. The court overruled all the exceptions but the eleventh, twelfth, and thirteenth filed by McGee, which were sustained. Both parties have appealed.

The first four exceptions by Russell were because the master allowed McGee credit for two amounts and interest which were not specifically set forth in his cross-complaint. As to one of these amounts there was no dispute; and as to the other, proof was introduced before the master by both parties; and, while good pleading would have required a more specific statement, there was no surprise to Russell, and no injustice was done him.

Russell's ninth exception was because the master only charged McGee with interest at 6 per cent. on the amounts paid for purchase money of the land, instead of 10 per cent.; and the argument to sustain his contention here is

based upon sections 6401, Mansf. Dig., which says: "When any bond, bill, or note for the payment of money or delivery of property shall not be paid by the principal debtor according to the tenor thereof, and such bond, bill, or note, or any part thereof, shall be paid by the surety, the principal debtor shall refund to the surety the amount or value, with interest thereon at the rate of ten per centum per annum from the time of payment." This statute evidently refers to sureties in the common or technical meaning of that term. Russell and McGee were joint debtors. It is true that, for the purpose of contribution, each joint debtor is regarded as the principal debtor for that part of the debt which he ought to pay, and as surety for his co-debtor as to that part of the debt which ought to be discharged by him, (Brandt, Sur. § 25,) but this statute is of that class which will not be extended in its application so as to embrace cases not within the plain meaning of the terms used. Brandt, Sur. § 515; *Nation v. Roberts*, 20 Ala. 544; Sedg. St. & Const. Law, 267 *et seq.*

In the case of *Memphis & L. R. R. Co. v. Dow*, 7 Sup. Ct. Rep. 482, on appeal from the circuit court of the United States for the Eastern district of Arkansas, it was held that a person seeking to be subrogated to the right of the original creditor as to a lien or incumbrance which he had been compelled to pay off for his own protection, would only be entitled to interest on the amount paid at the rate provided by law, and not at the higher rate which the obligation paid off bears.

All other exceptions to the master's report overruled by the court related to questions of fact, about most of which the evidence was conflicting, and as to which we think the master, in his findings, has exercised an impartial and discriminating judgment.

Three commissioners were appointed by the court to partition the land, who reported that they had been unable to make an equal division, and allowed McGee the sum of \$1,817 to make his share equal in value to the part allotted to Russell. This report, on exceptions filed by Russell, was set aside by the court, because the commissioners allowed owelty to McGee, and it was referred back to the commissioners, with instructions, if necessary, to call to their assistance a surveyor, and that, if an equal division could not be made, to allow owelty, or, if partition could not be made without great prejudice to the parties, the commissioners should so report. Two of the commissioners, at the next term of the court, reported that they had called to their assistance a surveyor, made careful examination of the land, and found it so situated that partition could not be made without great prejudice to both parties. To this report McGee filed exceptions, but the court overruled his exceptions, and decreed a sale of the land. The land is in one body, and contains 2,330 acres. No fact or circumstance is shown by the report why this large tract cannot be divided. Each party had the right to insist that his interest in the land be set apart to him in kind, in so far as it can be done without material detriment to the interest of the other. It may be that the land, as the commissioners say, is so situated as to render a division impracticable. If so, the report should show the facts on which they based their conclusions, so that the court may be able to determine whether or not it is well founded. *Hardin v. Cogswell*, 5 Heisk. 549. In the absence of such showing, it seems to us unreasonable, almost incredible, that partition cannot be made in this case.

The decree of the court, in so far as it relates to the master's report, is affirmed. The decree sustaining the report of the commissioners, and ordering a sale of the land, is reversed, with instructions to appoint new commissioners, and such other proceedings, not inconsistent with this opinion, as may be necessary. The receiver will be required to settle his accounts with the court below.

SETTLES v. BOND.

(Supreme Court of Arkansas. April 29, 1887.)

EXECUTION—EXEMPTION—HOW AVAILLED OF.

An action cannot be maintained against an officer for levying upon property claimed as exempt under Const. Ark. art. 9, § 2, exempting, in certain cases, \$500 worth of personal property to be selected by the debtor, unless the debtor first proceeds, in the manner prescribed by Dig. Ark. § 3006, viz, by filing a schedule of all his property in the court from which the execution has issued, specifying what property he claims as exempt, and asking for a *supersedeas*.

Appeal from circuit court, Cross county.

N. W. Norton, for appellant. Geo. H. Sanders and J. D. Black, for appellee.

SMITH, J. The complaint alleged that Settles was a resident of the state and the head of a family; that all of the personal property owned by him did not exceed in value \$150; that Bond had recovered judgment against him on a debt due by contract for \$17.50 and costs, and had taken out execution, which was levied on a quantity of molasses, the property of the plaintiff; and that the molasses was held by the defendant under the levy aforesaid, but was by law exempt from seizure; and a specific recovery of the same was sought. This action was brought, two weeks after the levy, before a justice of the peace other than the justice who rendered judgment for the debt. The circuit court sustained a demurrer to the complaint, and, the plaintiff declining to amend, dismissed his action. The grounds of demurrer were that the justice had no jurisdiction of the subject-matter of the action, and that the plaintiff had filed no schedule of his property. The rule at common law undoubtedly was that goods taken in execution were in custody of the law, and could not be replevied from the officer by the defendant in the writ. *Freem. Ex'ns*, § 268. This rule, however, has been modified by the Code of Civil Practice, (Mansf. Dig. § 5572, cl. 5,) which is a distinct recognition of the right of the defendant in execution to recover property so seized; that is, by statute exempt from execution. Note to *Dunham v. Wyckoff*, 20 Amer. Dec. 696; *Wells*, Repl. § 268; *Wilson v. McQueen*, 1 Head, 17; *Moseley v. Anderson*, 40 Miss. 49; *Wilson v. Stripe*, 4 G. Greene, 551, 61 Amer. Dec. 138; *Cooley v. Davis*, 34 Iowa, 128; *Mason v. Perrott*, 17 Mich. 332; *Frost v. Mott*, 34 N. Y. 253; *Carlson v. Small*, 32 Minn. 492, 21 N. W. Rep. 737.

The constitution (article 9, § 2) exempts from sale on execution to the resident debtor who is married or the head of a family, besides the wearing apparel of himself and family, \$500 worth of personal property, in specific articles, to be selected by him. Doubtless, if the sheriff should seize any part of such apparel, the debtor might replevy it out of his hands, as it is all exempt. But in the case of other chattels there must be a selection. The debtor's personal property may exceed \$500 in value, or, if it does not, he may waive his privilege. Now, the constitution does not prescribe the mode of selection, but has left to the legislature unquestioned authority to regulate the claim and ascertainment of exempt property. The method devised by the legislature for this purpose is that the debtor shall file, in the court from which the execution issued, a schedule of all his property, moneys, credits, and effects, specifying therein the particular property he claims as exempt, whereupon a *supersedeas* issues staying a sale of such exempt property. Mansf. Dig. § 3006. Until the schedule is filed, the debtor has not claimed his exemptions in the manner pointed out by law. On the contrary, by neglecting to pursue his remedy, he waives his right. *Chambers v. Perry*, 47 Ark. 400, 1 S. W. Rep. 700, and cases there cited.

The officer is not a trespasser, and cannot be subjected to damages, and the costs of an action, merely because he has seized property which may turn out

to be exempt; for, until the schedule is filed, he has no certain means of knowing what part will be claimed, or whether any claim will be made. The statute provides a simple, expeditious, inexpensive, and effective method for making and determining the claim, and parties must be held to it. A schedule is the only mode of selection known to our law; and an action of replevin is not available until it has been resorted to. Affirmed.

CAULKINS and others v. MEMPHIS GAS-LIGHT CO. and others.

(*Supreme Court of Tennessee. April 26, 1887.*)

1. CORPORATIONS—LIABILITY—TRANSFER OF STOCK.

By order of court, the Memphis Gas-Light Company was directed to take up a certificate of stock for \$16,000, issued to Margaret Riggs, deceased, and issue new certificates, one to plaintiff for \$9,000, and one to Wurzbach for \$7,000, as devisees under the will of Mrs. Riggs, each of the new certificates to be held "according to the provisions of that will." This was accordingly done by the company, the certificate to Wurzbach reciting that it was issued to him "as devisee under the will of Margaret Riggs, deceased." The same entry was made on the stub of the company's stock-book. Under the will of Mrs. Riggs, Wurzbach was entitled to a life-estate only in the stock, and plaintiff to the remainder after his death. Wurzbach determined to sell his stock, and sent his certificate to a friend in Memphis, one Wilkins. The latter inquired of the company if the certificate was all right, and if Wurzbach had the right to sell and transfer, and was told that it was all right. He thereupon sold the stock to different parties, surrendered the certificate issued to Wurzbach, and the company issued new certificates in the names of the purchasers. Wurzbach afterwards died, and plaintiff, as remainder-man, brought this action against the company to recover the value of Wurzbach's stock; claiming that the company acted negligently, and in violation of its trust, in taking up the certificate issued to Wurzbach as devisee, and issuing a new one to the purchasers. Held, that the decree and certificate both charged the company with notice that Wurzbach had not an absolute interest in the stock, but only such limited interest as the will conferred; and that plaintiff was entitled to recover, not, however, the value of the stock at the time of the transfer, but its value at the date of the death of Wurzbach, the life-tenant.

2. SAME—DEFENSE—LEGAL ADVICE.

The fact that the company consulted counsel before making the transfer to the purchasers does not protect it from liability; there being no evidence as to what facts were communicated, or what records exhibited, to the attorney upon which he based his opinion.

3. SAME—PURCHASER—NOTICE.

The purchasers, never having seen the certificate of stock issued to Wurzbach, are not charged with notice of the character of his title.

4. SAME—LIABILITY OF AGENT.

Wilkins, through whom the stock was negotiated, and who had possession of the certificate for some time, is equally liable with the company for his participation in the wrongful sale of the stock; but, as between him and the company, the latter is primarily liable.

Appeal from chancery court, Shelby county.

Finlay & Peters and *Humes & Paston*, for complainants in error. *Craft & Cooper*, for defendants in error.

FOLKES, J. This suit, as it is now presented, involves the question as to the right of complainants to recover from the defendants, gas-light company and others, the value of \$7,000 of stock in said company, which it is claimed the company has negligently and wrongfully aided in the transfer of.

The facts necessary to a proper understanding of the case are as follows:

Mrs. Margaret A. Riggs, who was then a resident of Pennsylvania, died in 1866, leaving a will, which was duly probated. After certain specific bequests, there follows the seventh clause, in which she provides that "all the rest, residue, and remainder of my estate, real and personal, of every nature and description, which I now own, or in which I may have any interest at the time of my death, in law or in equity, I give, devise, and bequeath to Al-

bert C. Wurzbach, of Memphis, Tennessee, and Robert Gardner, of Charlestown, Mass., *in trust*, nevertheless, for the uses and purposes declared in this will." By item 11 she directs her executors (who are said Albert C. Wurzbach and Robert Gardner) "to pay, subject to the foregoing requests and annuities, *two-thirds* of the net income of my estate to my daughter Julia A. Wurzbach, (now the complainant Julia A. Caulkins,) in equal quarterly payments, during the term of *her natural life*, for her own support, use, and free from the control of her husband; and the remaining *one-third* thereof to the said Albert C. Wurzbach during the term of his natural life." By clauses 12, 13, 14, and 15 it is provided that, if Wurzbach should survive the daughter and her issue, he should have the entire estate; but, should Julia A. or her issue survive him, then he should only be entitled to receive one-third of the *net income* of the estate *during his natural life*, and the estate itself to go Julia A. and her issue *at his death*, the said Julia A. receiving the net income of the entire estate during her natural life, the whole estate to go to her issue *at her death*.

A. C. Wurzbach alone qualified under this will, and letters testamentary were issued to him in December, 1868, by the orphans' court of Erie county, Pennsylvania. He never qualified, either as executor or trustee, in the state of Tennessee.

On February 26, 1872, the will of Mrs. Riggs was probated in Shelby county, Tennessee, and E. M. Hearn was appointed by the probate court of said county administrator with the will annexed of the estate in Tennessee. He was also appointed by the same court, August 6, 1872, trustee to carry out said will. At the time of her death, Mrs. Riggs owned 160 shares of the capital stock, of \$100 each, aggregating \$16,000, in the Memphis Gas-Light Company, a corporation chartered by the state of Tennessee, and having its *situs* in Memphis, Tennessee. The gas company paid dividends to Wurzbach until Hearn qualified as administrator, when Wurzbach demanded that the company should continue to pay him dividends, and issue new stock to him in lieu of that which he then held, standing on the books in the name of Mrs. Margaret A. Riggs. Hearn, having collected dividends on the stock for awhile, demanded that it should be transferred to him, as administrator, etc. The company refused to issue stock to either of them, *after an examination of the will*.

On March 13, 1872, Julia A. Caulkins and husband filed a bill in the chancery court of Shelby county against Wurzbach, Hearn, and the gas-light company, alleging Wurzbach's waste of the estate; his incompetency; dissipated habits; his attempts and efforts to get possession of the said stock, and to convert it to his own use; and praying for the appointment of a trustee in Tennessee to take charge of the stock, and for an injunction prohibiting the gas-light company from issuing said stock to Wurzbach, etc., which said injunction was duly granted and served on said company. At the time of filing this bill, litigation was pending between Mrs. Caulkins and Wurzbach in the orphans' court of Erie county, Pennsylvania, which was soon afterwards settled by an agreement and decree therein, by which Wurzbach was to assign his trusteeship of Julia A. Caulkins under the will of Mrs. Riggs; "and agrees to transfer to David Olier, of Girard, or whomsoever the orphans' court of Erie county may appoint her trustee, \$9,000 of the stock of the Memphis Gas Company; also to transfer and deliver to said trustee ten thousand dollars of the bonds of the United States, and certain real estate in Omaha, Nebraska, valued at fifteen thousand dollars; the said Wurzbach to retain the house and lot in Girard aforesaid, valued at \$10,000, and retain \$7,000 of the capital stock of the gas company aforesaid. * * * " He, the said Wurzbach *is to retain the trusteeship* of the property retained by him, and reserves all of his rights as *devisee* and *legatee* of said will of said Margaret Riggs. The said Julia A. Caulkins relieves the said Wurzbach from all claims as her said trustee

tee, or as executor or guardian, up to this date. The said Wurzbach is to have no further or other claim *on the income* of the said estate than the house and lot in Girard, and the \$7,000 of Memphis gas stock, during the life of the said Julia A. Caulkins.

And on the same day a decree was entered on said agreement, in said orphans' court, reciting that "the parties having agreed upon terms of settlement and partition of the income of the estate, which the court, after due consideration, decrees to be just and equitable, and not repugnant to the will of the testatrix, nor the law, and having filed his resignation of his trust as testamentary trustee of the income and estate of the said Julia A. Caulkins, the court accepts his said resignation, and appoints David Olier, of Girard, in said county, trustee of *that portion* of said estate and income belonging, by the terms of said settlement, to Julia A. Caulkins; and the said A. C. Wurzbach to *remain trustee* of that portion of the estate given to him by the terms of said agreement; and that the said agreement filed as aforesaid shall constitute a part of this decree; and that the same, and every portion thereof, shall be specifically performed, and carried out according to its true intent and meaning."

We have been thus elaborate in the quotations from the agreement and decree, for the reason that the same, together with other parts of the record from the orphans' court of Erie county, Pennsylvania, were brought to the knowledge of the defendant company, by being filed on the sixth day of December, 1872, in the chancery court of Shelby county, in the said cause therein pending, of *Caulkins v. Wurzbach*, and made the basis of the decree, which is now set up by the gas company as a conclusive answer to the question of its liability to the complainants in this suit.

This decree of said chancery court of Shelby county is as follows: "It appearing that all matters in dispute between the complainants Caulkins and wife and defendant Wurzbach have been settled by agreement of the parties, and that under said agreement defendant Wurzbach has resigned as trustee of complainant Julia A. Caulkins, and David Olier, of Erie county, Pa., has been appointed by the orphans' court of said county, Pa., trustee for said Julia in his place and stead. It further appears by their agreement, confirmed by the decree of said Pennsylvania court, all the assets of the estate of Margaret A. Riggs, dec'd, in the hands of said Wurzbach, (who is her executor duly appointed and qualified under the laws of Pa., where she resided at the time of her death,) have been divided, or agreed to be divided, between said Julia A. Caulkins and said A. C. Wurzbach, *according to the directions of the will* of said Margaret A. Riggs; that among other assets there came to the hands of said Wurzbach, in the state of Pennsylvania, certificates for sixteen thousand dollars of stock in the Memphis Gas-Light Company, which, by the agreement and settlement between the parties aforesaid, is to be divided, and nine thousand dollars of it held by said Olier as trustee for said Julia A. Caulkins, and the remaining seven thousand dollars to be held by said Wurzbach in his own right, and for his own benefit, *but the shares of both to be held according to the provisions of the will* of said Margaret A. Riggs, dec'd. * * * On motion, therefore, the attachment herein is discharged, and the injunction dissolved, and decree modified, so as to permit said Wurzbach, as Pennsylvania executor, to surrender to the Memphis Gas-Light Company said certificates of stock, and take out new certificates of stock so as to divide the same *according to said agreement of division* made by the parties; and said gas-light company is hereby directed and required, upon the surrender of the old certificates, to issue new ones, seven thousand dollars to said Wurzbach in his own right, and nine thousand dollars in *form, so that he can deliver or transfer* the same to said Olier, as trustee for complainant, Julia A. Caulkins. It is further ordered that defendant E. M. Hearn pay the dividends collected by him, after paying costs, according to the

agreement of the parties, two-thirds to said Olier, trustee, for complainant Julia A. Caulkins, and one-third to said Wurzbach or his order. A copy of this order will be immediately served on the Memphis Gas-Light Company, and charged in the costs of the cause; and all other matters are reserved."

A copy of this decree was served upon the gas company, which copy was preserved, and is shown to be still in the possession of the company, attached to the stock-books, together with the following communication:

"MEMPHIS, TENN., December 10, 1872.

"*Memphis Gas-Light Co.*: Issue new certificates for these, as follows: 7 thousand dollars in name of Albert C. Wurzbach, as devisee under the will of Margaret A. Riggs, dec'd; and 9 thousand dollars in the name of David Olier, trustee for Julia A. Caulkins, devisee under the will of Margaret A. Riggs, dec'd. Deliver to me only. CHAS. KORTRECHT, Atty. for Parties."

Thereupon, the original certificates held in the name of Mrs. Riggs being surrendered, the company issued \$9,000 of new stock to said Olier, trustee, and \$7,000 certificate to Albert C. Wurzbach, devisee under the will of Margaret A. Riggs, deceased. This new certificate of stock for \$7,000, so issued to Wurzbach, devisee under the will of Margaret A. Riggs, deceased, recites on its face that it is "transferable only on the books of this company." This certificate bears date, and was issued, on the twenty-fourth December, 1872; and on the twenty-eighth day of January, 1873, a final decree was entered in said cause of *Caulkins v. Wurzbach, Hearn, and the Gas Co.*, pending in the chancery court of Shelby county, wherein, after reciting that it has been made to appear to the court that the \$16,000 of gas stock, attached and described in said cause, has been divided up according to the agreement of the parties and the orders of this court, and reciting that Hearn, as administrator and trustee, has fully paid out the \$2,560 of dividends on said stock collected by him pending his administration and trusteeship according to the agreement of the parties and the decree thereon, to-wit, two-thirds to David Olier, trustee for complainant Julia A. Caulkins, and one-third to defendant Wurzbach, and after reciting that there are no further duties to be performed by said Hearn, trustee, in consequence of which he and his sureties are discharged, said decree concludes as follows: "And it appearing that the object of this suit has been accomplished, and nothing further remains to be done herein, this suit is hereby dismissed and ended, according to the agreement and compromise made by the parties in interest, and filed herein,—all of which is finally ordered and decreed."

So far there has nothing been done upon which any liability of the company can be predicated. It has, up to this time, recognized its duty, and faithfully discharged it. We find that the company refused to cancel the old certificates in the name of Mrs. Riggs, remained neutral in the struggle over the stock, and only acted when and as directed by the court.

As indicative of a further purpose to continue the performance of its duty to its stockholders, it made and preserved, as we have seen, a careful record of the manner in which the original \$16,000 of stock had been surrendered, and of the division and reissue of the same, not only showing on the face of the new certificates that \$9,000 was issued to Olier, trustee for Mrs. Caulkins, and \$7,000 to Albert C. Wurzbach, devisee under the will of Margaret A. Riggs, deceased, but showing the *exact* language on the stub of the stock-book, and number of the certificate, that we find on the face of the certificate,—“devisee under the will of Margaret A. Riggs, dec'd.” And, in addition to this, they attach to the stock-book the canceled stock, and the copy of the decree of the court, and the original of the letter of instruction from Charles Kortrecht.

Let us resume the history of the \$7,000 certificate. It seems to have remained in the possession of Wurzbach, in Pennsylvania. He in the mean time collected the semi-annual dividends thereon, until November, 1876, when he signed his name as follows, “A. C. WURZBACH,” without more, to the

blank power of attorney for the transfer of the stock, printed upon the back of the certificate, and sent the same to his friend, James S. Wilkins, at Memphis, with request to sell same, and remit proceeds to him in Pennsylvania.

Wilkins called at the principal office of the company, and asked if it was all right, and if he could sell and transfer the same, and says he was told by the secretary that it was all right; whereupon he placed same in the hands of B. Richmond, a broker at Memphis, with instructions to sell. Richmond found a purchaser in the person of the defendant Rossi for \$3,000 of the stock, and thereupon the secretary of the company filled up in his own handwriting the blank power of attorney on the back of the \$7,000 certificate, so as to make it read:

"For value received, I hereby authorize Jas. S. Wilkins to transfer to J. B. A. Rossi thirty shares, and to James S. Wilkins forty shares, of the capital stock of the Memphis Gas-Light Company, on the books of said company.

"Witness my hand this twenty-first day of November, 1876.

[Signed]

"A. C. WURZBACK.

"Attest. JAMES S. WILKINS."

Whereupon the company issued a new certificate for \$3,000 in the name of J. B. A. Rossi, and delivered same to the broker, Richmond, who carried same to the purchaser, Rossi. Rossi never saw the Wurzbach certificate, never knew whose stock he was purchasing, but merely contracted to purchase of Richmond \$3,000 of stock, and paid for it when the latter delivered to him an original certificate for the amount named, issued directly by the company to him.

It is abundantly established that Rossi's purchase was in good faith, for value, without any notice. Clearly, therefore, there can be no recovery against Rossi. *Cherry v. Frost*, 7 Lea, 1; *Cornick v. Richards*, 3 Lea, 1. If Rossi were, in any view of the case, liable to these complainants, the gas company would unquestionably be responsible to him. *Bank v. Lanier*, 11 Wall. 369; *New York & N. H. R. Co. v. Schuyler*, 34 N. Y. 30; *Telegraph Co. v. Davenport*, 97 U. S. 369.

As to the remaining \$4,000 of the stock involved herein, the gas company issued a new certificate to James S. Wilkins, in his own name, for that amount. The proof shows that this was done to facilitate the sale and transfer of the stock by Wilkins, who subsequently sold and transferred same to other parties, who are not sued. Wilkins acted throughout as the friend and agent of Wurzbach in his sale of the stock, with no benefit or profit to himself. The question of his liability will not be considered separately from that of the company.

That a corporation is charged with many of the duties of a trustee towards its stockholders; that it is bound to exercise proper care and diligence in protecting the title of a *cestui que trust*, or equitable or beneficial owner; and that it is responsible for any injury sustained by its negligence or misconduct,—are propositions so well established as not to require any discussion. We content ourselves, therefore, with a mere reference to some of the many cases familiar to the profession: *Perry, Trusts*, § 242; *Louvy v. Commercial Bank*, Taney, 310; *Bayard v. Farmers' Bank*, 52 Pa. St. 232; *Stewart v. Fireman's Ins. Co.*, 53 Md. 564; *Loring v. Salisbury Mills*, 125 Mass. 150; *Shaw v. Spencer*, 100 Mass. 382; *Duncan v. Jaudon*, 15 Wall. 165; *Mor. Corp.* § 181; *Field, Corp.* § 116; and the late case from this court of *Covington v. Anderson*, 16 Lea, 314.

Knowledge of the contents of a will on the part of a corporation is presumed by law from its knowledge of the fact that there is a will, upon the terms of which the title to its stock is made to depend; and especially is this so where the company has taken up and canceled stock standing on its books in the name of the testator, and issued in lieu thereof other stock, in terms referring on its face to such will. A corporation whose stock is, as in this case, transferable only on the books of the company, is made the custodian of the shares.

and is clothed with power to protect the rights of its shareholders from unauthorized transfers. With this *power* there exists the duty that rests upon all trustees to protect, so far as the exercise of proper diligence and care can do so, the interests of the *cestui que trust*, and it must respond in damages for any injury sustained in consequence of its negligence or misconduct. Indeed, the general propositions, as stated, are not controverted by the learned counsel for the defendant company.

The defense made for the company is that "the change of the original certificate, and the issue of the new one for \$7,000, was authorized by the chancery court, and that Wurzbach was then clothed with the entire title" in his own right, "and that, if any wrong has been done, it was in 1872, when the original certificates were canceled, and not in 1876, when the reissue of the stock was made to Rossi and to Wilkins;" that the company acted solely in obedience to this decree, and that the words, "devises under the will of Margaret A. Riggs, deceased," was only a derangement of title, and in no way differed in legal effect from a transfer to him, or a certificate in his name simply, *i. e.*, "in his own right," in either case.

With this contention we are unable to agree. In our view, the wrong resulting in the injury complained of was not done in 1872. The decree of the chancery court did not have the effect to abrogate the terms of the will, and was not so intended nor understood by the parties. The gas company, itself a party, did not so understand it, as is shown by the manner in which it issued the stock at that time. Ignorance of law or fact cannot, under the proof in this case, be involved on behalf of the company. As a party to the chancery court suit, it had before it the agreement made in Pennsylvania, and the decree thereon in the orphans' court in the state, which informed it that the controversy then pending between Julia H. Caulkins and A. C. Wurzbach was compromised only to the extent of Wurzbach resigning the office of testamentary trustee as to *two-thirds* of the property then held by him under the will of Mrs. Riggs, and he "*retaining the trusteeship*" as to the other one-third. While he had been trustee for the whole, two-thirds of the *income* only was to go to Mrs. Caulkins, and one-third to him. In order to make effectual his surrender of the office of trustee *as to Mrs. Caulkins*, he turned over to David Olier, *the new trustee*, two-thirds of the corpus of the property, to-wit, \$9,000 of the gas stock, \$10,000 of United States government bonds, and \$15,000 of lands in Nebraska; making \$34,000; he retaining one-third, to-wit, \$7,000 of the gas stock, and the house in Girard, Pennsylvania, at \$10,000, making \$17,000. The entire property was, by express terms, to remain under the dominion of the will, both as to corpus and *income*. The only change was that Olier was trustee for Mrs. Caulkins' share, and Wurzbach was, in the language of the agreement, "to retain *the trusteeship* of the property retained by him," and, in the language of the decree, "to remain trustee of that portion of the estate;" and again with this agreement and decree filed in our chancery court, with our court assuming merely to enter a decree in conformity therewith, referring to the division of this gas stock, concludes with this language: "But the shares of both to be held according and *subject* to the provisions of *the will* of said Margaret A. Riggs, dec'd."

How can it be possible, and upon what rules of construction can it be said, that the use of the words, "in his own right," are to override the provisions of the will, overturn the express stipulations of the agreement and decree, and render nugatory the proviso immediately following the supposed magical words. The office of a proviso is to restrict and qualify what has gone before. As if anticipating that the words, "in his own right," might be misleading, or apparently contradictory of the preceding terms of the agreement, the decree carefully follows the use of such words with the proviso, "*but the shares of both* [*i. e.*, of both trustees] to be held according and subject to the provisions of the will," etc. Surely it is asking too much when called on

to give the construction of this decree as contended. As already said, the company itself, when it came to obey the direction in the decree to issue this \$7,000 of stock to Wurzbach in his own right, did not then construe these words as now contended for. They did not issue it to him "in his own right," but they used the words, "devisee under the will," etc.; thus very properly putting an ear-mark upon the stock that was well calculated to have defeated its negotiability, and preserve it for the beneficiaries under the will after the falling in of the life-estate of Wurzbach.

It is worthy of note that this stock,—that is, *this* certificate,—thus ear-marked, was never sold and transferred to a purchaser. Before it could be sold or transferred, the old certificate was taken up and canceled by the company, thus actively assisting in the breach of trust which it was manifest that Wurzbach was attempting. It is remarkable that the company, with its knowledge of the will, and of all the proceedings thereunder, should have canceled this stock, and issued new certificates in its stead, for the avowed purpose, as stated by Wilkins, of enabling him to sell the stock for Wurzbach; the company not only removing any doubts which the form of the certificate had erected in the mind of Wilkins as to the right of Wurzbach to sell, but the secretary himself filling up the blank power of attorney that was signed by Wurzbach; and it would seem that the secretary also filled up the date of the power of attorney, as it is dated November 21, 1876, the very day that the books of the company show the issuance of the substituted stock to Rossi and Wilkins. The fact that the secretary says he consulted the legal adviser of the company, if the fact be that way, can furnish no protection to the company, where, with knowledge of the trust, it enabled and aided the trustee to fraudulently dispose of the stock. There is no evidence as to what facts were communicated, or what records were exhibited, to the attorney, upon which he based his opinion and advice. The company's knowledge was independent of the attorney's, and, with or without his advice, it acted at its peril. *Covington v. Anderson*, 16 Lea, 314.

There has been no conduct of the complainants that would bring the case within the principle of acquiescence or encouragement, such as would estop them from holding the defendant liable, under the cases of *O'Brien v. Weld*, 92 U. S. 81-85, and *Swain v. Seamens*, 9 Wall. 254, 274, cited by counsel. The complainants have had no connection whatever with the cancellation of the \$7,000 certificate, nor with the issuance of the stock to Rossi and Wilkins; and, as we have already seen, there is nothing in the suit, resulting in the decree of compromise, done or suffered by the complainants, that can excuse the defendants from the liability which the well-settled principles of law impose upon it.

When the large amount of corporate securities held in trust throughout the country, for a class of beneficiaries who are generally dependent entirely upon the fidelity and diligence of the corporations issuing same, are considered, courts of equity will not be eager to condone negligence, nor to put a premium upon infidelity. This court certainly has no inclination to depart from the well-defined principles applicable to such cases, and upheld by the undeviating current of authority.

The result is that the decree will be reversed, the exceptions to the report of the referees sustained, and decree here for complainants, declaring them entitled to the value of the stock, not at the time of the conversion, but at the date of the death of the life-tenant, A. C. Wurzbach, with interest from that date. The cause will be remanded for the purpose of taking the account herein ordered, and further proceedings in accord with this opinion. Upon the ascertainment of the amount, the money will be paid into court, and a trustee will be appointed, with good and sufficient bond, and security to be approved by the chancellor, conditioned to administer the same according to the terms of the will of Margaret A. Riggs, deceased, under the direction and

The appellee, Thomas Greenwade, Jr., sold to the appellant a tract of 1,577 acres of land, for which he paid all the purchase money except \$4,098, and for that sum two notes were executed, payable at different periods. A conveyance was made and recorded, in which a lien was retained for the unpaid purchase money. This action was instituted to enforce the lien on the land conveyed. The appellant filed an answer, alleging a deficit in the land of several hundred acres, and, if the statements of the answer are true, reduces the amount of each payment to less than \$1,500. The court below rendered a judgment for this amount, and left the question of the deficit to be thereafter ascertained.

We perceive no objection to this judgment, so far as it affects the appellant, as it compels him to pay for the land only that by his answer he admits is in his possession. Thomas Greenwade, Jr., had purchased this land of his father, and was in the possession when he sold to the appellant. It seems that his father owned a large tract of land in the county where this land sold appellant is located, and that, after his death, the heirs of the father (Thomas Greenwade, Sr.) sold and conveyed this large body of land to the appellant and others for the sum of \$18,000. The land sold by the appellee to the appellant was not included in this sale. When the large tract of land was purchased by the appellee and others from the heirs, it appears that a petition in equity had been filed for a settlement of the estate of Thomas Greenwade, Sr., and, his personality being insufficient to pay the debts, the land was sought to be subjected to their payment. To obviate the trouble the purchaser might have in acquiring the title as against the claims of creditors, the appellant and those purchasing with him, by an agreement with the heirs, deposited \$12,000 in bank, to be applied to the payment of the debts when ascertained, and executed their notes for the balance. An action was instituted by the heirs on the purchase-money notes due on this large purchase, to which various defenses were set up, and among them that there was a large deficit in that sale, and that much of the land was in the adverse possession of others at the date of the purchase; also that the money deposited in the bank was not sufficient to pay the debts; that the heirs were insolvent, and had covenanted that they had title and were in fact seized of the land in the actual possession when the sale was made; that there was a breach of the covenant, for the reason that much of the land was held by others under an adverse title,—a fact known to the vendors, and unknown to the appellant and others when they purchased. The appellant, in his answer to the present action, attempts, by a general averment, to make the answer of himself and others, in the suit for the large tract of land, a part of his answer in the present action, with a view of consolidating the two cases. The present action is independent of the other, and, in making the defense, it was necessary to make it complete; and the mere reference to what had been pleaded in some other case could not make the defense good in the present action, without pleading specially the facts constituting the defense. There is no allegation of insolvency on the part of the appellee in this case; and, if there was, the appellant admits that he is in the possession of the land sold him, and cannot question his title, as it seems to be perfect, except so far as the deficit is concerned in the number of acres.

It is alleged that the boundary of land conveyed by the father to the son embraces more land than the father intended to convey, but, if this be true, the appellant, as purchaser, has entered into the possession, and holds a deed, and no one is attempting to disturb his possession or title. The fact is that the amount deposited in bank, with the amount owing by the appellant and others on the large purchase, is ample indemnity to the appellant, and there is no reason why the judgment as rendered should not be enforced. If the answer of the appellant is regarded as good as to the present action, it stops the coercion of any of the purchase-money notes on either sale until the entire litigation is ended. If the contract for the larger tract of land is rescinded or

knowledge. This court has therefore held that the cause of action shall be deemed to have accrued, and the limitation to commence running, at a time when, by the exercise of ordinary diligence, the discovery of the fraud ought to have been made; and, while the recording of the conveyance may not be constructive notice to prior creditors, it is a circumstance which it is proper to consider in determining when the discovery might have been made."

And in *Zachay's Adm'r v. Hicks*, decided April 1, 1886, the same rule was adhered to; the following language being used: "When, in an action for relief on the ground of fraud, the defendant relies on the five-years statute of limitation, and shows that the fraud was perpetrated more than five years before the action was instituted, the plea must prevail, unless it is avoided by a replication showing that the action was brought within five years after the discovery; and the burden of showing that fact is on the plaintiff. But it is not sufficient for the plaintiff to show that the action was brought within five years after the discovery of the fraud. He must establish a state of facts showing that he could not with ordinary diligence have discovered the fraud until within five years before the action was instituted."

Tested by the rule of pleading adopted in these cases, we do not think the reply of appellant contains such a statement of facts as to avoid the statutory bar of five years pleaded in answer, and supported by the facts of this case; for the language of the reply is simply that neither he nor his assignors had notice or knowledge of said pretended deed till within the last five years. More than eight years had elapsed when the action to set aside the deed was instituted; and according to neither the policy of the law, nor the doctrine held by this court, can it be regarded sufficient to avoid the statutory bar of five years to allege merely the plaintiff did not have notice of the deed.

There is nothing in the case of *Ward v. Thomas*, 8 Ky. 452, inconsistent with this ruling; it being there decided that the recording of the deed was not to be regarded as actual notice of the fraud.

It seems to us that, as the reply did not contain a statement of facts sufficient to avoid the statute of limitation, the appellee's defense to the action must be held sufficient. Wherefore the petition for rehearing is overruled.

RUSSELL and others v. GREENWADE, Jr.

(Court of Appeals of Kentucky. May 7, 1887.)

1. VENDOR AND VENDEE—SUIT FOR PRICE—DEFICIT IN LAND—JUDGMENT.

In an action by the vendor of land against the vendee, upon the notes given for the purchase money, the vendee defended on the ground that there was a deficiency in the number of acres conveyed. Held, that a judgment for the price of so much of the land as the vendee admits he is in possession of, and reserving the question of deficit to be afterwards determined, is not erroneous.

2. PLEADING—ANSWER—DEFENSE IN INDEPENDENT SUIT—REFERENCE TO.

When this action was brought another suit was pending, to which the vendee was a party, involving the right to recover on the purchase-money notes of another tract, and in his answer in this action he attempted, by a general allegation, to make his answer in that suit a part of his answer in this, with a view to consolidating the two cases. Held that, as the two cases are independent of each other, his defense in this action must be complete in itself, and a mere general reference to what had been pleaded in the other case could not make such matter part of the defense in this.

Appeal from circuit court, Menifee county.

Thos. Turner & Son, for appellants. *Wood & Day*, for appellee.

PRYOR, C. J. This record is in such a confused condition that it has required much labor to understand it, and would be condemned but for the suggestion by counsel on each side that it is impossible to obtain a better one.

considerable estate, both real and personal, the former amounting in value to more than this dower claim, and which affords her a competent livelihood.

It appears that prior to May 19, 1862, her husband and G. F. Thomas were, as partners, largely engaged in farming, buying and selling stock, and transacting whatever was necessary to such business. The answer avers that they owned the two tracts of land in which she now claims dower as partners, and used it for their partnership purposes. This is denied, it being asserted upon her part that they were merely joint owners. If real property be purchased with partnership means, and used for partnership purposes, it is treated in equity as held by the partners in trust for the firm, subject to the same rules as apply to partnership personal property, and liable to the debts of the firm, and the claims of the partners *inter se*. This is so whether the title be vested in one or all of the members of the firm. It does not satisfactorily appear, however, that this character had been impressed in any way upon this land. There is no oral testimony upon this subject; and the wording of the deeds, and form of the notes which were executed for the deferred payments, leave it a matter of doubt whether the purchase was by G. F. and A. Thomas as partners, or merely as joint owners.

It appears, however, that Robert Lee, through whom the appellants, Pepper and Laughlin, derive title, purchased the land subject to the appellee's potential right of dower. In fact, the appellant Pepper simply stepped in, and took the bid of Lee as to so much of the land as the latter obtained. G. F. and A. Thomas became involved, and in 1862 made an assignment of all their property, much of which was undoubtedly held by them as partners, to trustees for the payment of their debts. The deed was a joint one, but executed in their individual names. It conveyed, among other property, the land in which the appellee now claims dower; her husband having died in 1883. In it her right to dower was expressly recognized, and the land conveyed subject to it. The trustees under the deed brought an action to sell the trust property, and to settle the trust. The petition recognized and admitted the contingent right of the appellee to dower, and asked that its value be ascertained and paid to her, in order that a purchaser might obtain a perfect title. A judgment of sale was obtained, which also recognized her right, and authorized the master to ascertain the value of her right, and to agree to pay it to her if she would release her claim. This was not done, however, and, no agreement having been made with her, the land was sold and bid in by Lee, *subject to her dower right*, and the master in his report says that the price of the land was materially affected by its sale subject to her claim, and that of the wife of G. F. Thomas.

It is urged that the commissioner's deeds to Pepper and Lee provided that the contingent right of dower of the appellee was not to be affected thereby, *if any existed*; that the proceedings named above could not enlarge her right; and that the question is yet open to investigation. The purchasers, however, are affected and bound by those proceedings, and they purchased the land subject to her contingent right of dower. It appears that they did so at less than its fair value, by reason of such contingent claim; and, after doing so, they will not now be permitted to deny its then existence.

The distinguished counsel for the appellants contends, however, that the admitted fact that the appellee took as devisee, and, as such, is now in the enjoyment of her husband's estate, the landed portion of which was worth more than this claim to dower, is a bar to its assertion. Section 6, art. 4, c. 52, Gen. St., provides: "A conveyance or devise of real or personal estate, *by way of jointure*, may bar the wife's dower; but if made before marriage without her consent, or during her infancy, or after marriage, she may, within twelve months after her husband's death, waive the jointure by written relinquishment, acknowledged or proved before and left with the clerk of the county court, and have her dower. When she so demands and receives her-

dower, the estate conveyed or devised in lieu thereof shall determine and revert to the heirs or representatives of the grantor or devisor."

The term "jointure," as above used, means such an estate as may be conveyed or devised to the wife *in lieu of dower*. It must be in satisfaction of it; and, if transferred to her without any intention or purpose that it shall be so, it does not operate to bar her claim. If, however, the grantor or devisor intends the estate conveyed or devised as in lieu of dower, then it is a jointure, and so operates. The bar arises, not by operation of law, but from the express or implied intention of the husband. 3 Bac. Abr. 230; *Yancy v. Smith*, 2 Metc. (Ky.) 408; *Tetis Ex'rs v. McCreary*, 3 Metc. (Ky.) 151.

In the case now before us it is merely averred that the estate was devised to her, and that she is in the enjoyment of it. The land was conveyed to the trustees, subject to her contingent right of dower. It is not like a case where the grantor or devisor has conveyed to the party against whom the widow is claiming, with covenant of general warranty, and she is in possession of an estate by devise from her husband worth more than the dower claim. In such a case the law rejects her claim, thus avoiding circuity of action. Here, however, there was no warranty of title by the husband; and, where his estate will not be liable to his vendee if dower be recovered, the law will not imply that the estate granted or devised to the wife was by way of jointure or in lieu of dower. Moreover, after the purchase by Lee, Alexander Thomas was discharged as a bankrupt from all his then existing liabilities. Lee neither purchased nor paid for the wife's contingent right of dower. The husband knew this, and there was no legal or moral reason why he should take it from her, and give it to Lee. In such a case an intention to do so by way of jointure cannot be presumed. The judgment, however, gives her dower in all the land, when she was only entitled to it in one-half of it, because only that much belonged to her husband. Indeed, this is all the petition claims. Evidently this occurred through inadvertence, but yet it was the act of the court. It fixed the rights of the parties, and was of a final character, because it directed the commissioner to allot the dower in conformity to it. It appears that, at a subsequent term, the court, upon notice and at the instance of the appellee, corrected it, and allowed her dower in but one-half of the land; but, even if the court had the power to do this, yet before it was done this appeal had been taken.

The judgment was also erroneous in another respect; and, whether this portion of it was of a final character or not, yet, as the case must go back for further proceedings, it is proper that we should notice it. The master was directed, in allotting the dower, to ascertain the value of the land, and then deduct from it what the purchase-money liens amounted to when the land was sold to Lee, and to then allot as dower so much of the land "as is of the value of one-third of the remainder." As already said, the direction to allot one-third in value of all of the land, less the liens, was erroneous, because she was only entitled to one-sixth. But the basis of allotment was otherwise erroneous. The master was directed to ascertain the then value of the land, when it should have been its value at the time of the sale to Lee. The value of any permanent improvements which the purchaser or his vendee may have made, cannot be taken into the estimate. The land must be considered in the same condition as it was in when it was alienated by the husband, and without amelioration or deterioration arising from the acts of the purchaser. The statute says: "Whether the recovery is against the heir or devisee or purchaser from the husband, the wife shall be endowed according to the value of the estate when received by the heir, devisee, or purchaser, so as not to include in the estimated value any permanent improvements he has made on the land." Gen. St. c. 52, art. 4, § 9. The commissioner should be directed to ascertain the value of the land when it was purchased by Lee, then deduct from it the purchase money then owing for it, and then allot to the appellee

as dower so much of the land as is of the value of one-sixth of the remainder.

The judgment is reversed, and cause remanded for further proceedings consistent with this opinion.

SWOPE and others v. SCHAFER.

(Court of Appeals of Kentucky. May 7, 1887.)

1. TRIAL—INSTRUCTIONS—HYPOTHESIS.

While the trial court is not bound to instruct the jury of its own motion, yet, if it does so instruct them, it should not direct them unconditionally to find against a party upon a given hypothesis, when there may be another hypothesis equally supported by the evidence, but withheld from their consideration, upon which they might find in favor of such party.

2. BOUNDARIES—PUBLIC LANDS—ADVERSE POSSESSION.

While, in the case of concurrent possession of land under two adjoining surveys, the true location of the line of the elder patent must govern, still the actual possession under a junior patent may ripen into a perfect title, in the absence of such possession and claim under the elder patent.

Appeal from circuit court, Campbell county.

O'Hara & Bryan and E. W. Hawkins, for appellants.

LEWIS, J. Appellants instituted this action to recover a parcel of land, of which they allege appellee unlawfully and without right holds the possession and detains from them, the owners. It appears that from about the year 1816, when the ancestor of appellants obtained a deed therefor, they, and those under whom they claim, by their tenants and agents, had the actual possession and claimed a tract of ——— acres of land patented to Reuben Taylor, until the year 1856, when it was divided into lots, one or more of which were allotted to appellants, and have been in like manner held and claimed by them ever since. In 1880, appellee entered and took possession of the tract in controversy, containing ——— acres, claiming under a patent for another tract issued to Mosby, which is older than the Taylor patent, and called for in the recital of the boundary of the latter.

On the trial, the court, on its own motion, gave the following instruction to the jury, no other being asked by either party: "The court instructs the jury that the back line of the seventh and eighth Mosby surveys constitutes the southerly boundary of the Reuben Taylor patent, under which the plaintiffs claim title to the land in controversy; and, if the jury believe from all the evidence that said land is within the Reuben Taylor patent, they should find for the plaintiff; but, if they find that said land is within the seventh Mosby survey, then they should find for the defendant."

Counsel for appellants contend that, as the lower court assumed the province of instructing the jury unasked, it should have given the whole law of the case suited to every state of fact upon which the jury might properly find a verdict for either party. This rule has never been applied to the trial of civil cases, to the extent stated by counsel; for, though the court may in such cases instruct the jury without being moved so to do, it is not bound to instruct. *Clarke v. Baker*, 7 J. J. Marsh. 197. Nevertheless, it seems to us that, if the court does on its own motion instruct in a civil case, it should not direct the jury unconditionally to find against a party upon a given hypothesis, when there may be another, alike supported by the evidence, but withheld from the consideration of the jury, upon which they might find in favor of such party.

By the instruction given in this case the jury is directed to find for the defendant in case they believe the land in controversy is within the Mosby patent boundary. The precise location of the dividing line between the two surveys is one of the questions that arise in the case; and, while we think there is a decided preponderance of the evidence showing it to be the line, A,

B, as appellants contend for, as laid down on the map of J. D. Ellis, the surveyor, still one witness locates the Mulberry corner at another place, and his evidence tends to show the dividing line as further north than the line, A, B, indicates. We are not, therefore, authorized to say the verdict of the jury should be set aside because flagrantly against the evidence. But it is almost conclusively shown that appellants and their ancestor have since 1816 held and claimed under the Taylor patent, up to the line, A, B, which is, as it was before the land was cleared, a marked line. While, in case of concurrent possession under two adjoining surveys, the true locations of the line of the elder patent must govern, still the actual possession under a junior patent may ripen into a perfect title in the absence of such possession and claim under the elder patent. The evidence does not show, that at any time within a period of 20 years after the year 1816, any one did hold and claim under the Mosby patent. Consequently, if the southern line of the Taylor patent, as actually located and marked, does extend from A to B, appellants acquired a title thereto, whether the north line of the Mosby patent was or not at a different place. But whether the dividing line extends west from A, or from a point north of A, it still runs through a field cleared and cultivated by the tenants of appellants, and which the evidence tends to show was so cleared and cultivated for more than 15 years before the entry of appellee, in 1880. Consequently, appellants, upon that hypothesis, had a right to recover so much of the land in dispute as was inclosed for that period before appellee entered, whether it was or was not included in the Mosby patent. And the instruction given, to that extent at least, prejudiced the substantial rights of appellants. We think, therefore, that as the lower court of its own motion undertook to instruct the jury, it should not have so framed the instruction as to exclude from their consideration the rights of appellants arising from their possession of the land in controversy.

Judgment reversed, and cause remanded for new trial and further proceedings consistent with this opinion.

DENNY v. CAMPBELL'S EX'R.

(Court of Appeals of Kentucky. May 10, 1887.)

1. SALE—PRINCIPAL AND AGENT—EVIDENCE.

An agreement by an agent with his principal, whose money he had invested in bonds, which afterwards depreciated, "for value received in" the bonds to pay the principal a price named, being the face value of the bonds, and interest annually "upon the bonds" until collected, "not to pay the principal until collected," held to show a sale of the bonds to the agent, although the principal afterwards, when weak in mind, directed the agent to use "one thousand dollars' worth of said bonds" for a certain purpose.

2. CONTRACT—CONSIDERATION—PRINCIPAL AND AGENT.

An agent's agreement with his principal to take certain bonds, in which he has invested the principal's money, and which have depreciated, at their par value, paying the same when the bonds should be collected, and, meanwhile, to pay the principal a certain rate of interest on the bonds, less than the rate which they bear, is supported by a sufficient consideration and is binding on him, although the agent's authority justified him in making the investment.

3. SAME—CONDITIONS.

In an action upon an agreement by an agent to take off the principal's hands, at a certain price, bonds in which the agent had invested the principal's money, the price to be paid when the bonds should be collected, held, that it was no defense that the bonds had not yet been collected; the defendant having neglected to sue upon them, as he should have done.

Appeal from circuit court, Madison county.

W. O. Bradley and John Bennett, for appellant. C. F. & A. R. Burnam, for appellee.

BENNETT, J. Prior to 1872 the appellant, as the administrator of Nancy Campbell's husband, received a large amount of money, one-third of which, amounting to several thousand dollars, belonged to Nancy Campbell, which sum he was permitted to keep and control for her as her agent. He invested a portion of this money in 22 Missouri, La Fayette county, railroad bonds, of \$100 each, which bore interest at the rate of 10 per cent. per annum. Nancy Campbell did not authorize the appellant to make this investment, nor did she know that he proposed doing so. At the time of the purchase of these bonds, they were regarded as worth their face value, and as a good investment; but, not long after the purchase of the bonds, the county of La Fayette ceased to pay the interest on them, and has not paid any interest on them since. In consequence of the cessation of the payment of interest on the bonds, they fell in price to about 50 cents on the dollar. Mrs. Campbell becoming dissatisfied with the conduct of the appellant in investing in these bonds, he executed and delivered to her the following writing: "For value received, in 22 Missouri, La Fayette county, bonds, I agree and bind myself to pay Mrs. N. Campbell two thousand two hundred dollars, to pay her 8 per cent. annually upon the bonds until collected, I to be at the expense of collecting, if any expense is incurred. Not to pay the principal until collected. *This sixteenth November, 1875.* GEO. DENNY."

The contention of the appellant is that by reason of his general authority to control and manage Mrs. Campbell's money, and invest it for her benefit at discretion, he had the right to invest her money in these bonds, and for that reason there was no consideration for the execution of the foregoing writing, and the same is not binding on him. We cannot agree to this proposition. By this writing the appellant agreed to pay to Mrs. Campbell \$2,200 for value received in 22 Missouri, La Fayette county, bonds. The payment of the \$2,200 was to be made as soon as the bonds were collected; and he was to pay 8 per cent. interest on the \$2,200 annually until the bonds were collected. This is a fair interpretation of the writing. The expression "to pay her 8 per cent. annually on the bonds until collected," was evidently used as equivalent to an agreement to pay her 8 per cent. annually on \$2,200, the agreed price of the bonds, until they were collected. By this agreement, the bonds, together with 10 per cent. interest thereon, belonged to the appellant. He purchased them, and agreed to pay for them \$2,200 when he collected the bonds, and 8 per cent. interest annually on said sum until he collected them. The advantage to him in the transaction consisted in obtaining title to the bonds, which bore 2 per cent. interest annually more than the rate that he agreed to pay on the agreed price. That the consideration was sufficient to uphold this transaction is self-evident.

The appellant also contends that the said sum is not yet due, because the bonds have not yet been collected, and cannot be collected. This defense is not available, because he has taken no legal steps to collect the bonds, which it was his duty to do, and which he has had ample time to do, and, in not doing, he has been derelict; and the way to test the question as to whether or not the bonds could have been collected was to sue.

The writing executed by Mrs. Campbell on sixteenth of June, 1882, which directs the appellant to retain \$1,000 worth of said bonds with which to pay a debt that Josephine Campbell owed the appellant, Mrs. Campbell having loaned her that sum for the purpose of paying said debt, does not show, when considered in the light of all the facts in the case, that Mrs. Campbell regarded the bonds as hers. The record shows that Mrs. Campbell was old and feeble, which considerably weakened her mind,—so much so that she was scarcely competent to understand ordinary business transactions, and evidently did not understand the purport of said writing, which committed her to the proposition that the bonds belonged to her, when they in fact belonged to the appellant. It is evident that Mrs. Campbell understood the transaction

as relating to the money the appellant owed her for the bonds, and that she was directing the appellant to appropriate \$1,000 of the money due her on the bonds for the benefit of Josephine Campbell.

The appellant himself shows that his claim of \$250 is for services which he rendered for Mrs. Campbell, she being his sister, free of charge, and that he never intended to charge for the services; nor did she understand that she was to pay for them. Therefore no implied *assumpsit* sprang up on the part of Mrs. Campbell, by reason of the rendering of said services and the reception of them, to pay a reasonable compensation for them.

The judgment of the lower court is affirmed.

DERBY'S ADM'R v. KENTUCKY CENT. R. CO.

(Court of Appeals of Kentucky. May 7, 1887.)

NEGLIGENCE—CAUSING DEATH—"WILLFUL NEGLECT"—CONTRIBUTORY NEGLIGENCE.

Where an experienced freight conductor was knocked off his train while passing through an overhead bridge, it appearing that one could stand up on the ordinary cars used by the company, and pass the bridge safely, but that the train in question happened to contain one car which was too high for this, *held*, that an action to recover damages for the death of the conductor, in which it is necessary to show "willful neglect" of the corporation, was not maintainable; although, when willful neglect is shown, in such an action contributory negligence of the deceased is not a defense. ¹ LEWIS, J., dissenting.

Appeal from circuit court, Kenton county.

W. K. Benton, for appellant. Hallam & Myers, for appellee.

HOLT, J. Frank Derby, while in charge of a freight train of the Kentucky Central Railroad Company as conductor, was run over by it and killed. It appears that, when near an overhead bridge, he had occasion, in the performance of his duties, to go from the front to the rear of the train. It was made up of box cars and flats, over which he was compelled to pass, and in doing which his back was to the bridge. When last seen alive, he was climbing from a flat onto one of the box cars, and the train was then within three or four hundred yards from the bridge. His body was found just beyond it. It is shown that one could stand upright upon the top of the box cars belonging to the road, and the cars of this character which ordinarily pass over the road, and pass under the bridge in safety. Upon the occasion in question, however, there was a car in the train belonging to another road, and which was considerably higher than the others; and, although it is not shown by the testimony that the deceased was upon this car when the accident occurred, yet the case proceeds upon the theory that he was, and, coming in contact with the bridge, was knocked off the train and killed. Indeed, the evidence is not entirely satisfactory that he was knocked off at all, and there is ground to suppose that he may have fallen from some one of the cars without coming in contact with the bridge. Some circumstances are proven, however, which tend to show it; but, aside from the fact that one could stand upon the ordinary box car, and pass under the bridge in safety, and that in this train there was one car uncommonly high, there is nothing tending to prove that the deceased was upon the car last named when the accident occurred. Inasmuch, however, as both parties upon the trial below appear to have proceeded upon the idea that he was, and in view of the fact above named, we will consider the case as if this were clearly shown.

The administrator of the deceased bases his claim to recover upon the allegation in his petition that the death was caused by the *willful* neglect of the company in permitting a car to be in the train of such uncommon height that

¹As to the measure of damages in actions for negligence causing death, see *County of Howard v. Legg*, (Ind.) 11 N. E. Rep. 612, and note.

its employes, when standing on top of it, could not pass in safety under the bridge. The jury returned both a special and a general verdict, the latter being for \$2,000. The court set it aside, however, and rendered a judgment for the company upon the special verdict.

The court in its general instructions erroneously told the jury that the appellant could not recover if there was such contributory neglect upon the part of the deceased that but for it he would not have lost his life. In a case of this character, when *willful* neglect upon the part of a defendant has been shown, contributory neglect upon the part of the party injured cannot be considered. The appellant cannot, however, complain of this in this instance, because the jury in fact returned a general verdict in his favor; and the special findings are of such a character that they could not to any extent have been produced by the instructions. The jury, by the special verdict, found that the bridge was sufficiently high to enable the deceased to pass safely under it when standing erect upon the cars ordinarily in use upon the road; and that he either knew or had reasonable opportunity to see and know that there was in his train a car higher than those ordinarily in use upon the road. Did these findings authorize the judgment for the company?

Undoubtedly a railroad corporation should be held to a high degree of care. It should use all reasonable care in the construction of its road, and as to the appliances and machinery connected with its operation. It is invested with extraordinary privileges, and to it is intrusted not only property, but human life. It is not an insurer, however, of the latter. Regard for it, however, requires, as said in the case of *Baltimore & O. & C. R. Co. v. Rowan*, 104 Ind. 88, 3 N. E. Rep. 627, that "a railroad company is and ought to be required to construct and maintain its roadway and appendages, and its overhead structures, in such manner and condition that its employe or servant can do and perform all the labor and duties required of him with reasonable safety." In the case of *Houston, etc., Ry. Co. v. Oram*, 49 Tex. 341, it was said: "It is the duty of the railroad company to use ordinary care to provide such cars, road-bed, tanks, etc., as are *reasonably* safe; that a failure to do this is negligence chargeable on the company itself; and that the company is responsible in damages to an employe for an injury resulting, without his negligence, from a tank or other appendage of the road so negligently constructed as to subject the employe to unnecessary and extraordinary danger, which he could not reasonably anticipate or know of, and of which he in fact was not informed."

We think the rule is that railroad companies are not bound to furnish appliances absolutely safe, but that they must use reasonable care to provide such as are reasonably adequate and safe for the use of their employes. The latter, in accepting the employment, assume all the ordinary risks of the business; but, if engaged in operating the trains, they cannot well know, and it is not a part of their business to ascertain, the condition of the appliances in use, unless they are immediately under their care, and subject to their control. They do not contract with reference to them. Thus a brakeman has a right to rely upon the company using reasonable care in providing a safe track. He has no opportunity to inspect it; it is not a part of his business; and unless he in fact knows of its defective condition, and recklessly exposes himself to the danger, he is not chargeable with neglect. The master cannot place an additional or extra risk upon the servant without notice to him.

In this instance, however, the deceased was an experienced railroad man. He had been running trains over the appellee's road for several months prior to the time of the unfortunate accident; and the jury have found that the bridge was sufficiently high to enable him to pass safely under it when standing erect upon the cars ordinarily in use upon the road, and that he either knew, or had reasonable opportunity to know, when the accident occurred, that there was a car in his train higher than those ordinarily in use upon the

road. If he was knocked off of it, he must have known its extra size and height, and have therefore known that, when standing erect upon it, there was a liability to injury by coming in contact with the bridge. The company had provided a bridge which was reasonably safe. The cars ordinarily in use upon the road were of such height that one could stand upright upon them, and pass safely under it.

The deceased was in charge of the train. He was bound to know its condition and character. The extra height of one of the cars was visible to him. He knew that thereby there was an increased risk of injury; and he was chargeable with knowledge that, upon that particular occasion, there was one car in his train which, while it could pass under the bridge, yet that it was of such a character that one standing erect upon it would be exposed to danger from coming in contact with the bridge. We do not mean to say that a conductor must stop and make a calculation by feet and inches as to whether the cars of his train will pass safely under a bridge. It is the duty of the company to use reasonable care in providing those which are safe; but in this instance the deceased was controlling the train, and knew that the size of one of the cars subjected him to danger of injury, provided he placed himself upright upon it; and yet he did so, and lost his life. It is urged, however, that the company was required by law to so construct its bridges, and make up its trains, that an employe could stand upright upon any car, and pass in safety over the road. Consideration for humanity should certainly prompt it to do so; and, as already said, it is its duty to use reasonable care in doing so; but an employe, if he knows that there is a chance of danger or an increased liability to it, must use corresponding care. Here the deceased knew it, and, knowing it, he by his own act placed himself in the way of it.

It is said that if a railroad company should send out an engine so large that it could not pass through a tunnel upon its road, and in charge of an engineer who did not know the fact, and in attempting to pass through it he should be killed by the smoke-stack being knocked off, and falling upon him, that the company would be liable. Undoubtedly; but that is not this case. Here the employe exposes himself to the danger, knowing that by reason of the size of the car there is a liability to it. Moreover, he does so as the superior officer in charge of the train; and, if a brakeman or subemploye had thus lost his life, the charge of willful neglect would have been based doubtless upon the conduct of the conductor in taking such a car in his train. It is not a case where the appliance could not pass under the bridge; but, if we may be allowed a homely illustration, it is as if, in the supposed tunnel case, the engineer had made a smoke-stack of himself, knowing that it created a liability to danger, and had thus been injured. Judgment affirmed.

LEWIS, J., dissenting.

ASKIN v. LEBUS and others.

(Court of Appeals of Kentucky. May 7, 1887.)

1. VENDOR AND VENDEE—SUIT FOR PURCHASE MONEY—EVIDENCE.

Upon the evidence, *held*, that the vendee of land was liable upon notes given for the purchase money, his allegations as to fraudulent representations made by his vendor, and defects in the title, not being sustained.

2. USURY—WHAT IS—VENDOR AND VENDEE.

Where, upon the purchase of land, the vendee agrees to pay, as part of the purchase price, a rate of interest on the deferred payments exceeding the legal rate, the contract cannot be considered as usurious.

Appeal from chancery court, Bracken county.

Suit on notes given for the purchase price of land. The land was sold and conveyed by appellee Susan Wilson to appellant, Vincent Askin, and the notes v.4s.w.no.5—20

executed by the latter for the purchase money were assigned by said Wilson to her co-appellees, Lebus and Struve.

R. K. Smith, for appellant. *J. Q. Ward*, for appellees.

PRYOR, C. J. The defense relied on by the appellant to the recovery in this case is, as to the one note, that usurious interest had been paid upon it, and as to the other note that there was a deficit in the boundary of land sold, it having been sold by the acre; and the alleged fraudulent representations made by the vendor as to the title, and the loss of a valuable spring supposed to have been on the land, when in fact it belonged to another, by which the value of the land purchased was greatly lessened.

The vendee, who is the appellant, accepted the deed, and went into the possession, and from the testimony shows that he has sold the land upon which the spring was located to a third party at the price he was to pay per acre for the land purchased. There was no fraudulent representation made by the appellee, or his vendor, as to the boundary or title, and in fact the proof shows that the appellant once owned the land, or a part of it, and knew as much about the boundary as his vendor. Nor is there any defect of title shown; but, on the contrary, the testimony of the appellant conduces to show that the part of the land he claims to be in the adverse possession of other parties belonged to his vendor, and had been recovered in an action of ejectment by her before the sale to the appellant. Besides, there is no allegation of insolvency, and no fraudulent representations established, but an answer filed that shows more of a purpose to delay than to present a substantial defense to the recovery.

The amount of usury paid was deducted from the amount of the judgment, and this is the only defense interposed. The 10 per cent. on the first note, being a part of the consideration to be paid for the land, was properly allowed.

The exhibits filed as evidence after the submission of the case do not constitute a part of the record, and have not been considered. Judgment affirmed.

PECK'S EX'R, etc., v. PRICE and others.

(*Court of Appeals of Kentucky. May 12, 1887.*)

1. LIMITATION OF ACTIONS—IMPLIED PROMISE—WILL.

A testator devised land which belonged to his wife, but directed that the devisee should pay her a certain sum in consideration thereof. In an action by the wife to recover the amount of the devisee upon his implied promise to pay it, *held*, that the statute of limitations was no bar to recovery. The title to the land was still in the wife, and the devisee could not acquire title, or be allowed to retain possession, without paying for the land.

2. EQUITY—PLEADING—ALTERNATIVE RELIEF.

In the action against a devisee of certain land the bill prayed for relief in the alternative either for the enforcement of a lien or a recovery of the land. The court, upon the idea that there was a misjoinder of actions, compelled plaintiff to elect whether she would proceed to recover the land, or to enforce the lien against it. *Held*, that this was erroneous, as there is no rule which forbids a party to ask for specific relief in the alternative.

Appeal from circuit court, Hardin county.

Bush & Robertson and *Irwin & Steel*, for appellant. *W. H. Marriott*, for appellees.

HOLT, J. It is an admitted fact that the land devised to Catharine Almeda Price by the will of her father, H. B. Peck, belonged in fact to her mother, the appellant, Catharina Peck. The fact that she signed the will of her husband did not divest her of title. The will provides: "I will and bequeath to Catharine Almeda Price, with the consent of my wife, Catharine Peck, the tract of land known as a part of Dr. William Smith's old farm, containing

237½ acres. I estimate it worth two thousand dollars. I give her seven hundred and fifty dollars out of the above two thousand. This land is hers, and after her death it must belong to her children. She is to execute her notes to me for the balance." In a subsequent part of the will the testator directed that the notes should be executed after his death and to his wife, and then again changed it by a codicil, and provided that they should be given either to him or to his executrix. His wife was nominated as such representative, and to her bequeathed all his personal estate, save a legacy of \$500 to a son. He died in February, 1879, and in the same month Catharine Almeda Price, who was then a married woman, executed to her mother, as the widow of H. B. Peck, a note for \$1,250, which recites that it was given for the balance on land willed to her by her father, and that a lien is to be retained on the land for its payment. Her husband did not sign it.

It has been held by some courts that the acceptance of a devise of land charged with the payment of money or a legacy creates a personal liability for its payment by the devisee; that an implied contract arises. While others have held that an express promise is necessary to create such a liability, and that without it the action, though in form that of debt, must be regarded as a proceeding *in rem* merely. Mrs. Price, however, being a married woman when she executed the note, there is no express assumption of payment which is valid, and hence no personal obligation exists. The remedy, if there be any, is necessarily *in rem*.

The appellant, Catharine Peck, both as executrix and in her individual name, brought this suit, but not within five years after her husband's death or the execution of the note, setting forth the history of the matter, and averring that she was either entitled to enforce a lien against the land for the \$1,250, or to recover it; that one or the other was true, but she did not know which; but she asked first that she be awarded a lien for the money, and that it be enforced. The lower court, upon the idea that there was a misjoinder of causes of action, compelled her to elect whether she would proceed to recover the land, or to enforce a lien against it; and, being compelled to do so, she elected to proceed for the lien. The court compelled an election upon the wrong side of the case. It should have required the defendants to elect whether they would surrender the land, or submit to the enforcement of the lien against it. Inconsistent statements in a pleading should be stricken out; but the Code provides that a party may aver alternatively the existence of one or another fact if he states that one of them is true, and that he does not know which of them is true. Here, however, the statements related merely to the relief to be granted. By the Civil Code a party must demand the specific relief to which he thinks he is entitled, and may also pray generally for any other proper relief. This the appellant did in this instance. It is true, she asked for specific relief in the alternative, but we know of no rule which forbids it.

It appears that D. W. Price and his children are in possession, and claiming the land, he having separated from his wife; and he, upon the idea that the appellant has no claim save one of a character which is barred by limitation in five years, relies upon the statute to defeat it. The parties are in equity. The title to the land is in fact in Catharine Peck. The appellees are claiming it under the will of her husband. She says to them: "You may have it if you will pay the charge which was put upon it by the will; but otherwise I claim the land." It is plain that under such circumstances a party who claims the land, but has never obtained the title, must pay for it before he can ask a court to divest the title holder of it. No principle is better settled, and none rests upon a higher equity. The plea of limitation would avail in such a case if the title had passed, and time had run against the claim; but in a case like this, the party claiming the land cannot say to the owner that he will hold the land, and yet refuse to pay for it.

If the title to the land had been in the husband, and he had charged it with the payment of a legacy to a third party, or with the payment of a sum to his estate, then a different case would have been presented from that now before us. Here, as the title to the land is in the appellant, it can only be taken from her, and transferred to those to whom it was devised by the will, upon such terms as she may dictate; and, these having been fixed by her, they must either elect to accept them, and submit to an enforcement of the lien against the land for the \$1,250, or surrender it to the appellant. Upon the return of the cause, if no statutory guardian appears for the infant defendants, the court should appoint a guardian *ad litem*, and a reasonable opportunity be given the parties to whom the land was devised by the will of H. B. Peck, and who are defending this suit, to elect whether they will submit to an enforcement of a lien against the land for the \$1,250; the guardian acting for the infants subject to the supervision of the court; and, if this be not done, then a judgment will be entered for the appellant, Catharine Peck, for the land.

Judgment reversed, and cause remanded for further proceedings consistent with this opinion. The cross-appeal is dismissed.

MEDLEY and others v. TANDY.

(Court of Appeals of Kentucky. May 12, 1887.)

1. PRINCIPAL AND SURETY—NOTICE TO CREDITOR—HUSBAND AND WIFE.

Gen. St. Ky. c. 104, § 11, provides that a surety may by notice in writing to the creditor require him to sue, and, if he fails to do so, such failure shall release the surety from all liability on the obligation. *Held*, that where a woman is surety, and afterwards marries, the notice to the creditor required by the statute is sufficient, if given by her husband.¹

2. HUSBAND AND WIFE—ACTION—JUDGMENT AGAINST HUSBAND.

In Kentucky, where husband and wife are sued upon a contract executed by her *dum sola*, it is not necessary to aver that the husband has received property by his wife; but, if a recovery is had against them, the judgment as to the husband must be to be levied only upon property that came to him by his wife, or might thereafter come.

Appeal from circuit court, Carroll county.

Warren Mountfort, for appellants. J. W. Rodman and Masterson & Grant, for appellee.

BENNETT, J. The appellee instituted suit in Carroll circuit court against the appellants, Herman Medley and his wife, Amanda, and E. J. Sanders, for the purpose of recovering judgment on a promissory note, dated the twenty-third day of August, 1880, and due 12 months after date, and executed to the appellee by E. J. Sanders and the appellant Amanda while she was a *feme sole*. Sanders made no defense, and judgment was rendered against him by default. The appellants defended the suit, and asked to be relieved from the payment of the note, upon the ground that the appellant Amanda was only a surety in the note, and that after their marriage the appellant Herman Medley instructed the appellee in person by writing to sue on said note, as he and his wife did not wish to be bound for the debt any longer. The appellee in his reply did not deny that the appellant Amanda was only surety in the note. Besides, the proof abundantly shows that she was only surety in the note. The appellee in his reply denied that he had been instructed by writing to bring suit on the note; also he alleges that, in a few days after the alleged instruction, the appellants verbally requested him not to sue on the note, and in obedience to that request he did not sue. Issue was joined on the latter

¹ Respecting the discharge of a surety in general for a failure to sue his principal, see Kennedy v. Falde, (Dak.) 29 N. W. Rep. 667, and note; Meriden Silver Plate Co. v. Flory, (Ohio,) 7 N. E. Rep. 757, and note; Kauffman v. Com., (Pa.) 8 Atl. Rep. 600; Ingals v. Sutliff, (Kan.) 13 Pac. Rep. —.

plea. A trial of the case by a jury resulted in a verdict and judgment thereon for the appellee; and, the appellants' motion for a new trial having been overruled, they have appealed.

By chapter 104, § 11, Gen. St., if a surety by notice in writing, served in person on the creditor, requires him to sue, and if he fails to sue, after receiving such notice, to the next term of a court having jurisdiction, at which he can obtain judgment, then such failure releases the surety from all liability on the obligation. The proof as it appears in the record shows conclusively that about the first of August, 1883, the appellant Herman Medley, by written notice addressed to the appellee, and which he received, directed him to sue on the note. The appellants swear that such was the substance of the written notice, and the appellee's son, who saw the notice after appellee received it, swears that such was its substance. And no witness contradicts this testimony.

But it is contended that, as the written notice was signed by the appellant Herman Medley, and not by the appellant Amanda, who was alone bound on the note as surety, that the notice was not such as the statute requires, and therefore placed the appellee under no obligation to sue. We cannot concur in this construction of the statute; for by chapter 52, art. 2, § 4, Gen. St., the husband is liable for any debt or responsibility of the wife contracted or incurred before marriage, to the amount or value of whatever he may receive by her independent of her real estate. And by section 1 of the same article, the husband has power to rent the real estate of his wife for not more than three years at a time, and receive the rent; and, if he appropriates such rent to his own use, he is liable, to that extent, for any debts of his wife contracted before marriage. He is also entitled to the use of his wife's real estate during her life; and, after the death of his wife, he is entitled to curtesy in her real estate, provided he has reduced it to possession during her life-time, and there has been issue born of the marriage. Also, her real estate being liable for her debts contracted before marriage, and the husband's right to its use during her life, and his right of curtesy therein being subject to the right of the wife's antenuptial creditors to have the land itself applied to the payment of her debts, it follows that he may be deprived of his right to the use of the land during the life of his wife, and his right of curtesy therein, by the land itself being subjected to her debts contracted before marriage. Also, his right to the use of the land during his wife's life being but a chattel interest, he may be made liable to the extent of the value of such use for any debt of hers contracted before marriage. For these reasons, if there were none other, the husband has a direct pecuniary interest in protecting his wife's estate from unjust demands, and to prevent her being made liable for unjust antenuptial debts, and to take such action as the law allows to relieve her from her antenuptial liabilities. So, to deny him such remedies as his wife would have were she still a *feme sole*, for her protection, would be manifestly unjust. But by virtue of marital relation, it is the right and duty of the husband to protect and guard the interest of his wife; to shield her estate from unjust demands; to take all legal steps to protect her property interests, and her legal rights growing out of her contracts or otherwise; and, when she is sued, to join with her, and make all proper defenses for her. This duty is devolved upon him by virtue of his marital relation; the law gives him this right for the protection of his wife and her property interests, which he cannot neglect without violating his duty, and which duty he can discharge independently of the wishes of his wife. For these reasons, also, the husband should not be denied the right to resort to any remedy the wife would have had for her protection had she remained a *feme sole*. It was therefore legitimate for the appellant Herman Medley, in his own name, and in his own personal right, as well as that of his marital right and duty to protect the interest of his wife, to give the notice to the appellee to sue; and, if he gave said notice in

either capacity, it was sufficient, and the jury should have been so instructed.

As to the defense that, within a few days after the notice was given, the appellants verbally requested the appellee not to sue, the appellant Herman Medley swears that neither he nor his wife made such request. The appellee, on account of his affliction, did not swear in the case, and there is no proof whatever contradicting that of the appellants. Nor is there any proof that the appellee and the appellants, or either of the latter, ever had an interview relative to that matter. The burden of proof to establish that fact was on the appellee; and the only evidence introduced by the appellee was that given by his son-in-law, Mr. Williams. He swore that after the fall term, 1884, of the Carroll circuit court, which was long after the appellee was notified to sue, that the appellant Herman Medley told him that "he was sorry that he had not made Tandy sue before." The appellant flatly denies this. The witness concludes his evidence by saying that "Medley at all times told me, when he spoke of the matter, that any waiting on Sanders was without his consent, and always told me to sue." Now, the notice having been given to sue, which is established beyond a reasonable doubt, and the improbability of the appellants, without any apparent cause, within three days thereafter, changing their minds, and directing the appellee not to sue, which is supported by the positive evidence of the appellant Herman Medley that no such request was made, are persuasive facts and circumstances too cogent and strong to be overcome by the testimony of Mr. Williams alone, to the effect that the appellant Herman Medley should have said, months afterwards, that "he was sorry that he had not made Tandy sue before." The jury could not have based their verdict upon the ground that no notice in writing was served on the appellee to sue. Their verdict, therefore, must have been based upon the ground that the appellants had, within a few days after the notice was given, changed their minds, and requested the appellee not to sue. In this we are constrained to say their verdict was clearly against the weight of the evidence.

Mr. Williams also testified, over the objections of the appellants, that, several months after the notice was given, Mrs. Medley told him that she did not want him to sue. This conversation occurred after one or more circuit courts had passed from the time of giving the notice. The evidence was incompetent, because by the failure of the appellee to sue at the next term at which he could have sued after receiving the notice the appellants were released from all liability on the note, and any request made by them, or either of them, after such release, was without any consideration whatever, and did not revive their liability on the note.

The appellee failed to allege in his petition that the appellant Herman Medley had received any personal estate by his wife, or that he had collected and appropriated any rents arising from his wife's land, or that he had realized any profits arising from the use of her land. Notwithstanding this the lower court rendered judgment against him for the debt, interest, and costs, which was to be "levied only on such property as he may have acquired from the said Amanda by virtue of his marriage with her." The appellants complain of this as error. They contend that no judgment could have been rendered on the petition against the appellant Herman Medley, because the petition failed to allege any of the foregoing matters in reference to the appellant's having received any estate from his wife; and that, to entitle the appellee to a judgment against him, the petition should have alleged what estate the appellant had received by his wife, and its value, and then have asked personal judgment against him for that amount. We cannot agree to this proposition. This court, in the case of *Beaumont v. Miller*, 1 Metc. (Ky.) 68, lays down the rule that in such action the plaintiff need not allege that the husband received any estate, outside of land, by his wife; that, in the absence of such allegation, the plaintiff is entitled to judgment against the husband, to be levied only upon such estate as came to him by his wife independent of her real

estate. The logic of that case is sound, and to the reasons therein announced it may be added that the rule contended for by appellant might subject the creditor to a multiplicity of suits before he could obtain his rights, because, if the husband, at the time the debt became due, had received no estate from the wife outside of real estate, then no suit could be maintained against him, or if he had received some estate by his wife, but not enough to pay the debt, then judgment could be obtained against him only to the extent of the value of the property received, and the suit dismissed as to the balance of the debt; and after a while another suit, if the husband had acquired any other property by his wife, would have to be brought to recover judgment against him for the value of that property, and so on. Also, the rule contended for would deprive the creditor of the benefit of a judgment against the husband, and a return of no property found so as to reach such estate as could not be otherwise reached. For these reasons, together with the reasons expressed in the case *supra*, we are not inclined to overrule it.

The judgment of the lower court overruling the appellants' motion for a new trial is reversed, and the case is remanded, with directions to grant appellants a new trial, and for other proceedings consistent with this opinion.

CLEMENTS v. RAMSEY and others.

(Court of Appeals of Kentucky. May 12, 1887.)

1. GUARDIAN AND WARD—SALE—GUARDIAN PURCHASING.

A guardian brought suit to obtain an order directing the sale of his ward's land. The sale being decreed, the guardian purchased the land for himself individually; and, as the purchase money was to go to him as guardian, no bonds were required of him, but the commissioner made a deed directly to him. *Held*, that the sale to him was not void, and one who purchased from him was entitled to hold the land as against the ward.

2. SAME—ACTION AGAINST GUARDIAN—NEXT FRIEND.

An infant may maintain an action by his *prochein ami* against his guardian and sureties, where the guardian has failed to make a settlement, and pay over money due the infant, is insolvent, and has left the state; and, as the chancellor is charged *ex officio* with the care of infants, the action is properly brought in equity. But the court should not direct the amount recovered of the guardian to be paid to the infant, or to the next friend, but to be paid into court.

3. SAME—INFANT COMING OF AGE PENDENTE LITE—PARTIES.

While the action was pending, and when ready for trial, the infant came of age, and that fact was suggested of record, and he was allowed to prosecute the action thereafter in his own name. *Held*, that this was proper. It was not necessary to file an amended pleading making the infant a party.

Appeal from circuit court, Union county.

L. W. Long, Hughes & Hughes, and W. P. D. Bush, for appellant. Ken Chapeze, for appellees.

PRYOR, C. J. William Southern qualified as the statutory guardian of Forest Ramsey, and gave bond as required by law. The ward owning an interest in land lying in Hopkins county in this state, the guardian instituted proceedings in the Hopkins circuit court for a sale of the land, as then authorized by chapter 86 of the Revised Statutes. In order to obtain a sale, and by virtue of the statute empowering the chancellor to adjudge a sale of realty belonging to infants, a bond was executed by the guardian, with the appellant Aaron Clements as surety, conditioned "that the guardian would legally account for all money that comes into his hands as such, and that he would faithfully discharge all the duties imposed on him by the statute authorizing such a sale, or under any judgment or decree of the court in pursuance thereof." This bond, therefore, made the surety liable for all moneys coming to the hands of the guardian as such from the sale of the infant's land, and the statute requires that the proceeds of the sale of the land shall be paid

over to the guardian. The land was sold as directed by the judgment, and purchased by William Southern, the guardian, in his own right, for \$3,000; and the commissioner reported that, the guardian being the beneficiary, no bond was required, evidently meaning that, as the guardian was entitled to the money, he required no bond. In a few months after this, the report of sale was confirmed, and a deed directed to be made to Southern in his individual right. This, then, was a confirmation by the court of the acts of the commissioner; and, as the guardian was entitled to the purchase money for the benefit of his ward, (there being more than one,) it was useless to require the money be paid into court by the guardian, and then repaid to him. The conveyance canceled his obligation to pay, and invested the guardian with the title in his own right, who, after this, sold the land for \$2,800. The guardian settled with his ward Henry Ramsey after he had arrived at age, but made no settlement of his accounts with Forest Ramsey, who was an infant. The infant, Forest Ramsey, filed this petition in equity in the Union circuit court, by his *prochein ami*, against the guardian and his sureties,—the surety in the county court bond, and the surety Clements in the bond executed in the circuit court of Hopkins county for the sale of the land,—in which the insolvency of the guardian is alleged; that he has removed from the state without making any settlement of his accounts; and asking for a settlement, and that the liability of the sureties be fixed, and judgment against Clements, the surety in the circuit court bond, for the interest of the infant in the land, and for all equitable relief.

There was a demurrer to the petition, and it is now urged that the infant plaintiff had no right, by his next friend, to institute this action against the guardian and his sureties to require the guardian to pay over the money to the next friend or to the infant. The prayer of the petition, in this character of proceeding, cannot affect the cause of action set forth in the petition. Here was an insolvent guardian who had left the state without making any settlement of his accounts, leaving his sureties denying any liabilities for much of the ward's estate; and, under such circumstances, a court of equity has been applied to that a settlement may be had of the accounts of the guardian, and the estate of the infant secured or ascertained by determining the liability of the surety. The infant plaintiff had in fact no other remedy; and, being the ward of the chancellor and deserted by his guardian, it was eminently proper that a settlement should be had, and the liability of the sureties determined. The forum selected to try the question as to the liability of the guardian was the proper one; and, if not, no objection was made to the proceeding on that ground. It is true, the next friend might have been authorized to sue at law, or the surety entitled to a common-law verdict, but no such demand was made; and, the case being within the jurisdiction of the chancellor, a settlement was directed and made, by which the liability of the surety was ascertained. While the chancellor would not direct the money due by the surety to be paid to the infant or to the next friend, there is no reason why the surety should not have been required to pay the money into court, and on his failure to do so an ordinary execution would have issued to compel payment, or, if the facts authorized or required it, a summary remedy by attachment to recover the debt. Upon the execution of a bond by the next friend, with the money in court, the chancellor could preserve it for the infant.

While this action was pending, and when ready for trial, the fact was suggested and shown of record that the infant plaintiff had arrived at age, and he was therefore permitted to prosecute the action in his own name. It is objected that such a proceeding is making a party plaintiff to an action without an amended pleading, and no time given the defendants to respond. There was in fact no party plaintiff made to the action. Forest Ramsey had been the plaintiff from its inception. He had instituted the action in his name by a next friend, who stood responsible for the costs; but, when he ar-

rived at age, the next friend was no longer a necessary party, and the action abated in fact as to him, and proceeded to judgment in the name of the real plaintiff, and with whom the litigation had been had from the bringing of the action up to the rendering of the judgment.

It is argued, however, that as the infant, when he instituted the action, had no right to a judgment for the money, his arrival at age did not enlarge his rights. The only reason the infant was not entitled to a judgment consisted in the fact that at law and in equity he was regarded as incapable of managing his estate; and the chancellor, instead of placing it in his hands, would have placed it with his commissioner to loan out, or permitted the *prochein ami* to hold it for the infant upon his giving bond and surety. If the chancellor could direct its payment by the surety for that purpose, we perceive no reason why he could not direct its payment to the infant on being satisfied the disability no longer existed. The action had been pending all the while in the name of Forest Ramsey, and the defense had every opportunity of making any defense that he could have made if Forest Ramsey had been an adult, and instituted the action as such.

The case of *Irvine v. McDowell*, cited by counsel for the appellant, and reported in 4 Dana, 629, has no application to the case. In that case the guardian and ward undertook, in the year 1818, to sell the land of the ward; and, when sold, the guardian receiving the money, the ward attempted to make the sureties of the guardian responsible. The guardian nor ward had the right to sell the land. The guardian had the right to the rents and profits,—nothing more. The sale by the guardian was not authorized by law, nor was it an official act. In the present case the chancellor adjudged the sale under the statute, and the bond signed by the appellant, Clements, executed to secure the infant in the purchase money. This was the prime object in requiring the bond, and without it the chancellor could not have adjudged a sale. The purchase was made by the guardian in his own right. Having been made by the guardian, the chancellor could have refused to confirm the sale. He saw proper to confirm it, and directed a deed made to him by the commissioner. That deed invested him with title; and, when he sold to a third party, the latter held it against the infant and all others claiming under him. The sale was not void. The infant had no right of election, because the land had been sold to an innocent party by one invested with a perfect title. If the infant could elect, he has elected to recover the purchase money. This secures to the guardian and surety relief from any further litigation with reference to the land or its proceeds. The fact that, years before the appointment of Southern as guardian, some one else had been appointed and never removed does not render the bond executed by Clements void, or release him from responsibility.

The bond is binding on the principal and surety, and the mode of release is to pay the appellee his money. See *Cotton v. Wolf*, 14 Bush, 239.

Judgment affirmed.

YORK v. STEELE.

(Court of Appeals of Kentucky. May 14, 1887.)

PRACTICE—TRANSFER TO EQUITY DOCKET—EJECTMENT.

An action of ejectment is purely legal in its nature; and the mere fact that the mode of holding or the evidences of title are set out in the pleadings by either the one side or the other does not convert the action into an equitable proceeding so as to authorize its transfer to the equity docket.

Appeal from circuit court, Carter county.

E. F. Dulin and *R. D. Davis*, for appellant. *Wm. Bowling*, for appellee.

PRYOR, C. J. The only question involved is as to the ownership of the 53 acres of land. The appellee instituted an action of ejectment for its recovery,

and the appellant pleaded title in himself. The issue was purely legal, and the mere fact that the mode of holding or the evidences of title were set out in the pleadings either by the one side or the other did not convert the action into an equitable proceeding. The issue remained the same. The appellee must show title. The case, therefore, should not have been transferred to equity against the objections of the appellant. He was entitled to a trial by jury of the legal issue. Judgment reversed for proceedings consistent with this opinion.

LOTH and another v. CARTY and others.

(*Court of Appeals of Kentucky, May 12, 1887.*)

1. CHATTEL MORTGAGES—FUTURE ACQUIRED PROPERTY—RIGHTS OF CREDITORS.

A mortgage of property, to be acquired *in futuro* is void as against creditors.¹

2. LANDLORD AND TENANT—LIEN—ASSIGNMENT FOR BENEFIT OF CREDITORS.

Where the tenant assigns his property for the benefit of creditors, and the assignor brings suit to settle the estate, the landlord need not sue out a distress warrant or attachment for his rent in order to preserve his lien.

3. SAME—ACTION.

And, although the statute requires that the landlord shall assert his claim for rent within three months after it is due, yet, where the tenant's assignee for the benefit of creditors brings suit to settle the estate within the three months, and avers that the landlord has a lien, this is sufficient to preserve the lien. The assignee represents the landlord, and holds the estate in trust for him along with other creditors.

4. SAME—REMOVAL OF PROPERTY.

The statute provides that, if property be removed openly and without fraudulent intent from the leased premises, the landlord's lien shall be lost unless asserted within 15 days. *Held*, that this provision does not apply where the property is removed by the assignee for the benefit of creditors.

5. SAME—ASSIGNEE'S LIABILITY FOR RENT.

Where the assignee retains possession of the leased premises, he is liable for rent under the lease, and the landlord is entitled to be paid therefor out of the proceeds of sale in the assignee's hands.

Appeal from circuit court, Fayette county.

Z. Gibbons, for appellants. *H. Marshall Buford*, for appellees.

HOLT, J. The lease of W. A. Varty of the store-house of the appellee M. E. Carty began May 1, 1882, and ended May 1, 1883, at \$1,000 per annum rent, payable monthly. It was paid to June 1, 1882, so that of the unpaid rent the first installment became due on July 1, 1882. On July 7, 1882, the tenant mortgaged to the appellants, Loth & Haas, his entire stock of merchandise then upon the leased premises, and the mortgage by its terms included "all goods that may hereafter be added to said stock." James Gallahue, as one of Varty's creditors, attached the goods on August 14, 1882; and subsequent thereto, but upon the same day, the debtor made an assignment to one Parker of all his estate for the benefit of his creditors. The trustee brought an action to settle the trust on September 19, 1882, to which the appellants and Mrs. Carty were defendants. The petition averred that they were claiming liens of some character against the assigned estate, and called upon them to assert them. The appellee Carty was summoned on September 21, 1882, to answer, but for some unexplained reason she did not do so until June 23, 1883, when she asserted a preferred lien or landlord's claim for her rent from June 1, 1882, to May 1, 1883. The attaching creditor, Gallahue, also claimed a lien superior to that of Loth & Haas as "to so much of the stock

¹ Respecting the validity of chattel mortgages when the mortgagor is permitted to retain possession of the property, and sell the same in the usual course of trade, see *Hubbell v. Allen*, (Mo.) 3 S. W. Rep. 22; *Hisey v. Goodwin*, (Mo.) 2 S. W. Rep. 567, and note; *Wilson v. Voight*, (Colo.) 13 Pac. Rep. 726; *Byrd v. Forbes*, (Wash. T.) Id. 715; *Howard v. Wulfekuhler*, (Kan.) Id. 566; *Fisher v. Sytters*, 10 N. E. Rep. 306.

of goods as had been purchased after the execution of their mortgage, and before the assignment." Upon the other hand, this was denied by them; they claiming that their mortgage, by virtue of its terms, attached to them as they were added to the stock. They also deny the right of Mrs. Carty to any lien for rent—*First*, because she never sued out any distress warrant or attachment for it; and, *second*, because if this were not necessary to create or preserve the lien, yet she failed to assert it within three months from the time it became due.

As the question as to her claim apparently presents more trouble in the true solution of it than that between the appellants and the attaching creditors we will first consider the latter. The clause of the mortgage relating to anything that might thereafter be added to the stock was valid between the parties; but the mortgagees thereby acquired no available right to such subsequently acquired property as against the creditors of the mortgagor. The general rule is that a mortgage of property to be acquired *in futuro* is void, and cannot avail against the claims of other creditors. *Ross v. Wilson*, 7 Bush, 29; *Vinson v. Hallowell*, 10 Bush, 538. We do not regard the case of *Zaring v. Cow's Assignee*, 78 Ky. 527, as in conflict with this rule. It is true that the facts of that case are not fully shown by the report of it; and it does not appear in it, as it does in this case, that any creditor had intervened by legal proceedings prior to the deed of assignment. Such an effort to mortgage what the debtor may subsequently acquire is constructively fraudulent; and, when the court in the last-named case said: "Such a conveyance is evidently good between the parties, and the lien attaches so soon as any stock is added; and, being good between the parties, it is good as to antecedent creditors, at least until attacked for fraud,"—it no doubt merely meant that it, being merely constructively fraudulent, was valid until another creditor asserted his claim, and denied the validity of the mortgage as to property acquired after its execution. In such a case the attacking creditor need only state the fact that the property was obtained subsequent to the giving of the mortgage, and is only embraced by it by a clause attempting to cover property acquired *in futuro*. This of itself makes it constructively fraudulent as to other creditors; and, when averred, constitutes an attack upon it for fraud, and the portion of the opinion cited no doubt meant that such a clause in a mortgage was valid as to antecedent creditors if they remained silent.

We now return to the other question. In *Petry v. Randolph*, 7 Ky. Law Rep. 754, the question presented was whether a landlord whose rent had been due more than 120 days, but less than 6 months, could under the statute distrain for it after the tenant had assigned his property for the benefit of his creditors. It was there held that, as between the landlord and tenant, the former could distrain for it within 6 months from the time it became due; that as to *lienholders* he must do so within 90 days, and as to all other persons having rights or equities against the property of the tenant he must do so within 120 days; and that in case of an assignment, the rights of other creditors having thereby intervened, he must do so within the last-named period; and that the sections of the statute providing that before the lienholder, or an officer under an execution or attachment, can remove the tenant's property from the leasehold premises, he must pay to the landlord a year's rent due or to become due, related to cases where the landlord had not lost his right as above indicated. The question now presented is, however, a different one. Unless the law requires what is needless, clearly where the tenant has assigned his property for the payment of his creditors, and the trustee has brought a suit to settle the estate, the landlord need not sue out a distress warrant or attachment for his rent. This would involve needless trouble and cost.

It is, however, urged that in this instance the landlord did not assert the lien until the expiration of three months after the rent became due. This is

true as to nearly all of it; but the assignment was made within three months of the time when the first unpaid installment became due. The suit by the trustee to settle the estate was brought within this time, and the petition averred that Mrs. Carty had a lien. By virtue of the assignment the property was held in trust for the payment of her debt as a lien claim. The trustee represented her; and, when the suit was brought, the estate was *in custodia legis* for the satisfaction of her claim. The law made it the duty of the trustee to pay the lien claims first, and then the general creditors. He held the property for this purpose as the representative of the beneficiaries; and, upon the bringing of the suit to settle the trust, the matter was already in the charge of the court. Then, why the necessity of the landlord proceeding by distraint, or how can it be said that her claim is barred by time when the property had already been placed in the hands of a party representing her for its payment? It is true that the landlord has a statutory right merely, and a legal remedy only. Undoubtedly the law requires vigilance upon his part in the assertion of his rent claim. This is to prevent him from enabling the tenant to obtain false credit. No such reason exists, however, in a case like this, where the tenant has already parted with the title to it, and it is in trust for the payment of the landlord. The statute provides that if the property be removed openly, and without fraudulent intent, from the leased premises, and not returned, the lien of the landlord shall be lost unless asserted within 15 days from the time of removal. Here it appears they were removed, and in fact sold as early as December 15, 1882. It was, however, done by operation of law, and by the assignee, who represented the appellants as well as all the other creditors of the tenant. The assignee, in this instance, retained control of the rented premises until the expiration of the lease; and we perceive no reason, either equitable or legal, for depriving Mrs. Carty of her right to be paid out of the proceeds now in the trustee's hands arising from the sale of the property which was upon the rented premises; nor do we think it was error for the court to order the expenses of settling the trust to be paid out of this fund, because they were necessary to the settlement of the trust and the rights of the various creditors, including the appellants. Judgment affirmed.

NORMAN and others v. BOAZ and others.

WATSON and others v. SAME.

(Court of Appeals of Kentucky. May 12, 1887.)

1. TAXATION—CONSTITUTIONAL LAW—RACE DISCRIMINATION.

White persons will not be heard to object that an act under which a tax has been levied is unconstitutional because the property of *colored* persons is made subject to the tax, while they are neither allowed to vote upon the question of taxation, nor to participate in the benefits for which the tax is levied.¹

2. SAME—ELECTION—VALIDITY.

The Kentucky act of March 17, 1884, authorized submitting to a popular vote the question of levying a tax to build a school-house in Fulton county, and provided that the clerk who was appointed to record the votes at the municipal election for officers should, at the same time and place, record the votes given upon the proposition to levy the tax, and that he should make out a poll-book with two columns, for the purpose of recording the votes given for and against the tax. The clerk did not prepare such a book, or record the votes in any book. But a third person, a mere private individual, on his own motion, kept a record of the votes in a book prepared by himself; and, although he was in the same room where the election for municipal officers was being held, neither the judge nor clerk of that election gave any attention to his proceedings. *Held*, that the election was not valid, and no tax could be levied in pursuance of the vote cast at it.

¹ Respecting the operation and effect of the thirteenth, fourteenth, and fifteenth amendments to the constitution of the United States, see Railroad Tax Cases, 13 Fed. Rep. 783; *Smoot v. Kentucky Central Ry. Co.*, Id. 343; *Le Grand v. U. S.*, 12 Fed. Rep. 583; *Ex parte Thornton*, Id. 553; *U. S. v. Buntin*, 10 Fed. Rep. 736.

3. SAME—CURATIVE STATUTE—EFFECT OF.

Pending an action by a tax-payer to enjoin the collection of the tax voted at the election, the legislature passed a curative statute declaring the election as lawful as if held in strict compliance with the law. *Held*, that the irregularities were not mere informalities, but affected the substantial and vested rights of the tax-payers. The election was therefore void, and could not be vitalized by the curative act.

Appeal from circuit court, Fulton county.

Robertson, Smith & Robbins, for appellants. *C. L. Bandle*, for appellees.

LEWIS, J. By an act of the general assembly entitled "An act to incorporate 'Carr Institute in Fulton County,'" approved March 9, 1882, and an amendatory act approved March 17, 1884, the college therein mentioned was declared a common school, and as such entitled to draw from the common-school fund of the state each year all the money due the school-district in which it is situated; and, for the purpose of erecting a suitable building, it was provided that the question of a subscription of \$5,000 by the district, to be paid for by taxation, should be submitted to the qualified white voters of the district on the first Saturday in May, 1884, and, in the event of the votes then cast being in favor of such subscription, the trustees of the college were to be authorized to annually, by some suitable person appointed by them, make an assessment of the taxable property in such district, and to levy a tax not to exceed 30 cents on the \$100 of property subject to taxation, and a poll-tax of not exceeding \$2 on each white tithe, for the purpose of enabling them to pay one-fifth of the subscription and accrued interest; the collector of the tax to be appointed by the trustees. Under these acts an attempt was made, at the time indicated, to hold an election upon the question of the subscription mentioned, and also of nine trustees of the district, as required thereby, when it is claimed the proposition for the subscription was carried by a majority of the votes cast, and the candidates were duly elected trustees. Afterwards, appellees, assuming authority to act as such trustees, caused an assessment of the taxable property of the district to be made by a person appointed by them for that purpose, made a levy of \$1.500 tax on the district for the year 1885, and appointed appellee Boaz to collect the taxes so laid. These two actions, consolidated and tried together, were instituted in July, 1885, by residents and tax-payers of the district, for the purpose of obtaining an injunction to perpetually restrain appellees, claiming to be trustees, from further proceeding to levy and Boaz from collecting said tax, and from distraining and selling their property therefor. And the lower court having dissolved the temporary injunction, and dismissed both the actions, the plaintiffs prosecute this appeal.

Before considering the grounds upon which the plaintiffs seek relief, we will notice the position assumed by counsel for appellee, that an injunction will not lie in cases of this sort. Whatever may be the rule in other states, as said in *Gates v. Barrett*, 79 Ky. 295, "the right to have an injunction to restrain the collection of an illegal tax has been so long recognized and acted upon in this state that it is unnecessary to stop to inquire upon what ground that jurisdiction is exercised by courts of equity." However, these are not cases in which it is sought to restrain the collection of taxes alleged to be illegal merely by reason of irregularity or misuse of authority by officers duly elected and qualified to act; but the remedy is against persons who, it is stated, are attempting to cause an assessment of property, lay taxes, and cause the collection thereof, without being officers with any authority whatever.

The first ground upon which plaintiffs ask relief is that the two acts are unconstitutional, because the property of colored persons residing in the district is made subject to the tax, while they are neither allowed to vote upon the question of the subscription, nor to participate in the benefits derived from the expenditure of the money raised by the taxation provided for. As

the plaintiffs are white persons, and consequently not at all affected by the alleged discrimination against colored persons of the district, the court, according to a well-settled and conservative rule, will not listen to the objection made by them to the constitutionality of the two acts on that account. But we do not think, according to a proper and reasonable construction of the acts, the property in the district of colored persons is made subject to taxation to pay the subscription authorized thereby; and, as only the property of white persons can be subject, the acts, according to the decision of this court in *Marshall v. Donovan*, 10 Bush, 681, cannot be regarded as in violation of the constitution of the United States. In that case the same objection was made to the statute as is made here; and this court, after a full consideration and discussion of the question, held that while, if colored persons were taxed for school purposes, and the money expended for the exclusive benefit of the whites, the taxation would be unconstitutional as to and might be resisted by the former, that fact would not render the act unconstitutional as to the latter.

By the act of March 17, 1884, the same clerk who was appointed to record the votes at the municipal election of police judge, marshal, and trustees of the town of Fulton, was required, at the same time and place, and in the same poll-book, to record the votes given upon the proposition for the subscription to erect the college building, and for the nine trustees of the school-district authorized to be then elected; and he was required, in making out such poll-book, to prepare two columns for the purpose of recording the votes given for and against the proposition for the subscription, and to propound to each person offering to vote the distinct question how he desired to vote upon that proposition. But it is alleged by the plaintiffs in each of these cases, and proved, that the clerk of the municipal election did not prepare the poll-book, as required by the act of 1884, for recording the votes upon the proposition to make the subscription and for the nine trustees of the school-district, nor did he in any book record the votes given for either purpose. On the contrary, the only record of such votes was made by a private person on his own motion, and in a book prepared by himself; and, though he was in the same room when the election of municipal officers was being held, it is conclusively shown that neither the clerk nor judge of that election did or could supervise or give attention to his proceeding. But he, without being appointed for the purpose, without being qualified or authorized by law to be qualified, and without the presence of judges to pass upon the qualification of voters, not only recorded the votes attempted to be given, but assumed authority to decide who were entitled to vote. It seems to us that an election attempted to be thus held cannot be valid for any purpose, nor can the book in which the votes purport to have been recorded by such unauthorized person be taken as evidence that either a majority of votes, or any votes, were cast in favor of the subscription, or that persons claiming the power to act as trustees of the school-district were so elected; for the conditions upon which the subscription was authorized by law have not in any respect been complied with, nor have the persons assuming the right to act as trustees in virtue of that pretended election been thereby invested with any official authority whatever. As, therefore, when these two actions were instituted, the school-district was not liable to taxation for the erection of the college building, and appellees had no power as trustees to levy a tax for such purpose, or to authorize appellee Boaz to collect it, it would seem that appellants were entitled to the relief sought by them.

But January 12, 1886, while the actions were pending, an act was passed, the first section of which is as follows: "That the election held in the town of Fulton * * * on the first Saturday in May, 1884, be, and the same is hereby, declared lawful, as much so as though it had been held and conducted in every respect in strict compliance with the law authorizing the election to

be held; and all the acts and doings of the trustees then elected, within the scope of the authority given the trustees of Carr Institute, when elected, shall be, and are hereby, declared lawful." And we will now consider what effect that act has upon the rights of the parties to these actions. A general rule applicable to retrospective statutes is as follows: "If the thing wanting, or which failed to be done, and which constitutes the defect in the proceedings, is some thing the necessity for which the legislature might have dispensed with by prior statute, then it is not beyond the power of the legislature to dispense with it by subsequent statute. And if the irregularity consists in doing some act, or in the mode or manner of doing some act, which the legislature might have made immaterial by prior law, it is equally competent to make the same immaterial by a subsequent law." Cooley, Const. Lim. 468.

The question then arises whether the manner in which the election was held by which it is claimed the proposition for the subscription was carried, and the nine trustees were elected, is a mere irregularity or informality not affecting the substantial and vested rights of appellants or tax-payers. It is true that it is not indispensable to the validity of a statute providing taxation for a local purpose that a majority, or any number of those to be taxed therefor, should at an election vote in favor of such taxation. And the legislature might have authorized the subscription for the erection of the college building, and the imposition of taxation upon the school-district, through the agency of trustees of Carr Institute named in the original acts, without submitting the proposition to the voters, or an election by them of trustees. *Slack v. Marysville & L. R. R. Co.*, 13 B. Mon. 22. But, by the terms of the statute of 1882 and 1884, the taxation was made to depend upon the sanction by a majority of the votes cast at an election to be held by officers appointed and qualified according to law,—not by a self-appointed and irresponsible private person; and the power to impose and cause to be collected the taxes was conferred only upon trustees duly and legally elected. When these actions were commenced, "the law was therefore for appellants, and the court would have so adjudged." And, as has been held by this court, the legislature has no right to intervene during the pendency of an action, and declare "that certain acts, which were unauthorized and illegal at the time of their commission, should be deemed and held legal and valid," where the substantial rights of the parties, either plaintiffs or defendants, are thereby affected. *Gaines v. Gaines*, 9 B. Mon. 295; *Allison v. Louisville, H. & W. R. Co.*, 9 Bush, 247. Of course, this rule does not apply when the curative act relates only to irregularities or informalities. But we do not regard the attempted election as merely defective or irregular, but it was absolutely void, and conferred no authority upon appellees or any others to impose taxation on the district. There was, then, in fact nothing for the curative statute to operate upon; and the recital in the preamble to that statute shows the legislature never intended to render legal and valid what, as this record shows, was void. But it was therein erroneously assumed that the person who acted as clerk was duly elected and qualified to act and record the votes upon a poll-book under the supervision of judges of the election.

In our opinion, therefore, the act of January, 1886, did not, nor was it intended to, have the effect of rendering valid the pretended election held in the manner and by the person shown by this record. Consequently the judgment of the lower court is reversed, and cause remanded, with directions to perpetuate the injunction in each case.

LANCASTER v. COMMONWEALTH.

(Court of Appeals of Kentucky. May 19, 1887.)

1. HOMICIDE—INSTRUCTIONS—SELF-DEFENSE.

Where, in criminal prosecutions for homicide, malicious wounding, or other offenses against the person, the facts raise any issue as to whether the accused acted in self-defense, the jury should be fully instructed how or under what circumstances the accused could exercise the right of self-defense, and the whole of the law on the subject should be given to them.

2. SAME.

Although this was not done in this case, the court refuses to reverse, as it appears that the accused sought a quarrel with the injured man, and attacked him when he was endeavoring to avoid the accused.

Appeal from circuit court, Mercer county.

P. B. Thompson, Sr., for appellant. *P. W. Hardin*, Atty. Gen., for the Commonwealth.

HOLT, J. Upon the trial of the appellant, J. W. Lancaster, for the malicious wounding of John Vandavie, the accused asked the court to give this instruction to the jury: "If the jury from the evidence believe that at the time Lancaster cut and wounded Vandavie, (if they believe it is proven beyond a reasonable doubt that Lancaster did cut and wound him,) that he (Lancaster) had reasonable grounds to believe and did believe that he was in danger of great bodily harm or death, or it reasonably appeared to Lancaster that he was in danger of such bodily harm or death, then he (Lancaster) had the right to use such means as were necessary, or reasonably appeared to him to be necessary, to protect himself against such bodily harm or death. The danger of bodily harm or death need not be actual, but only apparent." The request was refused, and it is now urged as a ground for a reversal that the law of self-defense was not given to the jury.

It is said, however, that this was done by the first instruction given to the jury, to-wit: "The court instructs the jury that if they believe from the evidence beyond a reasonable doubt that the defendant, J. W. Lancaster, in Mercer county, before the finding of the indictment herein, willfully and maliciously, and not in his necessary or apparently necessary self-defense, did cut and wound with a knife, with intent to kill, John Vandavie, but of which cutting and wounding he did not die, they will find the defendant guilty, and fix his confinement in the penitentiary not less than one year nor more than five years."

It is true that by it the jury were told that they could not convict the appellant if the wounding was done "in his necessary or apparently necessary self-defense," but they were not informed by any instruction how or under what circumstances the accused could exercise this right, nor was it defined to them. This should always be done in a proper case. The whole of the law of self-defense should then be given to the jury. The counsel for the appellant is correct in contending that it was not done in this instance. The law of self-defense, however, is but that of necessity. The evidence in this case shows that the appellant provoked and brought on the difficulty; that he declared he had been desiring to do so for a year; and that he cut the injured, and so far as the evidence shows, unarmed, man when the latter was trying to avoid the difficulty by getting out of the way. Under these circumstances the instructions as given embraced the law of the case. Indeed, so far as they speak of self-defense, they are more favorable to the accused than he had a right to demand; and the case, in our opinion, falls within that provision of the Criminal Code which forbids the reversal of a judgment of conviction for an error of law if, upon a consideration of the entire case, the court is satisfied that the substantial rights of the accused have not been prejudiced thereby. Judgment affirmed.

DUNCAN v. COMMONWEALTH.

(Court of Appeals of Kentucky. May 19, 1887.)

BURGLARY—ALLEGATION OF VALUE—PUNISHMENT.

Gen. St. Ky. c. 29, art. 5, § 4, provides a punishment for any one who shall feloniously break into any dwelling-house, and feloniously take away anything of value, although the owner or any other person may not be there. *Held*, (1) it does not make any difference, under this section, how great or how little may be the value of the thing taken, and an allegation that the article taken was of the value of five dollars need not be proved; (2) where the offense of felonious breaking and taking away is charged and proved, the punishment cannot be for the mere larceny only; (3) nor does it make any difference whether, if the owner or other person be present at the commission of the offense, he does or does not object or protest.

Appeal from circuit court, Nicholas county.

Hanson Kennedy and *John F. Morgan*, for appellant. *P. W. Hardin*, for appellee.

LEWIS, J. The indictment under which appellant was tried and convicted is for the offense of feloniously breaking the dwelling-house of James Boyd, and feloniously taking therefrom silver spoons of the value of five dollars, denounced by section 4, art. 5, c. 29, Gen. St. It is stated substantially in the indictment that appellant broke and entered the house by raising a window thereof, and taking therefrom the spoons described; neither the owner nor any other person being there at the time. Upon the trial the wife of the owner of the house testified that she was, on the day the offense is charged to have been committed, returning from a visit to a neighbor; and, when she got to a point between 200 and 300 yards of the house, saw appellant enter it in the manner mentioned, and in a short time come out of it, and approach to within about 150 yards of where she was, and then turn and go along a path leading to his (appellant's) house. She further testified that, after going into the house, she missed the spoons, and thereafter charged appellant with the offense. She is corroborated, to a considerable extent, by her husband and another witness; and, while she was contradicted in some important particulars by others, we are not authorized to disturb the verdict of the jury because contrary to the evidence, for they evidently believed her testimony; and of her credibility they were the exclusive judges.

We do not think her statement that on Friday morning her husband found the spoons that Jack had stolen hanging on the gate-post, could have prejudiced his substantial rights; for her husband himself testifies to the fact of finding the spoons; and whether the appellant stole them or not was to be determined by the jury alone upon the evidence, and doubtless they did in that way, and not upon the opinion of the witness, arrive at their verdict.

It was not proper to permit the witness Banta to state that Boyd told him, the next day after it occurred, that appellant had broken into his house. But in view of the facts testified to by Boyd and his wife, corroborated by other witnesses, we are satisfied that statement did not substantially prejudice appellant.

As one of the grounds for a new trial, appellant stated in his affidavit that he had discovered what he could prove by two persons who were not examined on the trial, the substance of which was that Mrs. Boyd told them, a day or two after she missed the spoons, that she did not know who had stolen them; but that, after they were hung on the gate-post, she then believed Jack Duncan, appellant, got them. This evidence, even if it had been before the jury in the precise form stated in the affidavit, would not have affected the verdict of the jury; for the simple fact the spoons were hung on the gate-post, in the absence of knowledge of the person by whom they were put there, could not have had any influence on the belief of Mrs. Boyd one way or another. Her statement is she saw appellant go into the house, and afterwards missed

the spoons, and two or three days thereafter charged him, as he admits, with having taken them, and the next day after that conversation they were found on the gate-post.

For appellant two instructions were asked, which it is contended were erroneously refused. The first one of them is, in substance, that if appellant broke and entered the dwelling-house in the presence of Boyd, or some member of his family, without objection or protest by such person, and took therefrom silver spoons of the value of five dollars, they must find him not guilty. By the second the court was asked to instruct the jury that, upon the same hypothesis, they could find him at most guilty of petit larceny, the property taken being of the value of five dollars.

So much of the section under which this indictment was found as is applicable is as follows: "If any person * * * shall feloniously break any dwelling-house, * * * and feloniously take away any thing of value, although the owner or any person may not be there, he shall be confined in the penitentiary not less than two nor more than ten years." It does not make any difference, under that section, how great or how little may be the value of the thing feloniously taken away from a house feloniously broken, and it was not necessary to aver in the indictment anything more in respect thereto than that the spoons were of value. And certainly the allegation that the thing taken was of value as much as five dollars did not render the indictment defective. Nor, where the offense of felonious breaking and felonious taking away is charged and proved, can the punishment be for the mere larceny only, either grand or petit larceny. The offense may be complete, whether the owner or any other person be present; and it does not, therefore, make any difference whether, if the owner or other person be present, he does or does not object or protest; for if without regard to the intent with which a person may break a dwelling-house and carry away property of value, his guilt must be determined by the conduct of the owner, it would follow that he might escape punishment simply because the owner was too timid to protest or weak to resist.

Perceiving no error to the prejudice of the substantial rights of appellant, we affirm the judgment.

ROBINSON and others v. HENNING and others.

(Court of Appeals of Kentucky. May 19, 1887.)

SPECIFIC PERFORMANCE—DEFECT IN TITLE—DISCLAIMER.

A married woman owned land as her separate estate, which she and her husband conveyed upon a merely formal consideration of one dollar, as recited in the deed. Plaintiff, becoming the owner of the land, sold it to defendant, who refused to accept the title because the married woman had not received valuable consideration for her conveyance. In a suit for specific performance, the married woman and her husband filed their answer, disclaiming any interest in the land, and ratifying their former deed. *Held*, that defendant might properly be compelled to take the title.

Appeal from Louisville chancery court.

This is an action brought by the appellee Henning against the appellant Robinson to compel the latter to specifically perform a contract to purchase land. Robinson resisted specific performance, on the ground of a defect in the title. The land was originally owned by Mrs. Mary V. Jewell, a married woman, as her separate estate, and was conveyed by her and her husband to one Meriwether, who conveyed it to plaintiff Henning. The deed from the Jewells to Meriwether was made upon a mere formal consideration of one dollar, as recited in the deed. Robinson based his objection to the title upon this fact: that the consideration of the married woman's deed conveying her separate estate was a formal, and not a valuable, one. Jewell and wife were made parties to this action, and file their answer ratifying the original deed

to Meriwether, and disclaiming any interest in the property. Judgment for plaintiff. Robinson appeals.

Stimrall & Bodley, for appellants. *Bacon & Stiles*, for appellees.

PRYOR, C. J. The statute empowers the wife to make a conveyance of her separate estate where the husband unites with her; and in this case it appears that both husband and wife were the grantors, and, in the present action of *Henning v. Robinson*, Henning, deriving title through Jewell and wife, has made them parties defendant. They reaffirm and ratify the original conveyance by them to Meriwether, who conveyed the realty to Henning, and, the latter being invested with a perfect title, in so far as any claim might be asserted by Jewell and wife, the chancellor below properly enforced the contract by compelling Robinson to accept the title. Judgment affirmed.

CHESAPEAKE, O. & S. W. R. CO. v. GRIEST.

(Court of Appeals of Kentucky. May 19, 1887.)

RAILROAD COMPANIES—SALE—DISSOLUTION—LIABILITIES.

Where one railroad company sells out to another, a person having a claim against the former company for damages on account of personal injuries cannot maintain an action against the latter company; and the old company, against which his right of action existed, having been dissolved by the sale, his only right of action remaining is against the stockholders of the old company, who received the purchase money.

Appeal from circuit court, Hardin county.

Holmes Cummins, Wm. Wilson, J. P. Hobson, and P. H. Darby, for appellant. Matt. O'Dougherty, R. C. Davis, and C. D. Walker, for appellee.

PRYOR, C. J. The appellee, William F. Griest, while in the employ of the Paducah & Elizabethtown Railroad Company, and running one of its excursion trains from Cecilia, in Hardin county, to the city of Paducah, was severely injured by the collision of the engine with horses upon the track, by which the engine ran off the road-bed and capsized, crushing and wounding him in a frightful manner. He instituted this action against the Chesapeake, Ohio & Southwestern Railroad Company and the Paducah & Elizabethtown Railroad Company, alleging, in substance, that the injury resulted from insufficient air-brakes, that were defective, and so known to the defendants, and unknown to the plaintiff, and which, if in proper condition, would have enabled him to check the train, and have prevented the injury. His claim for damages was allowed to the extent of \$10,000 against the Chesapeake, Ohio & Southwestern Railroad Company alone, the Paducah & Elizabethtown Railroad Company not being served with process, or appearing in the action.

The Chesapeake, Ohio & Southwestern Railroad Company was incorporated in the month of January in the year 1882, and the accident resulting in injuries to the plaintiff occurred in July, 1881. The claim against this corporation is attempted to be maintained on the idea that by its charter, and the contract by which it became the owner of the Paducah & Elizabethtown Railroad Company, the two were consolidated, and constituted the one corporation; and, further, that by the terms of the purchase the present appellant undertook to discharge all the liabilities of the Paducah & Elizabethtown Railroad Company. A demurrer was filed to the petition, on the ground that it presented no cause of action against the appellant, and the demurrer overruled. An answer was then filed to the petition, the first paragraph of which denied any responsibility for the tort complained of, or for any personal injury to the employe while engaged in the service of the Paducah & Elizabethtown Railroad Company; maintaining that the agreement by which it be-

came the owner of the last-named corporation was a deed of bargain and sale, entered into by both corporations under their respective charters. The identical question, in fact, is made by this paragraph of the answer that was raised by the demurrer to the petition.

We must look to the writing, therefore, by which the appellant acquired the Paducah & Elizabethtown Railroad to determine the liability of the one for all the debts and liabilities of the other. The facts alleged in the petition constitute a cause of action against the Paducah & Elizabethtown Railroad Company, and, if the appellant is liable in this case, it must be by reason of the contract between the two corporations. The deed of bargain and sale recites that "*the one has bargained and sold, and by these presents doth grant, bargain, and sell, alien, convey, and confirm*, unto the Chesapeake, Ohio & Southwestern Railroad all the railroad, and its properties," naming them specifically, to have and to hold in fee, including "*all debts, dues, and demands, of whatever nature, due, or to become due, to it, and all the rights, privileges, and franchises belonging to, or appertaining to, the P. & E. R. R. Co.*" The consideration for this sale was over \$70,000 in money, and \$2,853,000 in negotiable bonds, and the assumption of certain mortgage liens that were upon the road; and, further, the appellant *bound itself to pay all sums lawfully due for taxes, and all current indebtedness incurred by the party of the second part in the operation of said railroad and property.*

The Paducah & Elizabethtown Railroad Company was authorized by its charter, with the assent of a majority in value of the stock of the company, to sell or lease its road, and the power to purchase was conferred on the appellant; so no obstacle existed to the consummation of such a transaction but the consent of the stockholders, as provided by the several charters. That consent was obtained, and the legal effect of the agreement was to transfer to the appellant all the rights, property, etc., of the Paducah & Elizabethtown Railroad Company free from the claims of creditors. It was a *bona fide* purchaser, paying full value for the road. At least, the validity of the transaction is nowhere assailed; and, in such a state of case, we are aware of no rule of law or equity that would follow the property in the hands of a *bona fide* purchaser for the benefit of a creditor who has no liens, by law or contract, as against it or the property sold.

If the corporation had but changed its name, with the same stockholders, or with additional stockholders, it would be regarded as the same corporation. Here, however, is a great line of railroad, incorporated under the name of the Chesapeake, Ohio & Southwestern Railroad Company, with responsibilities greater than those belonging to the corporation whose property has been purchased by it, with different stockholders, and property rights that were, before and after the purchase, disconnected from the interest of stockholders in the corporation purchased, and it cannot be well argued that the two have consolidated, or have each a common interest in the appellant. No stockholder in the Paducah & Elizabethtown Railroad Company held stock as such in the Chesapeake, Ohio & Southwestern Railroad Company, but, on the contrary, the stockholders in the Paducah & Elizabethtown Railroad Company were paid off in bonds by the appellant, extinguishing the existence of all the property rights of the latter company, and in fact it may be said to have no longer an existence, except for the purpose of winding up the affairs of the company.

A creditor of the corporation, whether from an express or implied contract, subjects himself, when dealing with it, to the powers conferred by the charter. If the power to sell is given by the terms of the grant, the purchaser for value holds the property as if it had been an individual transaction. There is no reason for making the distinction, and the rule in individual transactions should apply, as between corporations, where the power to sell and purchase is conferred by the charter. While a dissolution of a corpora-

tion would entitle the creditors to enforce their demands in a court of equity, or, where there is a consolidation, to follow the assets of their debtor in the consolidated company, still, where there is a sale of the corporate property, it passes the title as to all, in the absence of some reservation in the charter protecting the rights of creditors. *Mor. Corp.* 567, 569. Where the corporation is dissolved, or is consolidated, the assets of the company are a trust fund for the payment of its debts, and may be reached by a court of equity.

What, then, is the remedy of the appellee in this case, in the event he is entitled to a judgment against the Paducah & Elizabethtown Railroad Company? If a sale in good faith has been made to the appellant,—and that is not questioned,—the stockholders of the Paducah & Elizabethtown Railroad Company, having received a consideration for their stock, would scarcely be permitted to hold the proceeds in their pockets, and the debts of the company be left unpaid. An equivalent has been paid by the appellant, in money and bonds, that have passed to the stockholders of the old corporation. This must be regarded as assets for the payment of debts, if not already appropriated in that way.

This court held in the case of *Smith v. Gower*, 2 Duv. 17, that where the property and franchise of a railroad company had been sold under a mortgage, that the liabilities of the corporation still existed, and the corporation still lived, at least for the payment of its debts.

It is urged, however, that the appellant undertook to pay the current indebtedness incurred by the Paducah & Elizabethtown Railroad Company in running its road, and that this embraced the tort complained of, or the liability of the company to the appellee under its implied contract to furnish safe machinery in operating the road. In the case of *Coggin v. Central R. Co.*, 62 Ga. 685, where the one company absorbed the former, one of the provisions of the act was that the living corporation should discharge all the contracts of the extinct corporation. There the court permitted the injured party to sue for a tort, and to recover on the agreement to pay all the debts; the reasoning being based upon some provision of the Code in which the word "debts" was used, the court saying that there was a strong probability that the record was intended to embrace liabilities of all classes, torts included. Whether the words, "to pay all current indebtedness in operating the road," embraces such a tort as is complained of in this case, is not necessary to be determined, as we think it evident that, before such a recovery could be had, some claim should be established against the party or corporation committing the injury. If we could construe the words "current indebtedness" as meaning what the appellee insists it does mean, we are not disposed to adjudge that an action for negligence, in which punitive as well as compensatory damages can be recovered, may be maintained against one not in existence when the tort was committed. This action should have been prosecuted against the Paducah & Elizabethtown Railroad Company for the purpose of establishing the claim, and then the equity of the appellant, as against the stockholders of that corporation, or the claim of any against the present appellant, could be asserted.

The case of *Powell v. North Missouri R. Co.* was a case where several railroad companies were, by an act of the legislature, merged into one, and constituted one body, under the name of one of them. It was there held that where, by the terms of the deed, the first corporation was extinguished, and the second only continued to exist, the case was not one of consolidation or amalgamation. There the one corporation was authorized by a majority in interest of its stockholders to transfer its effects, assets, rights, and privileges to the North Missouri Railroad Company, and upon such transfer the company was to cease to exist, and the road thenceforth to be styled the West Branch of the North Missouri Railroad, their franchises to be completely vested in the North Missouri Railroad Company, etc. It was there said that the one corporation was absolutely extinguished; it was a matter of contract,

and made upon a valuable consideration to a *bona fide* purchaser; and that, while a court of equity will not allow a corporation to give away its property to the prejudice of creditors, it will not follow the property into the hands of *bona fide* purchasers. 42 Mo. 68; *Eaton & H. R. Co. v. Hunt*, 20 Ind. 463.

In this case the appellee is proceeding on the theory that the Paducah & Elizabethtown Railroad Company no longer exists; that its property and franchises have passed to the appellant by the deed filed with the petition. It has no interest in common with the appellant, nor has any of its stockholders any stock in the new company; and the fact that the president of the appellant was the owner of most of the stock in the Paducah & Elizabethtown road cannot have the effect of making a new and distinct corporation, that is a purchaser for value, liable for its debts, except as made so by the terms of the sale. We do not mean to adjudge that one corporation can be relieved of its liability by passing its property over to some other company, or that a creditor is deprived of his rights as such in a case where the company liable to him consolidates with another. The right to consolidate cannot be prevented by the debtor, but he may, in such a case, have the assets applied by a court of equity to the payment of his debt, because, in effect, the corporation is dissolved.

The creditor, in the event the agreement of consolidation bound the consolidated company to pay the debts, could not be compelled to accept the agreement, and thereby destroy his right to look to his own debtor; and, as said in *Morawetz*: "It has sometimes been held that, when a new company is formed by consolidation of several companies, it thereby impliedly assumes the debts and obligations of the old. But this doctrine is not universally accepted, and there seems to be no sufficient reason for implying such an assumption of liabilities, particularly as creditors are not compelled to accept the same," etc. *Mor. Corp.* 558.

In the present case it is apparent that there was an absolute sale of the Paducah & Elizabethtown Railroad, and the action should have been prosecuted to judgment against the latter company. The demurrer by the appellant should have been sustained. The judgment is therefore reversed and remanded, with directions to sustain the demurrer.

JACKSON and others v. ANDERSON and others.

(*Court of Appeals of Kentucky.* May 12, 1887.)

INSURANCE—POLICY—ASSIGNMENT.

Ordinary life insurance policies are not assignable, and cannot be placed upon the market as a promissory note or bank paper. But where a certificate of membership in a mutual benefit association in terms confers on the member the right to assign the benefit, and the member assigns it in exchange for a tract of land, *held*, that the assignee, after retaining it for 10 years, cannot sue to set aside the contract on the ground that there was no right to assign and recover the land, especially where it appears that he has not tendered the certificate back to the member, but has allowed it to lapse by failing to pay the premiums.

Appeal from circuit court, Knox county.

Action to rescind a contract and cancel a deed conveying land. The consideration of the deed was the assignment of a certificate of membership taken out by the wife of appellant Jackson in the Kentucky Grangers' Mutual Benefit Society. Judgment for plaintiffs. Defendants appeal.

Wm. Lindsay and James D. Black, for appellants. *Dishman & McCleary, J. H. Tinsley, John H. Wilson, and Richards & Hines*, for appellees.

PRYOR, C. J. After the reargument in this case, the court is still disposed to adjudge that the appellant is entitled to a reversal. The parties were dealing at arms-length in regard to these policies, that seem to have had a marketable value. The husband of Mrs. Jackson was one of the beneficiaries, and, be-

sides, the benefit certificate on its face made the sum aid, at the death of the member, her assigns as well as those named as the beneficiaries. Lawyers had been consulted, and opinions given *pro* and *con*, as to the right to assign. That ordinary life policies are not assignable, and cannot be placed upon the market as a promissory note or bank paper, is well established; but here all the certificates issued by the grange purport to confer on the insured the right to assign, and it may well be doubted whether the corporation can make any defense to a *bona fide* holder who has been induced to purchase, not by the representations of the agents, that they were assignable, but by the express terms of the policy transferred.

Speculation was freely entered into by many parties in the county of Knox in these policies. Appellee, who should have informed himself as to the rights of the parties, was an active participant in the purchases made. He purchased this policy in 1877, and there was no complaint made until 1882, when it is apparent the members of the grange were being reduced in numbers, and the inducement to continue purchasing was not so great. There was never any tender of the policy back to the appellant, or any offer to pay the premiums that were unpaid; but, on the contrary, there was a forfeiture of the policy while in the hands of the appellee, and no notice, from the decided weight of the testimony, given by him of his intention to abandon the contract. He had a policy on his own life, besides others that he forfeited about the same time, and it was evident that the speculation was becoming a burden, and the cause prompting the appellee to sue consisted in the lessening of the ability of the corporation to pay by reason of its falling condition. He was offered by Vaughn \$500 for the policy, and by Parrott \$600. He asked \$1,800, and, if Mrs. Jackson had died, would have been entitled to \$2,000, in the event he acquired the interest of all the children. As to the husband's interest, he acquired that in the event he survived his wife; because the policy assigned by the husband and wife gave the right to assign, and estopped the husband from asserting any claim to the insurance money. The appellants, from the proof, have entered upon the land, erected buildings, improved the fence, and lived on it some five years before this suit was brought. That, from the preponderance of the proof, was the first notice appellants had of the purpose on the part of the appellee to seek a rescission of the executed contract. The land was worth not exceeding \$600. Mrs. Jackson could have sold her policy at any time upon a risking bargain for that sum. The appellee refused to sell it until he saw that it was becoming worthless, and, when in no condition to place these parties *in statu quo*, asks to have the contract rescinded.

This judgment is reversed and remanded, with directions to dismiss the proceeding as to Jackson and wife.

It appears that all of the children of Mrs. Jackson are of age but two. There are eleven children in all; and, as the mother has obtained the benefit of the policy by accepting for it a conveyance for this land, the appellee should be allowed to amend his petition, making the children defendants, and have the policy to be renewed by the corporation payable to the appellee.

Judgment reversed, and remanded for proceedings consistent with this opinion.

GRAHAM v. CONGER.

(Court of Appeals of Kentucky. May 14, 1887.)

1. CONSTITUTIONAL LAW—TITLE OF ACT.

Kentucky act of April 21, 1882, entitled "An act providing for the improvement of the Fountain Ferry road at the cost of the property benefited thereby," provides for the assessment of adjoining property within 800 feet of either side of the road, the same being an ordinary county road running through the country. *Held*, that the act is not unconstitutional, on the ground that the title is misleading.

2. SAME.—TAXATION.—LOCAL ASSESSMENT.

Kentucky act of April 21, 1882, provides for macadamizing an ordinary county road, and imposes for that purpose a tax on those owning land adjacent to the road to a depth of 800 feet on either side of the road. *Held*, that as no peculiar benefits accrued to such owners, as distinct from the other residents of the county, the tax is unjust and unequal, and the act unconstitutional. No rule or principle of taxation authorizes the taxing of agricultural lands by the square foot, or compelling those owning land fronting on an ordinary county road to bear the expense of maintaining or repairing it.

Appeal from Louisville chancery court.

Jas. S. Pirtle, for appellant. *C. B. Seymour, Humphrey Marshall*, and *L. Joseph*, for appellee.

PRYOR, C. J. By an act of the legislature approved the twenty-first of April in the year 1882, on the petition, as is alleged, of a large majority of persons owning property on either side of the Ferry Fountain road, in the county of Jefferson, a tax was imposed on the owners of the land lying between two lines parallel to the center of the road, and distant on each side 800 feet, for the purpose of improving and macadamizing the road (that was then an ordinary county road) from the western boundary of the city of Louisville extending to the bank of the Ohio river. The commissioners under the act, authorized by its provisions to contract for the construction of the improvement, gave the contract to the appellee, Conger, who completed the work in accordance with his contract, and is now seeking to enforce his lien on the land bordering on the road, and owned by these appellants. The entire improvement, including compensation to the engineer and other expenses, amounted to about the sum of \$20,000.

The appellants filed an answer presenting several defenses to the action, only one of which will be determined in this case, viz., the validity of the act under which this work was done. It is insisted by counsel for the appellants that the act is unconstitutional for two reasons: (1) The title to the act is misleading; (2) that the taxation imposed is unequal, and the property of the appellants proposed to be taken for public uses without compensation.

A demurrer was sustained to the answer filed; and the facts therein alleged, connected with the act of the legislature under which this lien is sought to be imposed, present the constitutional question. The apportionment of the cost of the work was proper, and a lien exists by the provisions of the enactment, if the demurrer was properly overruled.

It is alleged in the petition that the road improved was, at the time of the passing of the act, one of the ordinary county roads of Jefferson county, under the supervision of the county authorities, worked and kept in order at the usual expense attending the improving of county roads, and the expenses paid out of the county levy; that the cost to each land-owner was only a few cents to the acre for such improvements as were required to keep the road in repair, and paid out of the annual levy; that the tax imposed for the extraordinary improvement made amounts to \$50 an acre on the land lying within the taxed boundary, or \$1 per foot fronting the road on either side; that these appellants were not instrumental in obtaining the passage of the law, or benefited by the improvement; that there is no general system of taxation for turnpike purposes within the county, and therefore the legislature exceeded its authority in requiring these appellants to pay for this public road, or its improvement, that belongs to the county, or under its control, and from which they derive no income and no greater benefits than must necessarily be attached to farming lands bordering on a public highway. The land sought to be taxed is agricultural land, and its annual rental about four dollars per acre.

By section 5 of the act it is made the duty of the Jefferson county court "to cause to be ascertained the names of the owners of each and every square foot of land within the tax district described in the first section of the act, and to

assess the entire cost of said improvement of said road, including the compensation to the engineer, etc., equally upon each square foot of land within said district, and a lien shall exist for the same on said property," etc. By the seventh section it is provided "that, after the Fountain Ferry road is improved as herein provided, it shall be thereafter kept in repair by Jefferson county as such." The act is entitled "An act providing for the improvement of the Fountain Ferry road [describing it] at the cost of the property benefited thereby." We perceive no objection to the title. Such is the purpose of the enactment, and the body of the act following the title authorizes the improvement made at the cost of the owners of the land bordering on the road. There is nothing foreign to the title, and the legislature has declared by the passage of the law that the improvement is beneficial to the owners.

That the improvement is beneficial there is but little room for doubt, and whether or not benefits are equal in all cases to the burden imposed, is not a material inquiry. The constitutional requirements, in reference to uniformity and equality in taxation, and that prevent such a discrimination as imposes the burden on a few for the benefit of all, seems not to have been regarded in the legislation upon the subject-matter involved in this case. While districts may be created, and taxation imposed according to the value of the property within the particular district, for the construction of turnpikes and other improvements, upon the idea of benefits derived, we are aware of no rule or principle of taxation that would authorize the taxation of agricultural lands by the square foot, or of compelling those who own land bordering on an ordinary county road to incur the entire expense of keeping the road in repair; and certainly no system exists by which such extraordinary expenditures can be made as in this case, imposing a burden of \$50 an acre on agricultural land for the construction of an improvement, for no other reason than that the land bordered upon the improvement made.

The road is devoted to the public use. It is a county road, in which the entire public is interested; and when the owners of the adjacent land, although not touching the road, are equally benefited with those living directly upon it, the few living adjacent to the improvement have been selected to discharge a burden that should be assumed by all, or at least by those who are benefited by it. It is a local tax for a county purpose,—a common burden imposed on a few—that violates every principle of just and uniform taxation, and borders on spoliation. If the owners of land bordering on this particular road can be compelled to improve it by converting the dirt road into a turnpike, then the owners of land bordering on any other road in the county may be required to make a like improvement; and by this means five-sixths or a greater proportion of the tax-payers of the county, directly interested in such improvements, released from taxation, and the entire burden placed upon those who happen to live near the improvement made. The burden may be apportioned according to the benefits received, whether it be a county or district tax; but such an unjust discrimination as has been made in this case, and that would exist if a like system had been adopted for the entire county, is in direct violation of the constitution, and an appropriation of the property of the citizen for public use without just compensation. Local taxation is often proper, because of the local benefits received, and the law-making power can ascertain those who from the benefits derived should be made the subject of taxation with an approximate certainty, and in this manner produce, as near as is practicable, uniformity and equality in the discharge of the burden; but to say that a few persons living on the road shall pay \$20,000 for improving it, and then have no other interest in it than *his* neighbor, who rides over it, and crosses it, is so obviously unjust as to require only the statement to show that it is in plain disregard of the rights of these appellants.

It may be called a "taxing district," but this imparts no efficacy to such legislation, where the district, when created, shows that the burden is im-

posed on a few for the benefit of all. In this consists the wrong done these appellants, and entitles them to the relief sought. We do not mean to adjudicate that turnpike districts may not be created in a county, and those within the district taxed to construct them; but, in imposing the burden, the district should include, and the burden be imposed on, those who are directly benefited by it, or who, by reason of their proximity to the road, would practically derive the benefits. The mode of assessments and taxation for street improvements cannot be applied to the improvement of highways in the country. The cost of improving streets and sidewalks in cities and towns is usually imposed on the property in each square where the improvement is made; that is, each square is made to improve the street fronting it. This is upon the idea, as said by this court in the *Case of McQuillan's Heirs*, 9 Dana, 513, that all the streets and sidewalks may be expected to be improved at some time in a similar manner, and, each square being liable for the cost incident to the improvement upon which it borders, it approximates uniformity and equality, as between the owners of the property, and this is indispensable in imposing such taxation. All the property within the square will in this manner be taxed for like improvements. The improvements may not be made at the same time, but the practical result of such a system is to make all the realty responsible for such improvements. Not so with reference to the taxation in this case.

If we could assume that the legislature would require the counties to make turnpikes on all their public roads, as we do with reference to the grading and constructing of streets in cities and towns under the authority of the common council, still the mode adopted in this case is clearly unconstitutional, because it taxes those for the improvement who live or own land on the road, and omit to impose any of the burden on those who derive similar benefits, for no other reason than that their land is not bounded by the improvement. A tax is imposed on the minority for the benefit of the majority, where the improvement is beneficial to all. It is similar to taking a few feet of the realty on the street in the city fronting the entire square, making it pay for the improvement, and leaving other owners of property within the center of the same square free from any burden. A tax for a public purpose cannot be imposed in such a manner, and the system of street improvements, when applied to highways in the country, is not only impolitic, but a plain departure from that doctrine of equality constituting the basis of all taxation. In our opinion, no lien exists upon this land for the improvement made, if the answer presents the facts of this case, and the demurrer should have been overruled. Those obtaining the grant would, of course, be estopped from denying its validity, as against those who have made the improvement under it.

Judgment reversed and remanded.

STAMPER v. CENTRAL KENTUCKY LUMBER, MIN. & MANUF'g Co., and others.

(Court of Appeals of Kentucky. May 19, 1887.)

1. VENUE OF CIVIL ACTION—TRANSITORY—VENDOR AND VENDEE.

An action by a vendee of land, to recover from his vendor for a deficit in the contents of the tract sold, is transitory in its nature, and may be brought in any county in which the vendor is served with process.

2. SAME—REMOTE VENDOR.

Civil Code Ky. § 78 provides that a transitory action may be brought in any county in which the defendant, or one of several defendants, resides or is summoned. An action by a vendee against his vendor was brought, and process served, in the county in which the vendor resided, but the vendor's vendor was also made a party. He lived in another county, and was served with process there. Held that, as the immediate vendor could have sued his own or the remote vendor only

in the county in which the latter resided, or in which process was served, he could not, by assignment, confer on his vendee the right to sue the remote vendor in any other county; and the judgment in this case against the remote vendor is therefore void.

Appeal from circuit court, Clark county.

John L. Scott, for appellant. *W. M. Beckner* and *C. H. Stoll*, for appellees.

PRYOR, C. J. The appellees Stuart and others purchased of the appellant, Stamper, a large tract of land in the county of Perry, for which they paid him the sum of \$5,000, the tract supposed to contain several thousand acres more land than was found to be in the boundary when the survey was made. A deed was made by Stamper, and his vendees placed in possession. Stuart, after this, sold the same land to his co-appellee, the Central Kentucky Lumber & Mining Company, for \$7,500, and by the terms of the sale a survey was accordingly made, and, there being a deficit of several thousand acres, this action was brought by the appellee to recover its purchase money by reason of the deficit, and an attachment obtained against Stuart and Stamper on the ground that they had not sufficient property to satisfy the demand, and its claim would be endangered by delay. Stuart was served with process in the county where the action was instituted, and Stamper with process in Letcher county, where he lived, and the attachment levied on his land. Stuart answered admitting the grounds of the attachment, or they were conceded to be true on an agreed state of facts, and Stamper, the appellant, failing to answer, a judgment by default was rendered against him, and his land in Letcher sold to satisfy the demand of the lumber and mining company against Stuart. The appellant, Stamper, brings the case here, insisting that the Clark circuit court had no jurisdiction to render the judgment against him, because it was in fact an action affecting land, and therefore local. The action to recover for the deficit was a transitory action, and could have been instituted in any county where the defendant was served with a summons, and therefore the Clark circuit court had jurisdiction to hear the complaint of the lumber and mining company against Stuart, as he was served in the county where the suit was brought, but as to Stamper the facts present a different state of case. The conveyance by Stamper to Stuart had been accepted, and was entirely independent of the transaction between Stuart and the lumber and mining company. The sale to the company by Stuart vested in the former no right of action as against Stamper.

It is said, however, that Stuart assigned to the lumber and mining company the benefit of his claim against Stamper, and therefore the company could sue Stuart, its vendor and assignor, in Clark county, and make Stamper, who was liable to Stuart, a party to the action. Stuart would have been compelled to serve Stamper with process in the county where the suit was brought, and, if so, we cannot well see how his assignment to some one else could confer a jurisdiction over the appellant that would not have applied if Stuart himself had instituted the action. Suppose Stuart had made his answer a cross-petition against Stamper, asking that if a recovery is obtained against him that he have a judgment over against Stamper for the benefit of his, Stuart's, vendee, could it be maintained that a service of process in Letcher would have given the Clark circuit court jurisdiction to render a judgment by default against Stamper? We think not.

The Code provides that "an action [other than those made local] may be brought in any county in which the defendant, or in which one of several defendants who may be properly joined as such in the action, resides, or is summoned." Section 78. Section 79 provides that, "in an action brought against a single defendant, there shall be no judgment against him unless he be summoned in the county wherein the action is brought, or unless he reside in such county when the action is brought, and be summoned elsewhere in the

state, or unless he make defense to the action before objecting to the jurisdiction of the court." This can be considered as an action only so far as the recovery against Stamper is concerned, by his vendee Stuart against him, instituted in Clark county, with service of a summons in Letcher county. The judgment is void as to Stamper, and should be so treated. This court cannot reverse the judgment, because no motion was made in the court below to set it aside, as, it is provided by section 763 of the Code, a void judgment cannot be modified or reversed until a motion to set aside or modify the judgment shall have been made in the inferior court, and overruled. The appeal is therefore dismissed without prejudice.

BULTON v. SHORT-ROUTE RY. TRANSFER CO., etc.

(Court of Appeals of Kentucky. May 21, 1887.)

1. CONSTITUTIONAL LAW—EMINENT DOMAIN—STREETS—RAILROADS.

The legislature has the constitutional right to authorize the construction of a steam railroad along a public street in a city, and it is immaterial whether the fee in the street is owned by the city, or by the abutting lot-owners. The latter have no claim for compensation against the railroad, unless it is so constructed or operated as to deprive them of the reasonable use of the street.

2. RAILROAD COMPANIES—CHARTER—ELEVATED RAILROADS.

A company chartered to build a "railroad" merely has the right to elevate it above the surface wherever the character of the country makes it either essential or convenient, although the word "elevated" may not occur in the charter, or the right to elevate it may not be expressly granted.

3. SAME—AMENDMENT OF CHARTER—ORDINANCE.

Even if the power under the charter to construct the road above the surface were questionable, yet, a subsequent amendment to the charter having recognized a prior city ordinance by which the road was authorized to be elevated in passing through the city of Louisville, this legislation placed the right beyond doubt.

Appeal from Louisville law and equity court.

A. Barnett and T. W. Bullitt, for appellant. Temple Badley and Woolley & Buckner, for appellee.

HOLT, J. The charter of the Short-Route Railway Transfer Company, granted by the legislature in 1873, provides:

"Sec. 2. Said corporation is hereby granted the exclusive privilege to build, construct, maintain, and operate a railway transfer company, by steam or animal power, for the transportation of passengers and freight by the car-load or otherwise, including that portion of the city of Louisville north of Main street, from the east side of First street to the west side of Fourteenth street, for a period of ninety-nine years, dating from January 1, 1873.

"Sec. 3. Said corporation shall have the right, by and with the consent of the general council of the city of Louisville, to the use of or right of way to such streets and alleys, and such portion of the city's wharf within the limits named in the second section of this act, as the interests of said corporation may require, and in such manner and under such reasonable restrictions and conditions as may be agreed upon between said corporation and the general council of the said city of Louisville."

Subsequent sections grant to the corporation, among other privileges, the right to connect its track with that of any other railroad terminating in the city of Louisville, and give to any shipper along its route the right to side-tracks and switches, upon such terms as may be agreed upon between him and the transfer company. A difference arose between it and the city as to the location of the road, and in the compromise it was agreed, among other things, that the road in crossing First, Second, and Third streets should be so elevated as to permit vehicles to pass under it. To do this it became necessary to build an elevated railway along the Ohio river front of the city, and

the company being about to do this, the appellees, who are abutting lot-owners, brought this action to enjoin it from either constructing or operating such a road along and over Water street, from the middle line of First street to the middle line of Third street, upon these grounds: *First*, that no legislative sanction had been given for the building of an *elevated* railway; *second*, that the appellants owned the fee to the center of the street adjoining their lots, subject only to the easement of the public in it as a street, and that any legislative grant of the right of way over it to the railway company, without providing compensation therefor, was in violation of the constitutional provision as to taking private property for public use; *third*, that, aside from the ownership of the soil, they, as abutting lot-owners, had the right to the unobstructed use of the street for travel, and for the purpose of ingress and egress, to receive light and air thereby, and to enjoy their property free from any inconveniences or injury *special* to them,—such as the jarring or substantial injury to their buildings; the deprivation of light or air; the throwing of smoke, sparks, or cinders into and upon the houses already upon some of the lots, or those which might be built upon the vacant ones; the disturbance to the occupants arising from the noise of passing trains, and the invasion of all privacy by reason of their proximity; and that all these rights would be illegally invaded and destroyed by the building of the road; and that injunction is the appropriate remedy for their protection.

The word “*elevated*” does not occur in the charter. It authorizes the company to construct and operate “a railroad” merely. It is therefore insisted that, considering the time when the charter was granted, it is improbable that the legislature intended to authorize the construction of any kind of a railway save a surface one; that this intention is manifest from the charter provisions as to side tracks and switches; and that corporation grants must be construed with all the strictness compatible with their execution. It appears, however, that only a portion of the appellee’s road is “*elevated*”; and, from the first introduction of railroads, portions of them have been elevated by reason of the topography of the country or liability to floods or the grades desirable in cities for the convenience and safety of the public. Certainly a company chartered to build a “railroad” merely would have the right to elevate it wherever the character of the country made it either convenient or essential; and the evidence shows that, if this road were a surface one from First to Tenth street, it would frequently be submerged by the floods of the Ohio river.

After the compromise was effected between the city and the company, and on April 1, 1882, the legislature amended the charter in various respects; and this amendment refers to the ordinances of the city of Louisville, which, among other things, required the road to be elevated at the street crossings. It is true that it merely provides that any provisions in them in conflict with the amendment shall be void; but we must presume that it was enacted with the fact in view that a portion of the road would have to be elevated. In interpreting and giving effect to a statute, the necessity, occasion, history of the times, and probable object of it are to be considered; and, while this amendment did not re-enact the city ordinances relative to the elevation of the road at the street crossings, yet it recognized the right of the company to build a road, which the ordinances thus referred to required to be elevated, and which the city council, by virtue of section 3, *supra*, had the power to enact.

Even if the power to build the road was questionable prior to this additional legislation, yet this legislative recognition of the right placed it beyond doubt. It must be presumed that the appellants own the fee in the street, subject to the use by the public; and the question presents itself whether the easement existing by virtue of the dedication of the street is of the same nature as that granted to the company by the legislature. Its power to appro-

priate a part of the common highway to the purposes of a railroad, without making provision for compensation to the owner of the fee, has been a fruitful subject of judicial conflict. It has been urged that it is an additional burden—a new and distinct servitude—upon the estate, inconsistent with the original dedication, and cannot, therefore, be imposed without compensation to the owner of the fee. Upon the other hand, it is said that it is consistent with the dedication; that there is an identity of uses; and that the use of a part of a street by a railway does not exceed the limit of the easement already belonging to the public. This conflict of opinion merely arises from a difference of view as to the uses contemplated by the dedication of a street to public use.

Upon the one side cases may be found holding that because the term "street" had acquired its meaning before railroads were in existence, that, therefore, it cannot be presumed that this character of use was intended in the dedication; and, if allowed, that the limit of the easement is overstepped, and the private property of the owner of the fee taken for public use, which, unless compensation be afforded, is inhibited by the constitution. In conflict with this view, many cases may be found which hold that the dedication of a street to public use contemplates no particular mode of travel; that it embraces, not only those then existing, but any that may spring up in this age of invention, and with advanced civilization; and that a railroad, being but a new mode of travel, is consistent with the uses contemplated by the dedication, and does not overstep the limits of the easement already in existence. In determining the proper uses of a highway it seems to us to be immaterial whether the abutting owner has the fee subject to the easement or not. The public right embraces all modes of travel consistent with the intended use. If compensation has been made for the easement, the subsequent appropriation to another mode of use, within the limit of the primary purpose, or one of a like kind, certainly should not require further compensation. In this age of advancement a rule confining it to a precise mode of use would be unreasonable. It has even been held that there is no new taking when, under legislative sanction, a plank road or a canal is converted into a highway or a railroad; and some jurists have contended that when private property has been once taken for public use, and compensation made, the legislature may apply it to any public use, irrespective of the special purpose for which it was taken. This view is based upon the idea that, in practice at least, whether the fee or an easement merely is acquired, the full value of the land taken is given as compensation; but this doctrine is fraught with danger to private right, which, although it may be that of the humblest citizen, it should be the pride of the judiciary to uphold; and it seems to us that where a grant has been made for a specific use, that the subject of it should not be used for a foreign purpose, without a new legal taking, or the consent of the party from whom it was derived, but that it may be applied to any new mode of use tending to the primary or general purpose.

It was said by the supreme court in the case of *Barney v. Keokuk*, 94 U. S. 340: "On the general question as to the rights of the public in a city street, we cannot see any material difference in principle, with regard to the extent of those rights, whether the fee is in the public or in the adjacent landowner, or in some third person. In either case the street is legally open and free for the public passage, and for such other public uses as are necessary in a city, and do not prevent its use as a thoroughfare, such as the laying of water-pipes, gas-pipes, and the like."

Pierce on Railroads, 234, says: "The purpose of opening a highway or street is to provide the public with a right of passage for persons on foot, or riding in carriages or other kinds of vehicles. The use for which this public right is obtained is not confined to the same species of vehicles, drawn by the same kind of power, that prevailed at the time of the dedication or appropriation, but

admits of the passage and repassage of such other vehicles, operated in such a mode and by such forces as an advanced civilization may require for the general convenience. The improved method of conveyance may incidentally increase or depreciate the value of the property on the highway; but, provided the right of ingress and egress, of passage and repassage, is left reasonably free to the adjoining owner, the injury is one which the law does not recognize. A railroad laid out over or upon a highway or street, under proper legal authority, is within the legal intent of the original sequestration or dedication, and is not an invasion of private right entitling the owner to compensation by virtue of the constitutional prohibition, provided it is so laid out and constructed as not to be incompatible with the use of the highway in the other usual modes of passage and conveyance. It is not necessarily a nuisance, even in a large city, although it may, to a certain extent, interrupt the free passage of other kinds of vehicles; and unless unreasonable, or permanently exclusive in its occupation of the highway, when authorized by competent authority, it is not an invasion of private rights." The writer cites numerous cases in support of the text.

The design of a railroad is to facilitate travel. It therefore subverts the object of a street dedication instead of destroying it. It may therefore, under legislative sanction, have a joint occupancy of a street, with other modes of travel having the same end in view; but it cannot occupy or use it to the unreasonable exclusion or obstruction of such other modes. The limitation upon the public right is that the appropriation of the street must not be inconsistent with the end for which it was established. Whether the abutting lot-owner owns the fee in the street subject to the public use, or does not, he, as such adjacent proprietor, has, however, a peculiar private right in the street which attaches to his lot. He has a peculiar use in the street, as appurtenant to his tenement, in order that he may enjoy it. This right is as much his property as the lot itself. He can claim no damage by reason of mere inconvenience, or a consequential decline in value of property or rents arising from the repair of the street; but there can be no such exclusive appropriation of it, even under legislative authority, as to deprive him of its reasonable use. He is entitled to its reasonable use for all the ordinary modes of passage. This is an easement attaching to his adjoining lot,—an incident of his title to it, and he cannot be deprived of it without compensation. He, however, holds his property subject to the appropriation of the street by the public to such means of facilitating travel and commerce as will most redound to the public good; and it is only when this appropriation becomes destructive of the purposes for which the street was established, and he is deprived of its reasonable use for such purposes that he can complain. Indeed, the right, under legislative authority, to permit the construction and operation of a railroad by steam along or upon a street is not now an open question in this state, however much conflict of authority may exist elsewhere; and this, without regard to whether the fee subject to the public use is in the adjoining owner or not. Beginning with the case of the *Lexington & O. R. Co. v. Applegate*, 8 Dana, 289, followed by the cases of *Wolfe v. Covington & L. R. Co.*, 15 B. Mon. 409; *Louisville & F. R. Co. v. Brown*, 17 B. Mon. 772; *Newport & Cincinnati Bridge Co. v. Foote*, 9 Bush, 264; *Cosby v. Owensboro & R. R. Co.*, 10 Bush, 283; *Elizabethtown, L. & B. S. R. Co. v. Combs*, Id. 382; and *Jeffersonville, M. & I. R. Co. v. Esterle*, 13 Bush, 675,—this doctrine has been repeatedly announced, and must now be regarded as firmly established in Kentucky, and we think it is supported by reason and public necessity, while at the same time individual right is preserved.

It follows that the construction of a railroad along a street is not *per se* an encroachment upon the individual right of the abutting lot-owner, and whether he can complain depends, not upon the fact of its existence, but the manner of its construction, and its operation. If he is thereby deprived of its rea-

sonable use, he may appeal to the courts for relief; but if he is merely inconvenienced thereby, or suffers some remote consequential injury, it is *damnum absque injuria*.

The structure in this case, at the point where it is sought to enjoin its construction, will be about 13½ feet high, supported by iron pillars 16 inches in diameter, and from 25 to 30 feet apart; and where they are in the street there is ample roadway upon each side of them, while where they are in the sidewalk they leave ample room for passage, and we fail to see that there is any unreasonable obstruction or exclusive appropriation of the street, while the character of the proposed structure is such that it is not likely to materially interfere with the passage of either light or air.

Before leaving this branch of the case it is proper to suggest that in the cases of the *Louisville & F. R. Co. v. Brown, supra*; *Newport & Cincinnati Bridge Co. v. Foote, supra*; and *Cosby v. Owensboro & R. R. Co., supra*,—the railroad was elevated either by a solid wall or an embankment, which was *pro tanto* an exclusive appropriation of the street; but, as it was not *unreasonably* obstructed, the complaint of the abutting lot-owners was not sustained. The road, the construction of which is now sought to be enjoined, by reason of its manner of elevation, will afford less obstruction than did the building of the roads in those cases.

It is urged, however, that it will be *specifically* injurious to the adjacent lot-owners, and in a *substantial* degree, because it will jar their buildings; weaken their foundations; throw sparks, smoke, and cinders into them by reason of their proximity; destroy their privacy; and render them untenable; and that these *substantial* injuries *peculiar* to them, and to which the general public are not liable, authorize the interposition of preventive equity. It is true that it is not the amount of pecuniary injury which authorizes such relief. If the injury goes to the substance of the right, and is of such a character that reasonable redress cannot be had at law, the chancellor will, with the arm of equity, stay the impending wrong. Whether any special and substantial injury will result to the adjoining owners in this instance is, however, as yet, a mere matter of speculation; and, if any, its character or extent cannot now be ascertained. If such should accrue, its extent can be much better estimated after the road is in operation; and, at most, it would be a matter of mere damage for which the law affords an adequate remedy. Undoubtedly, if the structure shall be so located as to unreasonably obstruct the abutting lot-owner's means of egress and ingress from and to his lot, or if he suffers substantial injury by having smoke, sparks, or cinders thrown into his house, or its walls be cracked by the movement of heavy trains, he would be entitled to recover for damages directly resulting from such causes. This is because a private right would then be invaded, and a direct substantial damage sustained. *Jefferson, M. & I. R. Co. v. Esterle, supra*; and *Elizabethtown, etc., R. Co. v. Combs, supra*. It was said, however, in the case of *Lexington & O. R. Co. v. Applegate, supra*: "But both public policy and a long series of adjudged cases require that a public improvement so beneficent in its general operations and results, and more especially when, as in this case, sanctioned by the legislature and the representatives of the local public, should not be destroyed or suspended by the injunction of a chancellor, unless strong reasons for doing it be conclusively manifested." This reason applies with peculiar force in this instance. The proposed work is one likely to redound largely to the public interest, and that of a commercial metropolis. The road will connect the railroads coming into the city upon one side with those reaching it upon the other, thus supplying, as is shown by the testimony, a now much needed connection; while, upon the other hand, it is as yet a matter of conjecture what injury, if any, will accrue to the lot-owner, and, if any, he is not remediless. The law of course will not override individual right in order that a public benefit may accrue; but,

under such circumstances, the facts should be clearly shown, and the ground made manifest, before the chancellor should interpose. Judgment affirmed.

LEWIS, J., not sitting.

McCANN and others v. HILL and others.

(Court of Appeals of Kentucky. May 14, 1887.)

1. ASSIGNMENT FOR BENEFIT OF CREDITORS—MORTGAGE—PREFERENCE.

Gen. St. Ky. c. 44, art. 2, § 1, provides that every mortgage made by a debtor in contemplation of insolvency, and with a design to prefer one creditor over another, shall operate as a transfer of the debtor's property for the benefit of creditors generally. *Held*, that this statute does not prohibit a debtor, though he be in failing circumstances, from executing a mortgage to secure a debt created simultaneously with the execution of the mortgage. But if a debtor, knowing that he is insolvent, and in order to give a particular creditor a preference over other creditors, gives him a mortgage to secure a debt already created, together with a liability simultaneously created, and the creditor knows of this, and aids in the arrangement, he can obtain no benefit under the mortgage; it will operate, under the statute, as a conveyance for the benefit of creditors generally.¹

2. SAME—HOMESTEAD.

Where a general creditor brings an action against the debtor to have such a mortgage declared to operate, under the statute, as a transfer for the benefit of all creditors, *held*, that the debtor cannot move on the land, never having lived on it before, and claim a homestead. The mortgage, operating as a transfer of all his interest in the land, precludes him from afterwards setting up any claim to or in the land.

Appeal from circuit court, Carroll county.

W. Montfort and W. M. Fisher, for appellants. *Masterson & Gaunt and Geo. C. Drane*, for appellees.

BENNETT, J. On the twenty-third day of January, 1885, the appellant L. E. McCann and his wife executed to the appellant Levi McCann a mortgage, which was duly acknowledged and recorded, on a tract of land containing about 77 acres, belonging to the appellant Lou E. McCann, to secure a debt of \$1,300, which debt was evidenced by a promissory note bearing even date with the mortgage. The appellees, as creditors of the appellant L. E. McCann, on the eighteenth day of February, 1885, instituted suit in the Carroll circuit court against the appellants, in which they assailed said mortgage upon the ground that the same was given by the appellant Lou E. McCann in contemplation of his insolvency, and with the design of preferring the appellant Levi McCann, one of his creditors, to the exclusion of the appellees and his other creditors. The appellants by their separate answers denied that the mortgage was given in contemplation of Lou E. McCann's insolvency, or to prefer the appellant Levi McCann, to the exclusion of Lou E. McCann's other creditors. They also alleged that the liability intended to be secured by the mortgage was created simultaneously with its execution. They further alleged that the land mortgaged was the homestead of the appellant Lou E. McCann, and was not worth more than \$1,000, and therefore he had the right to mortgage it to the exclusion of his other creditors.

We will first dispose of Lou E. McCann's claim to a homestead in the land mortgaged to Levi McCann. The agreed facts relative to that matter are that the appellant Lou E. McCann, before and at the time he executed the mortgage to the appellant Levi McCann, was a housekeeper with his family, in the town of Ghent, some five or six miles from the land mortgaged; that he continued to reside and keep house in the town of Ghent until about a week after process was served upon him in this action, when he moved to the land mortgaged, and took up his residence on it as his home. So the question is,

¹ Respecting preferences in assignments for the benefit of creditors, see *Woonsocket Rubber Co. v. Falley*, 30 Fed. Rep. 808.

do the foregoing facts entitle the appellant Lou E. McCann to a homestead, as against the claim of the appellees?

The affirmative of this proposition is maintained by the appellant upon the authority of *Nichols v. Sennitt*, 78 Ky. 630. This case decides that "if the land was purchased, or the improvements made, prior to the creation of the debt, the homestead right attaches when the claimant is in occupancy as a housekeeper in good faith at the time the attempt is made by execution to subject the land. The clause of the statute giving the homestead is general in terms, allowing the exemption to all *bona fide* housekeepers with families, and without reference to the time at which the homestead may have been created by actual occupancy. The sixteenth section of the thirteenth article of chapter 38 provides that the exemption shall not apply if the debt existed prior to the purchase of the land, or prior to the creation of the improvements. This seems necessarily to imply that if the purchase of the land, or the erection of the improvements, was prior to the creation of the debt, the homestead existed without other condition than that the claimant be a housekeeper with a family, and in occupancy at the time it is attempted to enforce the claim." The facts of this case readily distinguish it from the case *supra*. Section 1, art. 2, c. 44, Gen. St., is in these words: "Every sale, mortgage, or assignment, made by debtors, and every judgment suffered by a defendant, or any act or device done or resorted to by a debtor in contemplation of insolvency, and with a design to prefer one or more creditors, to the exclusion, in whole or in part, of others, shall operate as an assignment and transfer of all the property and effects of such debtor, and inure to the benefit of all his creditors, except as hereinafter provided, in proportion to the amount of their respective demands, including those which are future and contingent; but nothing in this article shall vitiate or affect any mortgage made in good faith to secure any debt or liability created simultaneously with such mortgage, if the same be lodged for record within 30 days after its execution." Section 2 provides that "all such transfers as are herein declared to inure to the benefit of creditors generally shall be subject to the control of courts of equity, upon the petition of any person interested, filed within six months after the mortgage or transfer is legally lodged for record, or the delivery of the property or the effects transferred." The debtor, by committing the acts denounced in the first section, transfers and assigns all of the property and effects owned by him at the time to the use of all of his creditors; and by section 2 the creditors may avail themselves of such assignment and transfer for themselves, by petition in equity, at any time within six months after the mortgage or transfer is legally lodged for record. In other words, by committing the acts denounced by section 1 the creditor's property is transferred to the use and benefit of all of his creditors by operation of law; the title is transferred to them; and courts of equity, upon their petition filed within six months after the transfer is lodged for record, must take hold of the property, and distribute it equally among the creditors. By filing the petition within the time prescribed, the creditor's right to the property and effects relates back to the time the debtor committed the acts denounced by section 1, because these acts operate as an immediate transfer of his property to the use and benefit of the creditors.

The agreed facts conclusively bring the appellant Lou E. McCann within the denunciation of the first section of the statute, *supra*; and, as he was not entitled to a homestead in the land at the time of the execution of the mortgage, because not occupied as such, and his acts having transferred his title to the land to the use of his creditors before there was such occupancy, and they having resorted to a court of equity within six months after, for the purpose of having said land appropriated to their equal benefit, it follows that his occupancy of the land, after the acts which transferred the title to it to the use of his creditors, did not and could not give him a right to a homestead therein. The agreed facts show that the appellant Levi McCann was,

before the execution of the mortgage, surety for the appellant on two notes, —one for \$600, and the other for \$250,—and these sums were included in the mortgage, also another sum of \$160 was included in the mortgage, which was created before the execution of the mortgage.

This court, in the cases of *Corn v. Sims*, 3 Metc. (Ky.) 397, and *Thompson v. Heffner's Ex'rs*, 11 Bush. 359, has decided that a surety who, subsequently to his becoming bound as surety, takes a mortgage for his indemnity from his principal, is not protected by the exception in favor of a creditor whose statute debt is created simultaneously with the execution of the mortgage, and he is therefore entitled to no preference over the mortgagor's general creditors to the extent of his liability attempted to be secured by the mortgage in the distribution of the insolvent's estate under the insolvent act. The agreed facts also show that the appellant Levi McCann, simultaneously with the execution of the mortgage, became bound as surety for the appellant Lou E. McCann on a debt of \$202, which debt existed prior to the execution of the mortgage. The question is, was the appellant Levi McCann entitled to a preference as to this debt?

The record shows that, at the time Lou E. McCann executed the mortgage, he was insolvent; that on the same day he executed the mortgage he sold his stock of groceries; that, at the time he executed the mortgage, he knew that he was insolvent, and the appellant Levi McCann also knew it. While it is true that neither the letter nor spirit of the statute forbids a debtor from creating a debt in good faith though he be in failing circumstances, and secure the debt by giving a mortgage on his property simultaneously with the creation of the debt, which would hold good as against his other creditors, yet if a debtor, knowing that he is insolvent, and in order to give a particular creditor a preference over other creditors, gives him a mortgage to secure a debt or liability already created, together with a liability simultaneously created, as was done in this case, and the creditor, knowing the true state of case, as in this case, aids the arrangement, then he is not a mortgagee in good faith to secure a debt or liability simultaneously created with the execution of the mortgage. Such conduct on the part of the mortgagor and mortgagee would be a fraud upon the rights of the mortgagor's other creditors, and the mortgagee could obtain no advantage over them by reason of holding the mortgage. Such being this case, the appellant acquired no preference over Lou E. McCann's other creditors, by reason of the fact that \$202 of the mortgage debt was a liability created simultaneously with the execution of the mortgage. Whether or not the creditor, under such circumstances, would be entitled to prorate with the other creditors, where the debt itself was created simultaneously with the execution of the mortgage, is an open question; but the appellants' right to prorate with Lou E. McCann's other creditors, as to this particular debt, is based upon the fact that the original creditor would be entitled to prorate with the other creditors as to said debt; and the appellant Levi McCann, if he has paid the debt, may stand in his shoes.

The judgment of the lower court is affirmed.

DAVIS v. BENEDICT.

(Court of Appeals of Kentucky. May 21, 1887.)

1. VENDOR AND VENDEE—RESCISSION OF CONTRACT—EVIDENCE.

Proof of the rescission by parol of a contract for the sale of land should be clear and convincing in order to entitle a court to act on it.

2. SAME—RECOVERY OF POSSESSION.

A vendor cannot recover the possession of land from the vendee in possession under a bond for a deed, although there has been some talk about rescinding the contract on account of the vendor's inability to make a good title, if the vendee in his answer tenders the purchase price, and offers to accept a deed.

Appeal from common pleas, Hickman county.

Geo. W. Griffey, for appellant. *N. T. Moss*, for appellee.

PRYOR, C. J. The appellant is attempting in this case to show that a contract evidencing the sale of a lot in the town of Clinton had been rescinded by a parol agreement between herself and the appellee, Benedict, who is the vendee. The latter held her bond for title, by the terms of which she was to make a conveyance with a general warranty of title; and, if she failed to do so, the vendee was to retain the possession until his rents satisfied or were equivalent to the value of any improvements he might make on the property. The purchase money fell due, and, the appellant not being invested with a perfect title, there was some conversation about rescinding the agreement, and an understanding that it would be done, as shown by the testimony for the appellant. This is all denied by the appellee, and neither the bond for title had been surrendered by the appellee, nor had his notes given for the land been surrendered to him by the appellant, and in fact the evidence only conduces to show that a rescission was in contemplation in the event the title could not be obtained. The proof of such rescission by parol should be clear and convincing, and we think the testimony falls far short of producing such a conviction with reference to the alleged rescission in this case.

The appellant, proceeding on the theory that the contract had terminated, and that the rents had paid for the improvements placed on the property by the appellee, brought an ordinary action in the nature of an ejectment to recover the lot. The appellee filed an answer setting forth the terms of his title-bond, and, filing it with the proceedings, asked that the contract be enforced. He also tendered the entire purchase money, with the interest, into court, and this was required to be accepted by the appellant, and the appellee accepted appellant's deed, or was willing to accept such a conveyance as the chancellor directed the appellant to make, and that was a deed warranting the title. We see, therefore, no reason for affording the appellant any relief at law or equity. She gets her purchase money and interest, and was properly compelled to make to the appellee the deed.

The judgment is therefore affirmed.

WALLACE and others v. ARNOLD.

(*Court of Appeals of Kentucky*. May 21, 1887.)

1. NEGOTIABLE INSTRUMENTS—TRANSFER—EQUITIES.

A., holding two notes executed by the vendee of land for the purchase money, sold one of them to B., representing to B. that there was an outstanding equity in favor of the vendee, but that it should be charged against the other note. A. afterwards sold the other note to a third party. *Held*, that the latter took the note subject to the equity.

2. EQUITY—PARTIES—VENDOR AND VENDEE.

In an action by the holder of one of two notes given for the purchase money of land to collect the note, and enforce a vendor's lien upon the land, the holder of the other note, against which an outstanding equity in favor of the vendee should rightly be charged, is properly made a party.

Appeal from circuit court, Ohio county.

Walker & Hubbard, for appellants. *McHenry & Hill*, for appellee.

PRYOR, C. J. Thomas Crowder purchased of one C. W. Stewart a tract of land, for which he executed three notes payable to his vendor. Stewart assigned two of the notes to the appellee, Job S. Arnold. Arnold brought his action in equity against Crowder to subject the land to the payment of the two purchase-money notes, without making Stewart a defendant, and had the land sold, Arnold becoming the purchaser. The last note due had been as-

signed by Stewart to the appellant Wallace, or to others who assigned it to him. Wallace then instituted the present action against Arnold and Crowder, seeking to enforce his lien, alleging that neither himself nor Stewart were parties to the action by which Arnold enforced his lien for the first two notes, and that, as the land was liable for all the purchase money, it should be again sold, or Arnold made to account for the amount. The defense relied on by Arnold was that, before he purchased the two notes first due, he inquired to know if any set-off existed against the notes, and was told by Stewart that there was a defense by Crowder; that one Lisle had a lien on the land that Crowder had agreed to pay off, but that the last note would be sufficient to satisfy this claim of Lisle if Crowder should pay off Lisle's lien; and, with this agreement, he took the two notes. Stewart then assigned the last note to Wallace, or to the assignors of Wallace; and, when this action was brought by him, Crowder alleged payment by him to Lisle in a sum sufficient to satisfy the note, and claimed that he was entitled to a credit on either the notes of Arnold, or on the note held by Wallace; that, when Arnold brought his action to enforce the vendor's lien on the two notes, he saw Stewart, who agreed that the credit should be placed on the Wallace note, and for that reason he made no defense.

While appellee, Arnold, should have made the holder of the last note due party to his action, whether Wallace or Stewart, still if Crowder, the purchaser, has paid off the Wallace note by his payment of Lisle's lien, then neither Wallace nor Stewart have any claim on the land, or any against Arnold. Stewart, having agreed that the set-off or claim of Lisle should, when paid by his vendee, Crowder, be applied as a credit on the note afterwards assigned to Wallace, and thereby induced Arnold to purchase the two notes first due, cannot now assert any lien on the land, for the reason that the note has been fully paid by Crowder in discharging the Lisle lien; and, when Wallace took this last note from Stewart by assignment, he held it subject to the equities that Crowder and Arnold had against it by reason of Stewart's agreement. The assignee of Stewart occupied the same position that Stewart did with reference to the notes assigned Arnold. When Wallace sues, it appears that the note has been paid, and therefore no lien exists.

The court acted properly in dismissing the petition. Judgment affirmed.

NEWMAN and others v. THOMPSON and others.

(*Court of Appeals of Kentucky.* May 21, 1887.)

1. SCHOOLS—STUDIES—TAXES—INJUNCTION.

The teaching of Latin and Greek in a common school established under the common-school law of Kentucky, is not in violation of that law. Nor does it justify an injunction to restrain the collection of a tax levied in aid of such school.

2. SAME—CONSTITUTIONAL LAW.

A system of education adopted in a particular district under an act of the legislature which authorizes a tax that the school may be taught the entire year, and the higher branches of education brought within the reach of all the children, is not in violation of the state or federal constitutions.

Appeal from chancery court, Pendleton county.

This is an action by appellants against appellees for an injunction restraining said appellees from collecting a tax levied on the citizens of common-school district No. —, Pendleton county, for the purpose of operating a school in said district.

John H. Fryer, for appellants. *L. T. Applegate* and *John H. Barker*, for appellees.

PRYOR, C. J. The indefinite statements contained in the petition from which the alleged illegal action of the board of trustees is attempted to be

charged, present no fact upon which it might even be inferred that they had violated their duties. It is, in effect, alleged that they are not trustees, and then admitted, impliedly at least, that they are trustees, and that, as such, have been authorizing the collection of this tax; that they have exacted no valid bond from the officers having the custody of the money; but in what respect the invalidity exists does not appear. That they have levied on property outside of the district belonging to one of the appellants is averred; but what kind of property, or where located, that the error may be seen, or the parties defendant enabled to respond, does not appear. How the money has been wasted, or in what manner the trustees are expected to make an improper use of it, is not alleged.

That Latin and Greek are taught in the school is not in violation of the act under which this tax is collected, nor is the teaching of such branches of learning in violation of the common-school law of the state. If the ordinary branches of education are taught, and the school open to all, the fact that the teacher may have a class in Latin or Greek should not prevent the collection of the tax, or authorize an injunction against him or the trustees to prevent it. A system of education adopted in the particular district in aid of the common-school fund, authorized by the legislature, by which a tax is imposed, that the school may be taught the entire year, or the higher branches of education brought within reach of all the children, is not in violation of the constitution, state or federal, and therefore we see no reason for granting the relief sought in this case. Judgment affirmed.

HECKMAN'S ADM'R v. LOUISVILLE & N. R. CO.

(*Court of Appeals of Kentucky. May 21, 1887.*)

LIMITATION OF ACTIONS—BRINGING OF ACTION—PARTIES—AMENDMENT.

In an action brought to recover for the death of a railroad employe, the papers named as defendant the A. Co., which at one time owned the road, but had sold out to the B. Co. previous to the killing. The individual upon whom process was served, was named in the return as "vice-president" of defendant company, but was in fact vice-president of the B. Co. He claimed also to have been, at the time of such service, president of the A. Co. An answer, filed by attorneys, was verified by one who was an officer of the B. Co., and it did not set up that defendant did not, at the time of the accident, own the road. Held, that the answer was an appearance by the B. Co., and stopped the running of the statute of limitations against it; and that, upon an amendment substituting the B. Co. as defendant being afterwards made, it was no defense that, prior to such amendment, though after the bringing of the action, the period of limitation applicable to such actions had expired.¹

Appeal from common pleas court, Jefferson county.

Young & Trabue, Kinney & Kinney, and O'Neal, Jackson & Phelps, for appellant. *Barnett, Noble & Barnett and Wm. Lindsay*, for appellee.

LEWIS, J. January 23, 1883, the administratrix of H. Heckman, deceased, instituted an action to recover damages for the destruction of his life in December, 1882, alleged to have been caused by the willful neglect of the servants of the defendant, named in the caption of the petition "Louisville, Cincinnati & Lexington Railway Company." The summons on the petition was directed against the same defendant, and the return made thereon by the sheriff of Jefferson county was as follows: "Executed on Louisville, Cincinnati & Lexington R. R. Co., January 24, 1883, by delivering a true copy of the within to M. H. Smith, vice-president, he being chief officer in this

¹Respecting the time of commencement of an action as affected by the introduction of new parties defendant, see *Great Southern R. Co. v. Smith*, (Ala.) 1 South. Rep. 723, and note.

county." March 3, 1883, an answer having the same caption, and signed by "Barnett, Noble & Barnett," was filed, which contained simply a traverse by the "defendant" of the allegations of the petition; and appended to the answer was a verification in the usual form, signed "A. M. QUARRIER," who stated therein he was assistant to the president, and assistant secretary of the defendant, and that the president and vice-president were then absent from the state, and that the secretary was too ill to attend to business. In June, 1883, the administratrix having died, an order of revivor was made in the name of the present plaintiff and appellant as administrator *de bonis non* of the estate of the decedent. All the motions made by the plaintiff were directed against Louisville, Cincinnati & Lexington Railway Company, and the caption of all orders made and entered on record was the same as of the petition, until January 21, 1884, when the plaintiff moved to file an amended petition, which was filed February 7, 1884. In that amended petition the plaintiff stated that by mistake the defendant was styled in the caption of the petition the "Louisville, Cincinnati & Lexington Railway Company," when it should and was intended to be the "Louisville & Nashville Railroad Company," which is the correct name of the defendant, and intended to be sued in the action, and prayed that the defendant be required to defend by its correct name of the Louisville & Nashville Railroad Company, and for judgment against it as prayed for in the original petition. May 31, 1884, an order was made dismissing the action as to the Louisville, Cincinnati & Lexington Railway Company, and June 21, 1884, the Louisville & Nashville Railroad Company filed an answer to the amended petition, pleading and relying upon limitation in bar of the action against it; and the sufficiency of that ground of defense presents the only question before us on this appeal.

As more than one year elapsed from December, 1882, when it is alleged plaintiff's intestate was killed, to February, 1884, when the amended petition was filed, the simple inquiry is whether that amendment made an entirely new action against the Louisville & Nashville Railroad Company. Though a party against whom a cause of action exists may be sued therefor by the wrong name, yet if the summons be actually served upon him, and he appears and files an answer, it seems to us he is effectually before the court, as much a party to the action and concluded by a judgment rendered against him as if his name had been entered in the caption of the petition, and in the summons issued by the clerk. Such was the rule under the former system of pleading; for, as said by this court in *Louisville & N. R. Co. v. Hall*, 12 Bush, 131, relying upon the authority of Chitty's Pleading: "At common law, when the defendant was sued by the wrong name, he might plead that fact in abatement, but to make his plea good he was bound to give the plaintiff a better writ in the future by disclosing his true name." And, as held in the case cited, the same rule may be applied under our Civil Code. Moreover, section 134 expressly authorizes a petition to be amended at any stage of the action by correcting a mistake in the name of a party.

In *Sherman v. Proprietors Connecticut River Bridge*, 11 Mass. 337, the plaintiff brought an action against the defendants by the name of "The Proprietors of a Bridge over Connecticut River between Montague and Greenfield, late in the County of Hampshire, and now in the County of Franklin." And afterwards the plaintiff was permitted to amend his writ by altering the name of the defendant to that of "The Proprietors of the Connecticut River Bridge." It appears that certain persons were incorporated by the name mentioned in the writ; but, that company having forfeited its charter, a new and distinct one was created having the name of "The Proprietors of Connecticut River Bridge." Said the court in that case: "The first corporation was dead, and the new one was created for the same purpose and object. The writ was served on the clerk of the existing corporation, by which regular notice was given to the real proprietors of the bridge. This is then the common case of

misnomer. The amendment may be made on the common rule of an election by the defendant of the costs of the action to this time, or a continuance."

In *First Nat. Bank of Baltimore v. Jagers*, 31 Md. 43, the court used the following language: "There is no doubt that when a party is sued by the wrong name, and he appears to the suit, and does not plead the misnomer in abatement, and judgment is rendered against him in the erroneous name, execution may be issued upon it in that name, and levied upon the property and effects of the real defendant; but there is some conflict in the decision whether the same result will follow if he does not appear, and the judgment is obtained by default. The weight of authority is, however, that this makes no difference; and if the writ is served on the party intended to be sued, and he fails to appear and plead in abatement, and suffers judgment to be obtained by default, he is concluded, and in all further litigations may be connected with the suit or judgment by proper averments." The same doctrine is stated in *Lafayette Ins. Co. v. French*, 18 How. 404, and in *Freem. Judgm.* 154, where numerous cases are cited.

In *Louisville & N. R. Co. v. Hall*, *supra*, the plaintiff sued a corporation styled "The Louisville, Nashville & Great Southern Railway Co.," and the summons was executed on Albert Fink, who was designated by the sheriff as the vice-president of that corporation. On the calling of the cause, "defendant by attorney moved the court to quash the sheriff's return on the process herein," and accompanied the motion with an affidavit by Fink to the effect there was no such corporation known to him as the one made defendant to the action; and there was also an answer filed, in which it was denied there is or ever was any such corporation as the one sued, which was sworn to by "the attorney for the defendant." In that case the court said: "The testimony showed beyond cavil that the proper defendant was in court. It knew its own name. The answer it saw proper to file was in the nature of a plea in abatement. It presented no defense whatever to the action. * * * And as it failed to plead further, and failed to disclose its true corporate name, it cannot complain that the judgment was rendered against it in the name by which it had been sued." In our opinion, not only according to unvarying authority on the subject, but upon the principle of estoppel and common fairness, when a party enters his appearance, and makes defense to an action, he cannot afterwards complain of the judgment that may be rendered against him, upon the ground that he was sued by the wrong name, or, what is practically the same thing, that the name of a different person was inserted in the caption of the petition and in the summons. And it therefore necessarily follows that the action must be regarded as commenced and actually pending against him, at least from the time he so enters his appearance, if not from the time he is served with the summons.

We are then left with the single inquiry in this case whether or not the Louisville & Nashville Railroad Company did enter its appearance and make defense to the action within one year from the alleged killing of plaintiff's intestate; for, if it did, the plea of limitation cannot avail. Though the summons was directed against the Louisville, Cincinnati & Lexington Railway Company, the summons was actually served on the Louisville & Nashville Railroad Company; for M. H. Smith, upon whom it was executed, was at the time the vice-president of the latter and not of the former company. It is true, he states in an affidavit he was then the president of the former; but the summons was served on him as vice-president, not as president.

However, the main question is in whose behalf the answer was filed March 3, 1883. It is alleged and not denied that, when Heckman was killed, the Louisville, Cincinnati & Lexington Railway Company did not own or operate the road from Louisville to La Grange, where the killing occurred, having previously sold and delivered possession and control of it to the Louisville & Nashville Railroad Company. If the answer mentioned had been filed for and

on behalf of the Louisville, Cincinnati & Lexington Railway Company, it would have been a complete defense to the action against it, and therefore, of course, stated in the answer, that at the time of the killing that company did not own, control, or operate the road, and Heckman was not, as alleged in the petition, its employee. But the Louisville & Nashville Railroad Company could not truthfully make such defense, nor was it attempted to be made in the answer. Quarrier, who swore to the answer, was at the time an officer of the Louisville & Nashville Railroad Company, and as such, and, as is obvious, for that company, made the affidavit.

It is alleged in the amended petition that Barnett & Noble, whose names are signed to the answer, prepared and filed it as the attorneys of the Louisville & Nashville Railroad Company. This allegation was, we think, improperly stricken out of the pleadings by the lower court. But it makes no difference, so far as the question of fact is concerned; for it would have been easy enough for the attorneys to have stated that they filed the answer of March 8, 1883, for the Louisville, Cincinnati & Lexington Railway Company, if it had been true. As this record stands, we are satisfied the Louisville & Nashville Railroad Company caused the answer to be filed, and its appearance to the action entered, within one year after the plaintiff's intestate was killed; and as unquestionably, if the plaintiff had any cause of action at all, it was against that company, we think the lower court erred in sustaining the demurrer to the reply. Wherefore the judgment is reversed, and cause is remanded for further proceedings consistent with this opinion.

TORBITT v. CITY OF LOUISVILLE.

(Court of Appeals of Kentucky. May 26, 1887.)

1. PAYMENT—RECOVERY OF TAXES PAID.

One who pays an illegal tax under the belief that it is valid, and in response to a demand, and threat of compulsory collection, may recover it back upon discovering his mistake.

2. TAXATION—MUNICIPAL CORPORATIONS—CITY PROPERTY.

Land adapted to municipal uses, deriving an increased value from its proximity to the city, and having a city population on or near it, creating a necessity for municipal government, or at least rendering the extension of such government over it reasonable, is liable to city taxation. The fact that the owner of such land chooses to use it for agricultural purposes does not exempt it from city taxation.

Appeal from Louisville chancery court.

Hargis & Eastin, for appellants. *L. N. Dembitz*, for appellee.

HOLT, J. It is evident that the taxes which the appellants seek to recover back upon the ground that they were paid under a mistake of law and fact, and in ignorance of their rights, and through compulsion, were paid under a belief upon their part that the city had the right to impose and exact them. It demanded them of them, and notified them that, if not paid by a certain time, a penalty would be imposed, and then, if not paid by the expiration of a further time, their property would be sold to satisfy them. The tax-payer has a right to presume that the taxing power has been properly exercised and not abused. Moreover, although the assessment may be illegal and void, yet there is an apparent means of enforcing it without resorting to judicial proceedings, thus depriving the party of his day in court. He should not in such a case be made to suffer upon the ground that ignorance of law does not excuse. He should not be held to know more than the law-making power. He has no voice in imposing the burden; he has no opportunity to be heard; and knows that, if payment be refused, his property will be summarily seized. In the absence, therefore, of any compromise, if he pays the tax under a belief that it is valid, and when it is being demanded, and compulsory col-

lection threatened, such payment is involuntary; and, if the taxation be in fact void, he may recover back his money. *City of Louisville v. Anderson*, 79 Ky. 334.

The question next arises, was the property of the appellants subject to municipal taxation? The taxes for 1880 to 1885, inclusive, are sought to be recovered back. The property upon which they were imposed appears to have been included within the city limits long before that period; but it is claimed that it is exempt because it is used for farming purposes only, derives no benefits from the city government, and that there is no city population on it or near it, rendering it reasonable to extend its government over it. From the intersection of Barrett avenue with Broadway it is 2,800 feet to where the avenue strikes what is known as "Page Street," but which latter so-called street is merely an opening, and unimproved. Running parallel with Barrett avenue for this distance is Vine street, the two being about 500 feet apart. For the first 1,000 feet next to Broadway, of this tract of land, 2,800 feet long, and 500 feet in width, it is thickly settled, both upon Vine street, and Barrett avenue. Then comes a portion of it belonging to John B. Hutchins; and next that of the appellant Caroline Hutchins of nearly four acres; next that of Samuel Hutchins; then William E. Hutchins, of two acres; then Anna M. Cood, of about three acres; and lastly that of Susan E. Haggin, of about five acres. The land of each of these parties extends from Vine street to Barrett avenue, or nearly so, and it is noticeable that the lots in each instance are comparatively small. There is a dwelling-house upon that of Caroline Hutchins; also upon the lots of Mrs. Cood and Mrs. Haggin, and they are used for yard and garden purposes. The lot of William E. Hutchins is used in an agricultural way only, as it has no house upon it. Barrett avenue has a rock roadway from Broadway to Page street, and curbing, but no sidewalks. Vine street has a like roadway going towards Page street until it nearly passes the lot of the appellant. There are no gas-lights upon either street, but the evidence shows that some gasoline lamps have been placed along them, but they do not appear to be now in use, or at least are not well kept up by the city. There is a fire-cistern on Vine street opposite the lot of John B. Hutchins, and a sewer out Barrett avenue, past the lot of the appellant, but which, when opposite the lot of Samuel Hutchins, turns eastward on Howard street. Several streets extend from Barrett avenue eastward, beginning opposite the lots of the parties above named, and these streets appear to lead to thickly-settled localities of the city. Vine street is thickly settled upon the side opposite the lots of John B. Hutchins, that of the appellant, and that of Susan E. Haggin, which is the outer lot from the city of those we have attempted to describe. Indeed, there are 17 houses, almost immediately connected with each other, opposite this last-named lot, and upon Vine street. Barrett avenue opposite the lots of William E. and Samuel Hutchins is quite thickly settled; and this is true of it at one point even beyond its intersection with Page street. This population around the lots we have described must be considered and are a part of that of the city of Louisville. They are, properly speaking, a town or city population; and, even if they do not create a necessity that the city government should be extended over that territory, yet the fact that they are there makes it reasonable that it should do so. The testimony tends to show that the lots above described can by a proper division be sold for over \$2,000 an acre, which is certainly very high for merely agricultural lands, and shows that they are more valuable for city property than for any other use.

Their proximity to the city renders attendance at school easy; it enables the people living there, in case of need, as the testimony shows, to send for the city police, even if they are not stationed immediately upon the ground; their size does not entitle them to be considered farms; and the testimony, when considered in its entirety, shows that they are not only capable of being used as city property, and possess value based upon such adaptation, but are in

fact so held with a view of bringing them upon the market as such when they reached a value commensurate with the views of the owners. Undoubtedly, land held for and adapted to agricultural purposes only, cannot be subjected to ordinary municipal taxation merely because of proximity to a city, although this fact may afford extra facilities for reaching the city, and renders it more valuable; nor merely because of improvements constructed by the municipality. If so, the area of the taxation would be made to depend merely upon municipal energy in extending improvements,—instead of the area in fact occupied by the town or city population. Upon the other hand, the owner of a lot in the heart of the city of Louisville would not be entitled to its exemption from municipal tax because he chooses to plant it in corn, when it is surrounded by a city population, and is adapted to city uses, and thence derives its value. If the land is adapted to municipal uses; if it derives an increased value from the proximity of the municipality, and there is a town or city population on or near it creating a necessity for municipal government, or at least rendering the extension of it over it reasonable,—then the owner must contribute his proper proportion of the public burden. This rule is necessary both to municipal existence, and the proper protection of the property owner. To make the taxation of his property depend entirely upon the use he makes of it would enable him to escape proper taxation while receiving all the benefits of the city government; while, upon the other hand, if the imposition of the tax were made to depend merely upon the energy and ability of the municipality in extending its improvements without regard to the presence of a town or city population to whom the ægis of city government should properly be extended, the property owner would often suffer wrong and injustice. *Courtney v. Louisville*, 12 Bush, 419.

Tested by the rule above indicated, the property of the appellant was liable to the tax imposed, and the judgment is affirmed.

TURNER and others v. SHORT and others.

(*Court of Appeals of Kentucky*. May 24, 1887.)

1. FRAUDULENT CONVEYANCES—ACTION TO SET ASIDE—WHO CAN MAINTAIN.

A conveyance executed by a debtor in fraud of his creditors can be set aside only at the instance of a creditor who has obtained a return of *nulla bona* on an execution or an attachment upon the property conveyed.

2. INFANCY—DEFENSES—PLEADING.

No advantage can be taken of the failure of an infant to plead; but it is the duty of the chancellor to consider as formally pleaded every defense to an action against an infant which might have been made for him.

Appeal from circuit court, Morgan county.

Action to set aside a deed as fraudulent, and subject the property conveyed to payment of plaintiff's debt.

Hazelrigg & Oreat, for appellants. *W. W. McGuire*, for appellee.

LEWIS, J. As there had been, when this action was commenced, no previous judgment for the debt sued on, and consequently no execution and return of *nulla bona*, nor any attachment issued and levied on the land in controversy when the case was submitted for trial, the court had no jurisdiction to set aside the deed therefor, and subject it to the satisfaction of the plaintiff's debt, and hence the judgment dismissing the action as to the vendees was proper and inevitable. Five of the vendees, children of the debtor, being infants, no formal traverse of the allegation of the petition that the conveyance was fraudulent was necessary in order to put in issue that allegation; nor did their failure to plead the want of jurisdiction of the court operate as a waiver on their part of objection on that account; for, as has been repeatedly held by this court, and according to a rule of practice which is founded

upon reason and necessity, no advantage can be taken of the failure of an infant to plead; but it is the duty of the chancellor to consider as formally pleaded every defense to an action against an infant which might have been made for him. Wherefore the judgment is affirmed.

SHUFFITT and others v. SHUFFITT and others.

(Court of Appeals of Kentucky. May 28, 1887.)

LIMITATION OF ACTIONS—INFANCY—SUSPENSION OF STATUTE.

Gen. St. Ky. c. 71, art. 1, § 3, provides that the time within which an action for the recovery of real property may be brought shall not be extended by reason of any disability which did not exist when the right to bring the action first accrued, nor by reason of any disability of the heirs of the person to whom the right first accrued. *Held*, that the cause of action in this case having accrued to the ancestor of the plaintiffs before his death, limitation continued to run after that event, and the fact that he left infant heirs did not have the effect to suspend it.

Appeal from circuit court, Metcalfe county.

This was an action in equity by appellants (as plaintiffs) to recover possession of a tract of land.

E. S. Wisdom, for appellants. *Garnett & Dohoney*, for appellees.

LEWIS, J. The evidence in this case is conclusive that the defendants, and those under whom they claim, had the actual, continuous, and adverse possession of the land in controversy described by the deed from Gorin, the commissioner, for more than 15 years before the commencement of this action. It appears that a patent was issued for the land in 1836, to Francis Shuffitt, under whom the plaintiffs claim; but even if that patent had been valid, and not, as the defendants contend, void because of the previous appropriation of the land, still he never took possession or claimed under that patent, and never resided on the land except about one year in 1849; and it does not clearly appear that, even for that short period of time, he claimed and occupied it as the owner. On the other hand, the evidence shows that Thomas Shuffitt lived on and claimed the land from 1820 to 1848, when it was purchased as his property by Buckner, and afterwards, in 1852, was conveyed by Gorin, commissioner, to Thomas G. Shuffitt and Francis Shuffitt, who held the possession claiming it as their own until sold to satisfy a mortgage given by Thomas G. Shuffitt, and thereafter occupied by him as tenant of the purchaser at the sale to satisfy the mortgage. The cause of action having accrued to the ancestor of the plaintiffs before his death, limitation continued to run after that event, and the fact he left infant heirs did not have the effect to suspend it.

The judgment is affirmed.

JOHNSON v. HUGHART and others.

(Court of Appeals of Kentucky. May 28, 1887.)

1. VENDOR AND VENDEE—CONTRACT—ESTOPPEL.

A., holding certain notes of B., agreed to surrender them in consideration that B. would convey to her a tract of land which he owned. She surrendered the notes, and without waiting for the deed for the land, conveyed the land to C. *Held*, that B. might be compelled to execute the deed, and both he and his privies were estopped to deny the transaction, or set up any claim to the land.

2. SAME—VENDOR'S LIEN—PARTIES—NOTICE.

Where husband and wife executed a mortgage upon several tracts of land, all of which were described as belonging to the wife when in fact two of them belonged to the husband, *held*, that the mortgage was valid as to all of the tracts as between the mortgagor and mortgagee, but the misdescription of the ownership of the two tracts rendered the mortgage inoperative as to third parties without notice of the

true state of things. So where one holding a vendor's lien on the two tracts owned by the husband brought suit to enforce the lien and sell the land, but did not make the mortgagee a party to the suit, *held*, that the sale nevertheless passed good title.

Appeal from circuit court, Hancock county.

W. N. & J. J. Sweeney, for appellant. *G. W. Williams & Son*, for appellees.

BENNETT, J. Edward Long, many years ago, died, owning a tract of land lying and being in Hancock county, Kentucky, and supposed to contain 198 acres. Higdon and wife, becoming the owners of two-thirds of said tract of land, on the — day of December, 1865, sold to appellee John W. Hughart, by deed, which was duly recorded, said two-thirds. Martha D. Long owned the remaining one-third interest in said tract of land, and Margaret E. Long, widow of Edward Long, owned an unallotted dower in said tract of land. Not long after John W. Hughart's purchase from Higdon and wife, proceedings were instituted in the Hancock county court for the purpose of having said land divided and the allotment of dower therein. Said proceedings resulted in a division of the land, and the allotment of dower; the appellee John W. Hughart, receiving 188½ acres, Martha D. Long 37½ acres, and Margaret E. Long 43½ acres as dower; the survey, it seems, having run out more than 198 acres. In 1871 the appellee John W. Hughart purchased from Margaret E. and Martha D. Long their respective parcels of land, and received a deed from them for the same on the twenty-third day of March, 1876. The deed recited the unpaid purchase money due by notes to each vendor, and retained a lien on the respective parcels conveyed, for the payment of the same. The appellee Jett became the assignee for value of these notes.

On the sixteenth of April, 1881, Jett filed his petition in equity in the Hancock circuit court against the appellee John W. Hughart, for the purpose of enforcing his lien on these parcels of land, and obtaining a sale thereof to satisfy the respective sums due thereon. The appellee John W. Hughart appeared, and asserted a right of homestead in said parcels of land. The circuit court denied his right to a homestead as against Jett's claim, but decreed the sale of both parcels of land as a whole, the same not being susceptible of advantageous division, for the purpose of satisfying said debt, interest, and cost; and both parcels were sold by the court's commissioner on the twenty-first of June, 1881, for the sum of \$347.40, the amount of the debt, interest, and cost, and Jett became the purchaser. On the ninth of November, 1881, the sale was confirmed, and Jett received the commissioner's deed for the whole of said parcels of land.

On the twenty-sixth of September, 1876, the appellees John W. Hughart and Armilda, his wife, executed to the appellant, Johnson, a mortgage, which was duly acknowledged and recorded, to secure the payment of a debt due the appellant by the appellee John W. Hughart, on "a certain tract of land lying and being in Hancock county, and on the waters of Yellow creek, containing two hundred and thirteen acres, more or less, and conveyed to said Armilda Hughart by Harriet Miller by deed duly recorded in the clerk's office of the Hancock county court, in Deed Book No. —, page —. Reference is to be had thereto for a more particular description of said tract of land." The appellee Armilda Hughart resisted the appellant's right to subject this land to the payment of said debt, upon the ground that, by the deed of Harriet Miller, the person mentioned in the mortgage, she held said land to her sole and separate use, to the exclusion of her husband, the appellee, during her natural life, and at her death the same was to go to her living children, and therefore the mortgage was invalid. In avoidance of this plea, the appellant urged that Mrs. Hughart was really not the owner of said land; that Mrs. Harriet Miller, at the time of the pretended conveyance to Armilda, was not the owner of said land, but that the appellee John W. Hughart was the owner of the same.

The facts as established by the record are that Mrs. Miller, prior to April, 1872, as the representative of her deceased husband, held several notes on the appellee John W. Hughart for a considerable sum of money; and, he being weak-minded and improvident, she desired to make some provision for Mrs. Hughart, who was her niece; and to that end she effected an arrangement through ——— Pate, then a lawyer, now a minister of the gospel, with the appellee John W. Hughart, by which she surrendered said notes to him, and in consideration thereof he was to deed to her the 138 $\frac{1}{4}$ acres of land which he bought from Higdon and wife, and which was allotted to him in the division heretofore mentioned; and, pursuant to this agreement, Mrs. Miller, on the ——— day of April, 1872, conveyed, by deed, which was duly recorded, said 138 $\frac{1}{4}$ acres of land to the sole and separate use (and to the exclusion of her husband) of Mrs. Hughart during her natural life, and at her death to her living children. It is the recollection of Mr. Pate that the appellee John W. Hughart conveyed said land to Mrs. Miller by deed. He says that he understood the necessity of his making a deed to Mrs. Miller, and intended to have him make it, and thinks that he did make it. Be this, however, as it may, it is certain that the arrangement above indicated was made; and Mrs. Miller, believing that the title was made to her, surrendered the notes, and made the deed to Mrs. Hughart. It is also certain that Mr. Hughart received the notes, and, in consideration thereof, admitted the right of Mrs. Miller to convey said land to Mrs. Hughart, and satisfied the act of conveyance after it was made. The mortgage to the appellant is conclusive evidence of these two latter facts.

It is an elementary equitable principle that, if A. devises property to B. upon the condition that B. must convey to C. a certain piece of his property, and B. accepts A.'s devise, he, by thus accepting, agrees to the condition imposed upon him; and C. may compel him to convey the property according to the terms of the will. Here Mr. Hughart agrees that, in consideration of Mrs. Miller's surrendering certain notes to him, she might convey 138 $\frac{1}{4}$ acres of his land to his wife and children. The notes are surrendered, and the conveyance is made. Now, by the same equitable principle, the transaction is binding upon him, and estops him from calling it in question; and his vendees and privies are likewise bound by the estoppel. So we think the lower court did right in dismissing the appellant's action as to the 138 $\frac{1}{4}$ acres of land. But there was included in the mortgage, in addition to the 138 $\frac{1}{4}$ acre tract, the two parcels of land which Hughart purchased from Margaret E. and Martha B. Long. Although the whole quantity mortgaged is described as the property of Mrs. Hughart, yet as to these two parcels it is clear, as between the appellant and Mr. Hughart, the mortgage is valid, because Hughart and his wife joined in mortgaging this land, which was his, and not hers; and while the misrecital in the mortgage rendered it inoperative as against third persons without notice of the true state of the case, and as to them it would have no greater effect than an unrecorded mortgage, yet, as between the parties, it is as good as an unrecorded mortgage, and is also good as against third persons having notice of the true state of case.

The appellee Jett did not make the appellant a party to his suit for a sale of said parcels of land to satisfy his lien thereon. He had a lien on the whole of the 37 $\frac{1}{4}$ acre parcel, also a lien on his assignor's life-estate in the 43 $\frac{1}{4}$ acre parcel; and, his liens on each parcel being superior to that of the appellant to this extent, his proceeding to enforce them, had it been so limited, without making the appellant a party, would not ordinarily have been a sufficient error to set the judgment and sale aside. But, notwithstanding he did not have a lien upon the reversionary interest in the 43 $\frac{1}{4}$ acre tract, he obtained a judgment for the sale of the whole estate. So the question is, can the appellant have the judgment and sale set aside for this error?

As before stated, the mortgage having described the land mortgaged as the

property of Mrs. Hughart, and it being a legitimate presumption on the part of third persons who knew not to the contrary that the mortgage recited the truth, and such persons dealing in reference to any land belonging to Mr. Hughart, though included in the mortgage, would not be affected with constructive notice that such land was mortgaged.

It does not appear that Jett, at the time he obtained the decree and the sale of the land, had actual notice that said two parcels of land were included in the mortgage; and, while he obtained a decree for the sale of the reversionary interest in the 43½ acre tract of land on which he had no lien, yet it must be remembered that this interest, as well as the dower interest on which Jett held a lien, belonged to Hughart, and that he owed the debt; that he appeared and claimed a homestead in the land, but never questioned Jett's asserted lien on the reversionary interest; that he could have sold the whole of said land to Jett to satisfy said debt, he not having actual notice that the land was included in the mortgage, which sale would have defeated the appellant's lien on same; that Jett could have obtained an execution on his judgment, and had the land sold to satisfy it, which would have passed the title as against appellant. Now, instead of having the reversionary interest sold under execution, the commissioner of court sold it to satisfy the judgment, and by which the debt was discharged; and this was done with the consent of Hughart, and without Jett's having actual notice of the appellant's mortgage thereon. So Jett accomplished by this irregular proceeding the same thing that he had the right to accomplish in either of the two other ways; the same end was reached; and we cannot see how appellant's rights would be prejudiced any more by one way than the other.

In addition to this, it appears that the appellant knew of the pendency of Jett's action to subject this land, and at one time thought of appearing therein, and setting up his claim, which purpose, however, he abandoned, and concluded to bid on the land at the commissioner's sale. By some casualty he was prevented from doing this. We see no error in the refusal of the lower court to disturb Jett's purchase.

The judgment of the lower court is affirmed.

ANDERSON v. WINFREE.

(Court of Appeals of Kentucky. May 19, 1887.)

1. VOTERS—DISFRANCHISEMENT FOR CRIME.

Gen. St. Ky. c. 33, art. 12, § 15, which provides that any person convicted of robbery, forgery, counterfeiting, or perjury, or other *like crimes*, shall forfeit his right of suffrage and right to hold office, embraces in the words "other like crimes" all crimes besides those specifically mentioned which are inconsistent with the common principles of honesty or humanity, and convict the perpetrator of moral turpitude; such as grand larceny.

2. ELECTIONS—MANNER OF VOTING.

Two persons who were qualified voters appeared at the polls very early in the morning, while one of the judges of election was absent, and before the judge who was present and the clerk had been sworn. The two voters cast their votes with the understanding that when the absent judge arrived, and all had been sworn, they would ratify the act. This the two judges and the clerk afterwards did. *Held*, that the votes were valid, and were properly counted.

3. SAME—DEFECTIVE BALLOT.

Where the election is held by ballot, and a ballot is cast which is so defective that it cannot be counted, an elector cannot testify that he cast that ballot, and intended it for a particular candidate.

Appeal from circuit court, Christian county.

John Feland & Son, A. H. Clark, and Jas. Breathitt, for appellant. *R. T. Petree and Joe McCarroll*, for appellee.

BENNETT, J. The appellant, A. H. Anderson, and the appellee, W. P. Winfree, were opposing candidates for the office of county judge of Christian county

at the August election, 1886. The election comparing board of the county found that the appellant, Anderson, received 3,095 votes at said election for the office of county judge, and the appellee, Winfree, received 3,065 votes for the same office; making a majority of 30 votes for the appellant, Anderson, which entitled him, according to the face of the returns, to a certificate of election, which he received. Appellee, Winfree, contested the appellant's right to the office, upon the ground that a large number of illegal votes were cast and counted for the appellant at said election; that some were not citizens of the state; some had not resided in the state a sufficient length of time to entitle them to vote; some were non-residents of the county; some were non-residents of the several voting precincts in which they voted. He also relied upon the fact that between 60 and 70 persons voted for the appellant in the two Hopkingsville voting precincts who were non-residents of said district. The appellant, Anderson, denied these several grounds of challenge, and alleged that a large illegal vote was cast for the appellee at said election on substantially the same grounds as those urged by the appellee.

The case was heard by the county contesting board, which decided that 88 of the votes cast for appellant at the election were illegal, and also decided that 23 of the votes cast for appellee at said election were illegal; and these respective numbers being deducted from the whole number of votes cast for each candidate, elected the appellant by a majority of 15 votes. The appellee appealed to the circuit court. The case was elaborately prepared in the circuit court by both sides; and the learned judge of that court, after hearing all the evidence in the case, by a learned and exhaustive opinion covering all of the questions, both of law and fact in the case, decided that the appellant received only 3,044 legal votes at said election,—the remaining 51 votes cast for him being illegal; that the appellee received at said election 3,047 legal votes,—the remaining 18 votes cast for him being illegal; and that the appellee was elected to the office of county judge by a majority of 3 votes. From that judgment the appellant, Anderson, has appealed to this court.

The appellant's counsel complains here—*First*, that the lower court erred in sustaining the challenge to the votes of Warner Dugind and Jack Smith, who voted for the appellant, upon the ground that they had been previously convicted and sent to the penitentiary of the state upon a charge of grand larceny. By section 4, art. 8, of the state constitution, it is provided: "Laws shall be made to exclude from office and suffrage those who shall thereafter be convicted of bribery, perjury, forgery, or other crimes or high misdemeanors." Pursuant to this provision of the constitution, chapter 33, art. 12, § 15, of the General Statutes declares: "Any person convicted of robbery, forgery, counterfeiting, or perjury, or other like crimes, shall forfeit his right of suffrage and right to hold office." The contention of the appellant is that the "crime of grand larceny is not like any of the crimes" named in the statute,—not even that of robbery. We cannot agree to this proposition. Larceny or theft at common law, as defined by Blackstone, (book 4, p. 229, of his Commentaries,) "is distinguished into two sorts,—the one called simple larceny or plain theft, unaccompanied with any other atrocious circumstance, and mixed or compound larceny, which also includes in it the aggravation of a taking from one's house or person." "Simple larceny, then, is the felonious taking and carrying away of the personal goods of another." "Mixed or compound larceny is such as has all the properties of the former,—simple larceny,—but is accompanied with either one or both of the aggravations of taking from one's house or person." See page 239. "Larceny from the person is either by privately stealing from a man's person, as by picking his pocket, or by open and violent assault." Page 240. "Open and violent larceny from the person, or robbery, is the felonious and forcible taking from the person of another of goods or money, to any value, by violence or putting him in fear." See page 241.

Says METCALF, J., in the case of *Com. v. Clifford*, 8 Cush. 216: "Robbery by the common law is larceny from the person, accompanied by violence or by putting in fear; and an indictment therefor must allege that the taking was from the person, and that it was done by violence or by putting in fear, in addition to the averments that are necessary in indictment and for other larcenies." See, also, the cases there cited.

By the common law it would hardly be correct to say that larceny is like robbery, because robbery is compound larceny, which has all of the properties of plain stealing, accompanied by the additional aggravating circumstance of taking the property from the person of the owner by force or from his person by putting him in fear. It is the circumstance that increases the atrocity of the crime, and distinguishes compound larceny or robbery from simple larceny. Both are larcenies. But when the theft or larceny is accompanied by the aggravating circumstance of taking the property from the person of the owner by force, or putting him in fear, it is called robbery simply to distinguish the manner of committing the theft or larceny from other larcenies. But the statute *supra* has a broader meaning than we have been considering. By the common law, the crimes which render the perpetrator infamous are treason, and such felonies as are inconsistent with the common principles of honesty and humanity, and convict the perpetrator of degradation, depravity, and moral turpitude; and also every species of *crimen falsi*, such as perjury, conspiracy, and barratry. See 1 Greenl. Ev. § 373; *Barker v. People*, 20 Johns. 460. Such crimes by the common law deprive the perpetrator of the right to vote, to hold office, to testify. See McCrary, Elect. § 20; 1 Greenl. Ev. § 373. It is the perpetration and conviction of the infamous crime, and not the degree of punishment, that renders the perpetrator infamous.

By the provision of the constitution which declares that "laws shall be made to exclude from office and from suffrage those who shall thereafter be convicted of bribery, perjury, forgery, or other crimes or high misdemeanors," it was evidently intended, the framers thereof having in their mind that class of crimes that rendered the perpetrators of them, upon conviction, infamous, to give the legislature an express constitutional sanction for passing laws excluding those from suffrage who may be convicted not only of infamous crimes by the common law, but convicted of any other crimes or high misdemeanor. The legislature having this constitutional provision as a guide, and knowing what crimes are denounced by the common law as infamous, and that the perpetrators are, among other things, excluded from the right of suffrage upon conviction, doubtless enacted the law that "any person convicted of robbery, forgery, counterfeiting, or perjury, or other like crime, shall forfeit his right of suffrage, and right to hold office," with a view to crimes declared infamous by the common law, and meant by the words "or other like crimes" to include all crimes, not previously specified, which are inconsistent with the common principles of honesty and humanity, and convict the perpetrator of degradation, depravity, and moral turpitude. The several crimes enumerated in the statute are of this class, known as infamous crimes; and it is to be presumed that the expression "or other like crimes" was intended to apply to and embrace such other crimes as are likewise inconsistent with the common principles of honesty and humanity, and convict the perpetrator of depravity and moral turpitude.

The poll-books showed that the votes of Carter, Craft, and Glover were recorded and counted for both appellant and appellee. The proof shows conclusively that Carter and Craft voted for the appellee, and that Glover voted for the appellant. The lower court deducted the two former votes from the appellant's vote, and counted them for the appellee, and deducted the latter vote from the appellee's vote, and counted it for the appellant.

Where the elector casts his vote by secret ballot which is fatally defective, he ought not to be permitted to testify that he voted the particular ballot, and

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intended it for a particular candidate. Because the ballots having been written by the elector himself, or by his direction, or, if printed, adopted by him as his own act, and no one having the right to control his action, or to become a party to it, the act being peculiarly his own act, it follows that if such act is so defective that it cannot be ascertained, from it and the surrounding circumstances, for whom his ballot was intended to be cast, he will not be permitted to testify for whom he intended to cast it. In such a case no evidence should be admitted that would be inadmissible under the general rules of evidence for the purpose of supporting or explaining other written instruments where the parties themselves would not be permitted to give evidence of their actual intention, where the instrument itself wholly failed to express their intention. So the elector having prepared his ballot himself, and for himself, no party to it but himself, no one having a right to a share in it but himself, and he prepares it so defectively that it wholly fails to express his meaning, such as leaving the name of the candidate blank, or writing the name of Jones where he intended Smith, he will not be permitted to supply the defect in the first place by testifying as to his intentions, nor in the second by testifying that he intended to write the name of Smith instead of Jones. See Cooley, Const. Lim. (5th Ed.) §§ 612, 626. But, says Cooley, (section 626:) "If votes were taken *vote voce*, so that it could always be determined with absolute certainty how every person had voted, the objections to this species of scrutiny after an election had been held would not be very formidable."

The elector, under the constitution and laws of this state, exercises his right of suffrage by a *vote voce* vote. He proclaims openly at the polls, in the presence of the clerk and judges of the election, for whom he votes. It is then the duty of the clerk, in the presence of the judges, to record his vote for that person. This duty is not devolved upon the clerk as the agent or representative of the elector. The elector has no right to record his vote. He can only announce for whom he votes. It is then the duty of the clerk to record it as an officer of the election. Now, the clerk, by inadvertence or design, records the vote for another person than the one announced by the elector; so by the record he has voted for a candidate against whom he had in fact openly and unequivocally voted. Now, whose mistake is this? The electors? No; because he has committed none; for, when he announced for whom he voted,—not intended to vote,—his act was full and complete; it was all that he could do. Then it was the clerk's mistake. The clerk, by this mistake, has disfranchised the elector for the time being; indeed worse, for he has voted him, without his knowledge and against his will, for a candidate that he did not want, and against whom he had in fact voted. That vote was not secretly deposited as by ballot, but proclaimed in the presence of at least four persons, and usually in the presence of a large crowd. It would be a rare case, indeed, that witnesses could not be had, other than the officers of the election, not only as to the fact of voting, but the candidate voted for. Not so, however, as to ballot voting.

Then, as the mistake is not that of the elector, nor caused by any misconduct or oversight of his, nor by the misconduct of any person representing him, or acting in privy with him, but caused by an agency beyond his control, and by which he is not only disfranchised of his choice, but voted for a candidate whom he may believe is unworthy of his vote, and as the fact as to how he voted can be established with absolute certainty, and the misapplication of his vote be in nowise attributable to him, we ask, by what principle of fairness should the correction be denied? Is it because the proof will contradict the record? The answer is, when it can be clearly demonstrated that the record is a mistake, it should not be adhered to when it would deprive the citizen of his free suffrage,—the dearest, highest, and most sacred privilege he enjoys. Is it because the temptation to corruption and fraud would

be so great that public policy forbids it, as in the case of the ballot? The answer is that the elector's act is done publicly and openly, in the broad daylight, and in the presence of witnesses; and it is therefore, in a very large majority of cases, capable of most convincing proof. If the proof is doubtful, then the record as made by the clerk ought to stand; otherwise it ought to be corrected, and the vote counted as it was really cast.

In this case the record shows that the clerk, in recording these votes, made a mistake; and we think it is clear, according to the principles just announced, that the mistake ought to be corrected by counting the votes for whom they were actually cast.

The appellant also contends that the votes of J. S. Cox and William Cravens, who voted in the Bellevue precinct for the appellee, ought not to be counted, because at the time these gentlemen voted, which was early in the morning, but within voting hours as fixed by law, one of the judges of the election was absent, and the other judge and clerk had not been sworn. It is an admitted fact that Cox and Cravens were legal voters in the Bellevue precinct. It also clearly appears that the judge and clerk that received the vote of these gentlemen, as well as the absent judge, had been legally appointed clerk and judges of the election for the Bellevue precinct. It also appears that these gentlemen were apprised of the fact that the clerk and judge present had not been sworn; but, wishing to go to another precinct, they voted with the understanding that when the absent judge arrived, and all were sworn, that they would ratify the act. This the judges and clerk did.

In McCrary on Elections (section 126) it is said "that mere irregularity on the part of election officers, or their omission to observe some merely directory provisions of the law, will not vitiate the poll." As to what is a mere irregularity that will not vitiate the poll, the author says: "The language of the statute must be consulted and followed. If the statute expressly declares any particular act to be essential to the validity of the election, or that its omission shall render the election void, all courts whose duty it is to enforce such statute must so hold, whether the particular act in question goes to the merits, or affects the result of the election or not. Such a statute is imperative, and all considerations touching its policy or impolicy must be addressed to the legislature. But if, as in most cases, the statute simply provides that certain acts or things shall be done within a particular time, or in a particular manner, and does not declare that their performance is essential to the validity of the election, then they will be regarded as mandatory if they do, and directory if they do not, affect the actual merits of the election."

In this case, Cox and Cravens were certainly legal voters in the Bellevue precinct 1, and they voted in that precinct for the candidate of their choice. Their votes were cast at the regular election place, and within lawful voting hours, and the officers of the election, after being sworn, ratified and certified their votes. The merits of the election were not affected. We must hold, therefore, that the lower court did right in counting these votes.

The opinion of the lower court clearly defines what it takes to constitute citizenship in this state; and also what residence is required in the precinct to entitle a person to vote therein; also what absence, and its kind, will debar one's right to vote.

We also think that the lower court, in overruling or sustaining the objections to the vote of each contested voter, save possibly in the case of one set of voters, not prejudicial, however, to the appellant, was sustained by competent and positive evidence; and we cannot say that in any case his decision was clearly against the weight of evidence.

This view of the case renders it unnecessary to determine whether the appellant's majority, according to the face of the returns, was 32 instead of only 30, as the result will be the same.

The judgment of the lower court is affirmed.

GULF, C. & S. F. RY. CO. v. RAINBOLT.

(Supreme Court of Texas. April 19, 1887.)

COURTS—JURISDICTION—CONSTITUTIONAL LAW—CONSTRUCTION.

Section 8, art. 5, Const. Tex., provides that the district courts shall have jurisdiction of "all suits, complaints, or pleas whatever, without regard to any distinction between law and equity, where the matter in controversy shall be valued at or amount to \$500, exclusive of interest." Section 16 of the same article, in defining the jurisdiction of the county courts, provides "that they shall have exclusive original jurisdiction in all civil cases when the matter in controversy shall exceed \$200, and not exceed \$500, exclusive of interest; and concurrent jurisdiction with the district courts when the matter in controversy shall exceed \$500." *Held* that, the two sections being repugnant, the more general must yield to the more specific, and that, therefore, in accordance with the provision of section 16, the district courts did not have jurisdiction of suits for the recovery of money of the exact amount of \$500.

Appeal from Milam county.

Ballinger, Mott & Terry, for appellants. *E. L. Antony*, for appellees.

GAINES, J This suit was brought by appellee in the district court of Milam county to recover of appellant a penalty of \$500 for an overcharge of passenger fare, under the provisions contained in articles 4256 and 4258 of the Revised Statutes. At the Galveston term, 1885, this court, adopting the conclusions of the commission of appeals in the case of *Jones v. Breedlove*, held that the district court did not have jurisdiction of a suit for the recovery of money of the exact amount of \$500. We see no reason for departing from that ruling; and, upon the authority of that case, the judgment of the court below in the cause before us must be reversed, and the suit dismissed for the want of jurisdiction.

The opinion of the commissioners not having been reported, it is considered a proper occasion upon which to set forth the grounds upon which the jurisdiction in these cases has been denied. It is provided by section 8 of article 5 of the constitution that the district courts shall have original jurisdiction of "all suits, complaints, or pleas whatever, without regard to any distinction between law and equity, when the matter in controversy shall be valued at or amount to five hundred dollars, exclusive of interest." Section 16 of the same article, in defining the jurisdiction of the county courts, contains this language: "And they shall have exclusive original jurisdiction in all civil cases, when the matter in controversy shall exceed two hundred dollars, and not exceed five hundred dollars, exclusive of interest; and concurrent jurisdiction with the district court when the matter in controversy shall exceed five hundred dollars, and not exceed one thousand dollars, exclusive of interest." It is apparent from the language quoted that there is an irreconcilable conflict between the two provisions. The district courts cannot have jurisdiction when the amount involved is precisely \$500, and the county court exclusive jurisdiction for the same amount. There is an evident mistake, and we must determine, by construction, which of the two provisions expresses the real intent of the framers of the constitution. There being but the one sum concerning which the doubt exists, it is essentially a matter of no moment upon which court the jurisdiction should have been conferred. There is nothing, then, in the reason or policy of the law, to aid us in solving the difficulty. The conflict is evidently the result of inadvertence; and we think the mistake is more likely to have been made in the former than in the latter section.

Section 8, which defines the jurisdiction of the district court, is literally copied from the corresponding section of the constitution of 1866, in so far as this could be done, in view of the difference between the powers conferred by the two instruments. The language of the provision in question is the same in both, except that the word "five" appears in this provision, instead of the

word "one" in the former. It would seem, therefore, that in drawing section 16 of article 5 of the present constitution, its framers having decided, in a general way, that the line between the exclusive jurisdiction of the county court and the jurisdiction of the district court should be drawn at \$500, copied from the former instrument the words "shall be valued at or amount to," without considering and determining which court should exercise jurisdiction over a matter involving that exact sum. On the other hand, it is to be presumed that in framing section 16, defining the powers of the county court, the language previously used in section 8 was not kept distinctly in view. But, in drawing the latter section, we know that the precise limits of the jurisdiction of the two courts must have been carefully considered and precisely determined, because that section not only accurately fixes the limit of the exclusive jurisdiction of the county court, but in perfect harmony therewith, with equal accuracy, defines the boundaries of the concurrent jurisdiction of the two courts. In framing section 16, the limits of the authority of the two tribunals having been considered together in order to make clearly manifest the intent of the framers in the language to be used, while in drawing up the former provision the definition of the jurisdiction of the district court was the main object in view, the latter section must be deemed the more accurate expression of the legislative will, and must prevail.

Furthermore, it is a rule in construing repugnant provisions of the same constitution or statute that the more general must yield to the more specific. This rule was applied by this court in *Erwin v. Blanks*, 60 Tex. 583, in deciding a similar question to that before us. It was there held that in a proceeding for the trial of the right of property levied upon by attachment, etc., which was of the value of \$500, the district court had jurisdiction, upon the ground that the provision upon this subject contained in section 8 applied to this class of cases specially by name, and should control the more general provision applicable to county courts in section 16. But, as to the matter now under consideration, the provision in the latter is more specific than that in the former section, and hence should be taken as the prevailing expression of the legislative intent.

It seems also to be a rule of interpretation, long recognized, that in case of a repugnancy between two provisions of a statute which cannot be reconciled, that the latter in position should control, as being the last expression of the legislative will. *Attorney General v. Chelsea Water-Works*, Fitzg. 195; *Bac. Abr.* word "Statute," D; *Packer v. Railroad Co.*, 19 Pa. St. 219; *Spencer v. State*, 5 Ind. 47; *Albertson v. State*, 9 Neb. 430, 2 N. W. Rep. 742, 892. This rule was also applied in construing repugnant provisions in the constitution of Indiana, in *Quick v. Township*, 7 Ind. 570. As applied to the fundamental law, which is presumed to be prepared with the utmost care and deliberation, this would seem but an arbitrary canon of construction. It should be appealed to, if at all, only as a last resort. We have not found it necessary to apply it in this case.

The judgment is reversed, and the cause dismissed.

McMURRY v. McMURRY.

(Supreme Court of Texas. April 19, 1887.)

EQUITY—DECREE—SETTING ASIDE—DIVORCE.

A decree depriving a married woman of her full share in the community property, obtained in her absence through willfully false evidence given and introduced by the husband on the trial of an action for divorce, will, on the petition of the wife, be vacated by a court of equity after the term in which it was rendered, when it appears that the falsity of such evidence was not discovered until after the close of the term, and that the husband, by reason of the marital relation, had means of

knowledge not accessible to the wife; and that she was thereby prevented from presenting all of her case at the time the decree was entered, without any want of diligence on the part of herself or counsel.

Appeal from Live Oak county.

• *T. A. Blair*, for appellant. *A. J. Peeler* and *J. M. Eckford*, for appellee.

STAYTON, J. This action was brought by the plaintiff in error on January 31, 1885, in the district court for Live Oak county, to vacate a decree rendered by that court on March 15, 1883, and to recover her share of the community property of which she claimed to have been defrauded through a decree obtained through willfully false evidence given and produced by her husband on the trial of an action for divorce instituted by him. The petition in effect alleges that the home of herself and husband was in Live Oak county, Texas, but that she was absent, with the consent of her husband, and at the home of her mother, in the state of Louisiana, distant from Live Oak county about 1,000 miles, when on January 3, 1883, she was served with notice to appear and defend an action for divorce which her husband had filed against her, alleging abandonment as a ground. The petition further alleges that she was without means to come to Texas, or to employ counsel, but that she did by letter secure counsel, to whom she gave such information as she possessed, and that evidence, so far as she was able to procure it, was obtained. The fact of abandonment was denied, and the petition gave a full statement of repeated intercourse between the parties while the plaintiff was in Louisiana, and of the repeated promises of her husband to take her to Texas so soon as he could provide a new home; he having induced her while in Louisiana to consent to the sale of their former homestead in Texas. The petition further alleged that the action for divorce "was brought by the defendant, her husband, with the wicked and willful intent to cheat and defraud your petitioner of her interest in the community property; that defendant willfully, wrongfully, and with the wicked intent to cheat and defraud your petitioner, procured and introduced false evidence to prove said abandonment by petitioner, and with like intent himself did testify falsely as to the amount and value of the community property; that said division was made by said decree on said false evidence so produced and given by defendant; * * * that the decree was made on the proof so made by defendant that said abandonment occurred on the fourth day of June, 1878; * * * that, on the trial of said cause, the defendant, testifying to the amount and value of his estate, testified that he was worth only the sum of \$20,000, and that the same was his separate property, when in truth and in fact, at the time of said decree, defendant had in his possession \$55,000 worth of property, * * * all of which was community property, except the amounts hereinafter mentioned, which were the separate property of defendant; * * * that defendant had always kept your petitioner in total ignorance of the amount and value of the estate; that petitioner and her counsel neither could find any one who knew anything of the amount and value of the same, but on the trial of said cause her counsel was compelled to rely upon the evidence of the defendant as to the amount and value of said estate; that on said trial defendant testified that all the property, amounting to about \$20,000, was his separate property, when in fact there was \$55,000 belonging to said estate, which was all community property, save and except the sum of \$1,572, which the petitioner admitted was the separate property of the husband." The petition further showed that by the decree in the divorce suit there was set apart to the plaintiff in error property amounting in value to \$1,800. The reasonable inferences from the petition are that the falsity of the evidence given by the husband was not discovered until after the close of the term at which the judgment was rendered. Demurrers to the petition were sustained, and the cause dismissed.

The district courts of this state doubtless have all the power exercised by

courts of equity to give relief against judgments obtained by fraud, accident, or mistake, and the inquiry arises whether the facts stated in the petition entitled the plaintiff to the relief sought. The petitioner in effect alleges that the defendant procured a decree to be rendered in his favor whereby she was deprived of her share of the community property, and that this was accomplished through willfully false testimony given by the defendant himself in reference to a matter which, from their relation, he had means of knowledge not accessible to her. There is some conflict of authority as to the power of a court of equity to vacate a judgment or decree obtained by false testimony, and it seems to be generally held that such a power will not be exercised unless it be shown that the false testimony was introduced through the procurement or connivance of the party to be benefited by it. *Fisk v. Miller*, 20 Tex. 581.

It has often been asserted in this state that the district courts, in the exercise of their equitable powers, may grant, by re-examining the case on its merits, such relief as equity and justice may demand, when it is made to appear that a judgment has been obtained by fraud, mistake, or accident, without any want of diligence on the part of the person against whom rendered. *Overton v. Blum*, 50 Tex. 423. That the willful giving of false testimony by a party to an action in relation to a matter affecting an issue to be tried is fraud of the most pernicious character cannot be questioned, and for such conduct it has been held that the injured party was entitled to have the cause re-examined. *Laithe v. McDonald*, 7 Kan. 254, and 12 Kan. 340; *Bell v. Walnitzsch*, 39 Tex. 132; *Burgess v. Lovengood*, 2 Jones, Eq. 460; *Peagram v. King*, 2 Hawks, 297; *Dunlap v. Glidden*, 31 Me. 439; *Peck v. Woodbridge*, 3 Day, 36; 3 Grah. & W. New Trials, 1543; Story, Eq. 1574, 1575.

In the case of *Greene v. Greene*, 2 Gray, 361, it was held that a decree of divorce obtained by a husband could not be set aside at a term subsequent to that at which it was rendered, on an original proceeding instituted by the wife for divorce in which she alleged that the divorce granted to the husband was obtained by fraud and false testimony. In commenting upon this case in the more recent case of *Edson v. Edson*, 108 Mass. 598, the same court said: "Strictly speaking, the decision is an authority only for the proposition that a decree of divorce cannot be called in question or invalidated, on the ground of fraud in its procurement, in a separate and independent libel subsequently brought between the same parties, when it appears that the first decree was entered after due notice to the adverse party, followed by an adjudication upon the evidence offered in the support of the allegations in the libel. To this extent there can be no doubt that the decision is in harmony with sound principles and with adjudicated cases; but beyond this, which was the precise point adjudicated, the authority of the case cannot be extended. It certainly is distinguishable from the case now before us. This is not a new suit in the nature of an original proceeding to obtain a decree of divorce, in the course of which it is attempted to treat a former decree as null and void, but it is a petition addressed to the sound discretion of the court, asking that a decree rendered at a former term may be reopened and vacated on the ground that it was fraudulently obtained. It is in the nature of an application to correct the record, and to prevent wrong and injustice from the effect of the judgment as it now stands. In this respect it only invokes the exercise of a power of the court for which there are precedents in analogous cases."

In the case of *U. S. v. Throckmorton*, 98 U. S. 61, it was held that a proceeding to vacate a decree alleged to have been obtained through the use of a false instrument and the deposition of perjured witnesses could not be maintained after the lapse of 20 years. There is nothing in the report of the case, however, to indicate that by the exercise of proper diligence the fraud complained of might not have been discovered before the decree was rendered; but, on the contrary, it was assumed that this might have been done; and, besides, the prop-

erty involved had passed into the hands of third persons. There is much in the opinion, however, which tends to a denial of the power of a court, after the term at which a judgment or decree is rendered, to re-examine the case, even though the judgment or decree may have been obtained through perjury of the successful party. But, after referring to classes of cases in which relief might be given, the court said: "In all those cases, and many others which have been examined, relief has been granted on the ground that by some fraud practiced directly upon the party seeking relief against the judgment or decree, that party has been prevented from presenting all of his case to the court."

If the averments of the petition before us are true, it cannot be denied that the plaintiff in error was prevented, by the fraud of the adverse party, from fully presenting all of her case at the time the decree was entered, and so without any want of diligence on the part of herself or counsel. If fraud was committed, this was done in obtaining the judgment, and not in some step which preceded the trial, of which the complainant was cognizant, and ought to have been prepared to meet. The rule which denies to a party the right to relitigate a matter once in controversy, and decided by a court having jurisdiction, is one on the observance of which the welfare of society largely depends, and should not be frittered away; but it assumes that there has been a trial in which the respective parties have had an opportunity to fully present their claims. It ought not to be given application when it is clearly made to appear that one party has, by his own false evidence, knowingly given, or by the evidence of others by him introduced and known to be false, obtained a judgment or decree against his adversary which gives to him something which truth and justice would deny. If, by accident or mistake, without fault or neglect of his adversary, one obtains a judgment or decree which he ought not to have, relief may be given. And why? Certainly for no other reason than that the party affected by the accident or mistake has not had an opportunity to present his rights. When one is deprived of the power to do this by the knowingly false testimony of his adversary, is he to be denied relief when it is to be given, on the ground of accident or mistake, when his adversary may be without fault? It has been well said that "ignorance of fact is clearly associated with the ground last above stated,—mistake of fact,—and rests on precisely the same principles. The subsequent discovery of such material fact of which the party was unavoidably ignorant during the progress of the cause, is a basis for equitable relief. This rule is for the reason that a state of ignorance is a moral incapacity of making a defense on trial. However, it is not sufficient that the defendant did not know of the grounds of defense during the trial, but it must likewise appear that the ignorance did not result from any want of diligence." Wells, Res Adj. 502; Breese, 149.

Such being the effect of ignorance of fact not resulting from the want of diligence, what must be the effect of such ignorance when knowledge is not only withheld, but concealed by false swearing, by one whose relation to the thing in litigation is such that it is his duty to have knowledge in regard to it, that he may properly manage it as its sole legal custodian, and whose relation to the ignorant beneficiary is such that to withhold needed information is a breach of duty constituting fraud?

As to community property, a husband is, in a restricted sense, a trustee for his wife, bound to good faith, and derelict in duty if he conceals knowledge from her necessary to enable her to protect her rights. As was said in *Wright v. Wright*, 7 Tex. 534: "When a party claims property consisting of various articles, which he attempted to enumerate, in order that all the constituents of his claim be presented for adjudication, the judgment or decree would generally preclude further controversy in relation to matters which should have been properly embraced in the pleadings and judgment in the first litigation, but this rule is subject to exceptions. It would not, for in-

stance, debar the party from claiming property which had been fraudulently concealed by the other party, or prevented by his fraud from being brought forward for disposition by the decree; nor in a case like the present, would a married woman suing for separation of property be concluded and restricted to the articles claimed in her pleadings. In such case there is no presumption that the wife has full knowledge of the property to which she has a claim. The inference would be unreasonable. The law invests the husband with the management of all the property in which the wife has an interest. The incapacity of the wife during matrimony is presumed. From the legal fiction she suffers many evils, and she is entitled to its immunities; at least in all cases where they are not invoked to shield the perpetration of gross frauds on the rights of others. She could not rationally be supposed to be fully cognizant of the extent or description of the community property, and she cannot be concluded if the whole of such property be not described in her pleadings. * * * The concealment of property by the husband, or the refusal of commissioners to insert it in the inventory, cannot prejudice the rights of the wife; for the law protects such as labor under incapacities, and such as are defrauded, and not those who commit fraud."

We are of the opinion that the petition states facts which entitle the plaintiff to a re-examination of the question of community property, and to the value of such additional part thereof as, in connection with that already decreed to her, will give her a share equal to that which the defendant under the law is entitled to retain.

For the errors in sustaining the demurrers, and dismissing the petition, the judgment will be reversed, and the cause remanded.

KELLOGG and others v. MULLER.

(*Supreme Court of Texas. April 22, 1887.*)

1. ASSIGNMENT FOR BENEFIT OF CREDITORS—VALIDITY—POWER.

A power granted to the assignee in a deed of assignment to sell and dispose of the goods, and collect the accounts, "converting the same into cash or its equivalent," is not a power to sell on credit, or if so, and therefore constituting a badge of fraud, is not sufficient to render the deed void upon its face.

2. SAME—SCHEDULE—SUFFICIENCY.

A provision in a deed of assignment, after giving a list of creditors, preferred and not preferred, that "should the said party of the second part have omitted or forgotten any creditor, and his claim is just and correct, he shall share alike with those in Schedule B, class 2, not preferred," is a substantial compliance with the requirement that the beneficiaries must be pointed out.

3. SAME—ATTACHMENT—BURDEN OF PROOF.

Where a creditor issues an attachment against property which has been assigned for the benefit of certain creditors under a valid assignment, and claims that such creditors have been paid, whereby the property has reverted to the assignor, the burden is on the attaching creditor to show such payment before he can establish his attachment as against the assignee.

4. BONDS—SHERIFF—JUDGMENT ON—ATTORNEY'S FEE.

A sheriff held liable with the attaching creditor in a suit for a wrongful attachment, if entitled to a judgment in that suit against his co-defendant upon the indemnity bond, is, at least, not entitled to have an attorney's fee included in such judgment in the first instance.

Appeal from Grayson county.

T. J. Brown and Bryant & Dillard, for appellants. *W. W. Wilkins*, for appellee.

GAINES, J. One Porter made a deed of assignment to appellee, Muller, for the benefit of creditors. This was before the act of 1879 concerning assignments went into effect. Appellants sued out a writ of attachment against Porter, and caused it to be levied upon a portion of a stock of goods which

had been conveyed by the deed. Muller brought this action against appellants, and against W. O. Everhart, the sheriff who made the levy, and the sureties on his official bond, to recover damages for the seizure. Everhart and his sureties pleaded that, before the levy, he had demanded and received of appellants a bond of indemnity, and asked judgment over against them in the event the plaintiff recovered. The jury found for the plaintiff, Muller, against all the defendants, and in favor of Everhart and his sureties against the appellants for the amount of the verdict in favor of plaintiff, and \$100 as his attorney's fees. Appellants excepted to the petition on the ground that the deed of assignment—which was made an exhibit thereto—was void upon its face. The exceptions were overruled by the court, and this ruling has been assigned as error.

The first exception to the deed is that the deed authorized the assignee to sell the property assigned on a credit, and is therefore void. The provision to which we are cited in support of the exception is as follows: "That, so soon as said inventory is complete, the said Frederick Muller, as such trustee aforesaid, shall thereafter, with all reasonable dispatch, proceed to sell and dispose of said goods, wares, and merchandise and furniture, and collect said book-accounts and bills receivable, converting the same into cash or its equivalents." It may be doubted if this can be construed to empower the assignee to sell for anything but money. The meaning of the provision is not clear. It is not easy to conceive what is intended to be embraced by the use of the words "its equivalents;" but to be equivalent to cash must be something commercially as good as cash, or, as we take it, something that could readily be converted into cash at a fixed price. The grant of power to an assignee to sell on credit has been declared a badge of fraud. *Carlton v. Baldwin*, 22 Tex. 724. It is so held mainly upon the ground that, its obvious effect being to unnecessarily delay the creditors, it tends strongly to create the presumption that such was the leading object of the assignment. By no reasonable construction can the power in the deed before us be held to have this effect, and hence we do not think it can be considered even an evidence of fraud. But however this may be, even if a badge of fraud, it is not sufficient to authorize the court in holding the deed void upon its face. *Baldwin v. Peet*, 22 Tex. 708.

The second ground of exception was to the effect that the deed was void upon its face because it did not fix the rights of the creditors, "but leaves it in the power of assignor and assignee to declare who are creditors." Schedule B accompanying the deed gives a list of the creditors in two classes; class 1 being the preferred creditors, and class 2 being those who are not preferred. The instrument also contains the following provision: "And should the said party of the second part have omitted or forgotten any creditor, and his claim is just and correct, he shall share alike with those in Schedule B, class 2, not preferred." The rule is that a deed of assignment, in order to be valid, must point out the beneficiaries; and it has been decided by this court that a conveyance of this character, which purported to be for the benefit of the creditors of the assignor generally, without naming any of them, is void. *Caton v. Mosely*, 25 Tex. 378. But a reasonable compliance with the rule, such a compliance as the circumstances of the case may admit of, is all that is required.

In *Nave v. Britton*, 61 Tex. 572, it was held that it was sufficient if the names of the creditors were specified, although the amounts of their respective claims were not stated. In the deed of assignment under consideration, the names of both classes of creditors, with the amount due each creditor, is stated with particularity, as far as they were remembered; and it would seem that out of an abundance of caution, in order that no creditor should be deprived of a participation in the assets, if there were more than enough to pay the preferred claims, the provision was made that any creditor whose name

had been omitted should share with those of the second class. This is materially different from the case of *Caton v. Mosely*, *supra*, in which the payment of the creditors were provided for generally, without naming any of them, and without pointing out any method by which the debts of the assignor could be ascertained. If we do not misconstrue the statement of the reporter in the case of *Van Hook v. Walton*, 28 Tex. 59, the deed of assignment which was upheld in that case as being good upon its face contained a similar provision for the participation of such of the creditors of the assignor as had not been named in the schedules. This must be deemed as establishing an authoritative rule of property, and is decisive of the question now before us. See, also, *Ward v. Tingley*, 4 Sandf. Ch. 476.

It is complained in the sixth assignment that "the court erred in refusing the third charge asked by the defendant, because the evidence showed that all of the preferred creditors had been paid, and did not show that any of the non-preferred creditors had accepted the assignment. But the statement in appellants' brief submitted in support of the proposition shows that the debt due Focke & Wilkins was \$2,000, and that they had been paid \$1,300. It seems that no evidence was adduced upon either side to show whether the creditors who were not preferred had been paid or not. If all the debts provided for in the deed of assignment had been discharged, then the property reverted to the assignor, and was subject to attachment at the suit of appellants. But we think the burden was upon appellants to show a satisfaction of the debts if, in fact, they had been paid. In *Caton v. Jones*, 21 Tex. 788, the property attempted to be assigned was attached at the suit of a creditor, and the assignee intervened, and alleged that there were other creditors besides the plaintiff who had attached, but failed to prove this fact upon the trial. The court held that, because he was asking equitable relief, he should have shown the existence of other creditors as alleged. The deed of assignment in that case was the same which was subsequently passed on in *Caton v. Mosely*, *supra*, and did not give the names of the creditors, or in any manner show what debts were owed by the assignor. In the case before us, the names of numerous creditors were given, and their debts specified; and it was certainly incumbent upon appellants to prove the payment of the claims of those who had been named, in order to hold the proceeds of the property as against an assignee claiming under a valid assignment.

We find no error in the judgment in favor of plaintiff against defendants; but we think the court erred in charging the jury to find in favor of defendant Everhart and his sureties against appellants for their attorney's fees. It may be that, all the parties being before the court, the sheriff had a right to demand a judgment against appellants as obligors in the indemnity bond, in case the plaintiff succeeded in his suit, so that he would have prompt means of indemnity at hand, "and thereby save himself the necessity of an advance and payment out of his own funds." See *Pope v. Hays*, 19 Tex. 375. And it may be that after judgment against a sheriff, which the obligors on his indemnity bond have failed to discharge after notice, he would have the right to recover of them a reasonable fee for the attorney who brought the action for him. This point we are not called upon to decide. Here there has been no breach of the bond. We cannot see that appellants would be in default until they had failed to pay the judgment after a final determination of the suit in the court of last resort. They ought not to be made to pay an expense the sheriff was not required to incur for his own protection. They could not discharge their obligation until his liability had been fixed, and hence we conclude they cannot be held liable for his attorney's fees in this action.

The verdict of the jury shows a separate finding in favor of Everhart against appellants for the attorney's fees. The judgment will accordingly be reversed, and reformed, so as to give him a recovery against them to the

amount of plaintiff's judgment, and no more. Appellants will be adjudged to pay one-half the costs of this appeal, and appellees Everhart and his sureties the other half.

DULL and another v. DRAKE and others.

(Supreme Court of Texas. April 26, 1887.)

1. APPEAL—PRACTICE—STATEMENT OF FACTS.

The action of the trial judge in admitting or rejecting evidence will not be revised on appeal, when there is no statement of facts in the record.

2. SAME—BILL OF EXCEPTIONS.

Under the Texas practice there is no authority for bringing to the knowledge of the supreme court the facts proved upon the trial of a case through the medium of a bill of exception. Such a bill brings up rejected testimony, or testimony admitted over objections. But evidence introduced without complaint, and which formed part of the case made before the court or jury, must be put in the statement of facts; otherwise it will not be noticed on appeal.

3. ADMINISTRATOR PRO TEM.—POWERS OF.

Under Texas probate law, a temporary administrator has only such powers as are expressly granted him by the county judge at the date of his appointment.

Appeal from McMullen county.

Archer & Atkinson, for appellants. *Murphy & Morrison*, for appellees.

WILLIE, C. J. Appellants brought this action of trespass to try title against the appellees for the recovery of 738 acres of land in McMullen county. The appellees pleaded not guilty and the statute of limitations. Judgment was rendered below for the appellees, and that judgment is brought here for revision. There is no statement of facts in the record, but a bill of exceptions is found which recites the introduction in evidence by the appellants of a copy of a patent for the land to the heirs of Joseph A. Spicer; transfer of Spicer's head-right certificate to S. Rhoads Fisher; will of Fisher, with probate thereof, giving his executrix full power to sell his lands; and deed from Ann Fisher to Charles H. Coley for the 738 acres in controversy. The bill further states that the appellants then offered in evidence a deed from J. L. Croom, Jr., administrator of the estate of Charles Coley, deceased, to W. A. Hill, for said land, and also the records of the probate court of McMullen county, showing application of John L. Croom, Jr., for letters of temporary administration on the estate of Charles H. Coley, deceased, and application to sell the land in controversy; also order of court appointing Croom temporary administrator of said estate, and ordering sale of the land in controversy by said administrator; also the report of the sale, and its confirmation by the court. Upon objection, the administrator's deed was ruled out by the court, and the assignments of error relate solely to its rejection. We have repeatedly held that we will not revise the action of a district judge in admitting or rejecting evidence when there is no statement of facts in the record. In this case it is attempted to make the bill of exceptions serve the purpose of a statement of facts by incorporating into it evidence admitted upon the trial, and by this method to show the importance of the rejected testimony. We know of no authority for bringing to the knowledge of this court the facts proved upon a trial of the cause through the medium of a bill of exceptions. Such a bill brings to our attention rejected testimony, or such as has been admitted over objection; but such as was introduced without complaint, and formed part of the case made before the court or jury, must find its place in the statement of facts; otherwise it will not be noticed. We are not informed by this record upon what state of facts the court determined the case in favor of the appellees, and are not, therefore, prepared to say whether the appellants were injured or not by the rejection of the administrator's deed. We will add, however, had the ruling of the court been properly before us, it would have been sanctioned.

The circumstances under which the sale was made were remarkable. A party applies for temporary letters of administration, and at the same time for the sale of a tract of land. He is appointed immediately, and the sale is ordered. The administrator neither gives bond, nor takes the oath, and he does not return an inventory of the property of the estate. Parties interested in the estate are not notified of the proposed sale. There is nothing before the court to show that there is not other property that could be sold with greater advantage to the estate. The administrator does not swear to the facts that he alleges as a reason why the sale should take place. The whole proceedings are hurried through with the greatest haste; and a species of property that the law deems of so much importance that it must not be sold for any purpose, so long as there is anything else that can be disposed of with more advantage to the estate, is sold within a few days after the original grant of letters, by a temporary administrator, and without compliance with a single prerequisite of such a sale prescribed by the statute. Our probate law does not contemplate that a temporary administrator shall have any powers except such as are expressly granted him by the county judge at the date of his appointment. He cannot, without special authority, continue in office longer than the day for taking up probate business at the next term of the county court. It was doubtless thought that by that time an executor or a permanent administrator would qualify, and the estate be thereafter managed by him as prescribed by statute. The principal object of the temporary appointment is to preserve and keep the estate together until it can pass into the hands of a person fully authorized to administer it for the benefit of creditors and heirs. It was certainly not intended that such a temporary officer should possess greater power than an ordinary executor or administrator, and should sell the lands of the estate before either he or the court could possibly know of the necessity for such sale, or anything else in reference to the general condition of the assets and liabilities of the deceased. The judgment is affirmed.

FORT WORTH & D. C. RY. CO. v. HOGSETT.

(*Supreme Court of Texas. April 29, 1887.*)

1. APPEAL—ASSIGNMENT OF ERRORS.

An assignment of error to the admission of evidence must rest upon the same objection in the appellate court as was taken to it below.

2. DAMAGES—MEASURE OF—INJURY TO LAND.

The true measure of damages, in case of permanent injury to the soil, is the difference between the value of the land immediately before the injury and its value immediately after.

3. TRIAL—CHARGE—PART AND WHOLE.

Where certain instructions in the judges' charge to the jury, claimed by appellant to be erroneous, are so qualified by subsequent instructions that the charge, taken as a whole, lays down the true rule of law, objections to it will not be sustained.

Appeal from Wise county.

J. M. O'Neal, for appellant. *Hogsett & Greene*, for appellee.

WILLIE, C. J. Hogsett brought this suit against the appellant to recover damages for the burning of the grass upon a tract of land belonging to him, and permanently injuring the land upon which the grass was growing, all of which was alleged to have been caused by the negligence of the appellant in operating its engines, and keeping them in repair, and in allowing grass and weeds and other combustible matter to remain upon their right of way through appellee's land. The appellant pleaded a general denial, and Hogsett, before jury, recovered a verdict for \$1,200. Judgment having been rendered against the appellant for that amount, it has taken an appeal therefrom to this court.

In proof of the market value of the grass, plaintiff below introduced as a

witness George W. Short, who was asked as to its market value for pasturage and hay purposes. To this question the defendant objected, because it restricted the witness to special purposes in his statement of the market value. It is difficult to conceive for what other purpose the grass could have had any market value; but, if there were purposes to which it could be applied which gave it a higher market value, the defendant cannot complain that the witness was not asked as to these; for it was to its advantage that the highest market value should not be proved; and, if there were purposes to which it could be applied for which it was less valuable, the question was proper, for the plaintiff was entitled to the highest market value of his property destroyed by the negligence of the appellant. This objection is abandoned in this court, and it is insisted that the answer was improper, because a cross-examination of the witness developed the fact that he was merely giving his opinion as to the value of the grass. But an assignment of error to the admission of evidence must, in this court, rest upon the same objection taken to it below. *Sharp v. Schmidt*, 62 Tex. 263. Moreover, it has been held that evidence as to market value is not objectionable because it is in a measure the opinion of a witness. *Railway Co. v. Knapp*, 51 Tex. 592. That the answer to the question is shown to be an opinion is no ground for ruling out the question before it is answered. If the illegality of the answer is not developed till cross-examination, the proper practice is to have it excluded from the jury. The appellee was sworn as a witness in his own behalf, and, among other things, was asked to state how much less the land was worth immediately after the fire than it was before, and to state upon what he based his estimate. This question was objected to because it called for an improper measure of damages. The objection was overruled, and the witness proceeded to answer, giving facts upon which he based his calculation as to the amount of damages incurred by him. The bill of exceptions recites that the defendant excepted to the answer, making objections several times as the witness proceeded with his answer. The petition claimed damages, not only for the destruction of the grass growing upon the land, but for permanent injuries to the land itself, caused by the destruction of the sod and roots of the grass, and diminishing the capacity of the land to produce crops of grass, to which it was best adapted, for future years. These allegations were sustained by evidence. That the true measure of damages in case of permanent injury to the soil is the difference between the value of the land immediately before the injury and its value immediately after, is well settled in this court. *Gulf, C. & S. F. Ry. Co. v. Helsley*, 62 Tex. 593; *Galveston, H. & S. A. Ry. Co. v. Seymour*, 63 Tex. 347. The bill of exceptions does not inform us what objection was made to the evidence while it was being detailed by the witness; but the presumption is that the same objection taken to the question was taken to the answer. Having held this objection untenable, it will not be necessary to go into an examination of the testimony given by the witness.

The charge of the court complained of in the twelfth assignment of error is as follows: "Railroad companies have the legal right to run steam-engines on their roads, but they have no right to scatter sparks along their track in such manner as to cause unnecessary danger to adjoining property along their line of road; and should they do so, and the property of others is thereby injured or destroyed, the company so doing would be guilty of negligence, and liable to the owner for such injured or destroyed property, for whatever loss or injury by fire results from said acts, and said railroad employes are bound to employ due care and skill for the prevention of mischief to the property of others from the emission of sparks of fire from their passing engines." This charge is in accordance with the law as laid down in *Railway Co. v. Timmermann*, 61 Tex. 660, when taken in connection with the entire instructions upon this particular subject. The subsequent division of the charge allowed the company to escape damages if they could show that the sparks did not es-

cape through its negligence, or if they used good and sufficient machinery and appliances to prevent the escape of fire from their engine. It did not assume that fire has escaped from the engine upon this particular occasion, but, in effect, placed that matter hypothetically before the jury.

The fourteenth assignment of error complains of the seventh subdivision of the charge, because it instructs the jury, in effect, that, if the company left any grass or weeds or other combustibles upon its track, that of itself was negligence. This is precisely the rule as laid down by the most eminent text writers, and gathered from the great weight of authority. 1 Thomp. Neg. 162; Cooley, Torts, 592; *Troader v. Railway Co.*, 74 N. C. 377; *Railroad Co. v. Chase*, 11 Kan. 47; *Flynn v. Railroad Co.*, 40 Cal. 14. The court, however, in this case required that the combustibles negligently left lying along the track should have taken fire from the engine, and then communicated the flame to appellee's grass, before the appellant could be made liable. It did not subject it to damages for keeping combustible matter upon the track if that matter had nothing to do with communicating the fire to the property of the appellee. As thus qualified, we think the charge was in line with the weight of authority, and that the court properly gave it to the jury.

The fifteenth assignment objects to the eighth subdivision of the charge, which is as follows: "If you find, and believe from the evidence, that defendant company, during the month of September, 1888, or at any time within two years next before the fifth day of March, 1885, by its agents, servants, or employes, while engaged in operating its engines and cars along its right of way, so negligently and carelessly managed and operated their engine *as to set fire to plaintiff's said grass on his land*, * * * then the defendant company would be liable for whatever damages, if any, plaintiff may have suffered thereby, not to exceed the amount claimed by him in his said petition." The objection raised to this charge is that the court thereby instructed the jury to find for the plaintiff if defendant, in operating its engines and cars, had set fire to his grass; but it is clear that the language used is susceptible of no such construction. The management and operating of the engine and cars was by the charge required to have been negligent, and the burning was required to have been the result of that negligence before a recovery could be had; and this is law too well established to demand discussion.

There is no error in the judgment, and it is affirmed.

M'ILHENNY Co. and others v. BLUM and others.

(*Supreme Court of Texas*. April 26, 1887.)

1. PRINCIPAL AND SURETY—RELEASE OF SURETY—EFFECT.

A creditor may release one who is bound to him as surety without releasing the principal debtor.

2. SAME—PAYMENT BY SURETY—EFFECT.

Where the surety pays the creditor a certain sum in consideration of his release, leaving the obligation in full force against the principal debtor, *held*, that the creditor may recover the full amount of the debt from the principal, and is not obliged to credit the amount paid by the surety.

Appeal from Bell county.

Dupree & McCutcheon and *Montleith & Furman*, for appellants. No counsel for appellees.

GAINES, J. The Mountain Home Co-operative Association, a private corporation, made a deed of assignment to appellee Woodworth for the benefit of creditors. Appellants, and appellees L. & H. Blum, proved up claims against the insolvent corporation, which were duly filed with the assignee. The property having been administered, and a dividend declared, this suit was brought by appellants to cancel the claim of appellees the Blums, and to re-

strain the assignee from paying over the dividend set apart to them. This claim was a promissory note, which read as follows:

"On January 1, 1883, we promise to pay to the order of Leon & H. Blum twenty-four hundred and ninety and 03-100 dollars, at their office in Galveston, Texas, with exchange and interest at the rate of 8 per cent. per annum from date, the fourteenth day of August, A. D. 1882.

[Signed]

"W. S. JONES, Agent.
"W. T. REESE.
"J. F. MCANINCH.
"A. J. DALLAS.
"E. B. EDWARDS.
"WRIGHT & HARRELL.
"J. C. BELL.
"A. C. STONE."

The evidence shows that the note was given for a debt of the corporation, and that Jones, who signed it as agent, was its agent, and that he had been accustomed to sign for it as such. This we think sufficient to prove that the note was the debt of the corporation, and that, as between the makers, the corporation was the principal promisor and the others merely its sureties.

But it is contended on behalf of appellants that Leon & H. Blum released McAninch, Dallas, and Wright & Harrell from the note, and thereby released its claim against the corporation. The facts in relation to that matter are these: Leon & H. Blum brought suit on the note and attached the property of the sureties last named. These makers paid the Blums \$600 in cash, and executed to them their promissory note for \$500, in consideration of a discharge from all further liability. The release by the Blums was in writing, and is as follows:

"Received from J. F. McAninch, A. J. Dallas, and Wright & Harrell, of Mountain Home, Texas, the sum of (\$600) six hundred dollars cash, and their note for (\$500) five hundred dollars, due October 1, 1883, in consideration of which we agree to file with Sam Woodworth, assignee of the Mountain Home Co-operative Association, a certain promissory note executed by above parties, and sundry others, August 14, 1882, for \$2,490.03, and due at Galveston, Texas, January 1, 1883, upon which they are guarantors. In consideration of above \$600 cash and \$500 note, we agree to release said McAninch, Dallas, and Wright & Harrell from any and all liability to us for the difference between the amount of dividends we receive on said \$2,490.03 note from Sam Woodworth, assignee, and the amount which may be due on said note.

[Signed]

"LEON & H. BLUM."

The principles laid down in the case of *Bridges v. Phillips*, 17 Tex. 128, are, in our opinion, decisive of the question presented on this appeal. It is there conceded that, as between joint promisors, who are principals, a technical release of one is a release of all. In a joint or joint and several contract, a principal who pays more than his proportion of the debt has a right to demand a contribution from the other promisors who are not sureties. Hence a release of one and not of the others would deprive the latter of this right, or would leave the former liable to contribute, which would be inconsistent with the release itself. This must be the fundamental reason of the rule that the release of one is the release of all, and for the same reason the release of the principal is a discharge of the surety. But as to the principal, where the surety is released, the reason ceases, and the rule itself must cease. The principal is liable for the entire debt, whether the surety pays it or not. If the surety does not pay it, he is bound to the creditor; if the surety does pay, he is bound to remunerate the surety. It follows that the liability of the principal is made neither more nor less by the release of the surety, and that no reason exists why the latter should not stipulate for his discharge, and leave the creditor at the same time to pursue his claim against the prin-

principal for the entire amount of the original debt. Such was evident by the agreement in this case. The stipulation that "we agree to release said McAninch, Dallas, and Wright & Harrell from any and all liability to us for the difference between the amounts of dividends we receive on said \$2,490.03 note from Sam Woodworth, assignee, and the amount which may be due on said note," plainly shows that the Blums were to prove up the claim against the assigned estate, and were to receive the dividend upon the entire amount. It was distinctly held in the case above cited, upon a very similar state of facts, that the release of the sureties did not release the principal, and it follows that the court below was correct in so holding in this case.

But it is contended that the amounts paid, and promised to be paid, by the sureties, in consideration of this release, should have been credited upon the Blum note. But what we have already said disposes of this question. The sureties only stipulated for their own discharge, and evidently contemplated that the Blums should prove up their claim against the corporation for its entire amount. They undertook to pay no part of the debt. They bought their release, and received it. That they made an advantageous bargain is shown by the fact that the dividend declared, together with amounts paid and agreed to be, will fall far short of satisfying the debt. This serves to illustrate the equity of the rule which permits the surety to buy his discharge, and at the same time to leave in force the debt against his principal.

We find no error in the judgment, in so far as it awarded to appellees Leon & H. Blum the entire dividend declared by the assignee in their favor, and it will therefore be affirmed.

MCANNINCH and others v. FREEMAN.

(*Supreme Court of Texas. April 29, 1887.*)

1. BOUNDARIES—PATENT—DESCRIPTION.

Where the defendant's title to a certain tract of land depended upon whether the land was included in plaintiff's survey or not, and it appeared that, if the boundaries of plaintiff's land were determined according to the course and distance called for in plaintiff's patent, the tract would not be therein included, while it would if the boundaries were determined according to certain marked corners called for, *held*, that the marked corners called for should be taken as the true corners, and the course of the lines thence run as designated in the field notes without regard to distance.¹

2. EVIDENCE—WRIGHT—SURVEYOR.

The report of a surveyor appointed by the court is entitled to no more weight, as evidence, than the testimony of a witness who knows the facts.

Appeal from Bell county.

Goodrich & Clarkson, for plaintiffs in error. *W. S. Holman*, for defendant in error.

GAINES, J. The plaintiff in the court below, who is defendant in error, brought this suit against defendants below for the recovery of a tract of land described in his petition. The cause was submitted to a jury, and resulted in a verdict for the plaintiff, and defendants below now bring this writ of error. The plaintiff below claimed, under a patent to Joseph Washington, one-third of a league, and the defendants under a survey and patent in the name of George Allen. The case presents a question of boundary. The Washington is the older patent; and, if it embraces the land covered by the Allen survey, plaintiff showed the better title. At the time the Washington was surveyed and patented there was a chain of surveys on Indian creek on the south, and another chain of surveys on Davis creek on the north, leaving vacant land more than 5,000 varas wide between them. Its field-notes call

¹ See note at end of case.
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for the Nowell surveys on the south, and the Wells and White surveys on the north. No question is raised about the south boundaries of the survey, or any of its southern corners. But beginning at its south-east corner, and running north, 19 east, for the north-east corner, the distance called for, and then running the other lines by course and distance only, the Allen survey is not included. But the east line is called to run north, 19 east, 5,829 varas, to a mound on the south line of the Jesse White survey; but a line so run passes some 600 varas south of the south-east corner of the White, and some 75 varas beyond a prolongation of the south line of that survey. The next call is thence north, 71 west, 528 varas, to White's south-west corner; but this corner is not reached either by the course or distance of that call, the distance called for being 1,000 varas short. The next call is "thence south, 19 west, 1,280 varas, to J. B. Wells' south-east corner;" but the distance from the south-west corner of the White to the south-east corner of the Wells, is only 905 varas. The field-notes next call to run north, 71 west, Newland's north-east corner; the distance to that corner being in fact only about 62 varas. The next call is to run from Newland's north-east corner south, 19 west, 5,204 varas, to Nowell's line; but the distance between that corner and line is actually 5,507 varas. The evidence shows that all the corners of the White are marked upon the ground. The south-west and north-east corners of the Wells are also marked. The surveyor who made the survey of the Washington when it was originally located, testified that it was an office survey, and the lines were not actually run on the ground, but it was his intention to embrace the land lying between the Indian-creek surveys at the one end, and the Davis-creek surveys at the other.

It has been held by this court in a number of decisions that a call for distance, when the evidence shows the surveyor actually stopped at the distance called for, will prevail over a call for an unmarked line or corner of a survey in the prairie. *Castleman v. Pouton*, 51 Tex. 84; *Oliver v. Mahoney*, 61 Tex. 610; *Gerald v. Freeman*, 2 Tex. Law J. 744, and *ante*, 256, (at the present term); *McCown v. Hill*, 26 Tex. 359. Plaintiffs in error seek to apply this rule to the present case; but it is clearly not applicable to the facts before us. Here we have the south-west corner of the White, which is a well-defined corner, called for as the more northern north-west corner of the survey; and in the absence of proof that an actual survey was made, and that the corner was not actually reached, but was called for by mistake, the distance must be made to yield to the call for the corner, and it must be taken as the true north-west corner of the survey in question. The proof showing that the land was not actually surveyed, but merely platted, and the field-notes made in the surveyor's office, and the beginning corner (which, in this case, is upon the Nowell survey on the south) being of no greater dignity than any other corner, we can see no greater reason for disregarding the call for the White corner than there is for departing from those at the other end of the survey. Distance must ordinarily yield both to course and marked lines and corners, (*Stafford v. King*, 30 Tex. 258;) and hence, in our opinion, the boundaries of the survey in question at its north end must be determined by taking the corners of the Newland, the Wells, and White surveys as called for as its true corners, and running the course of the lines as designated in the field-notes without regard to the distance. The north-east corner is to be established by a prolongation of the south line of the White to an intersection with the east line of the survey in controversy. The lines of the Washington survey, so established, include the land claimed by the plaintiffs in error. The charge of the court was in accordance with the view of the law expressed in this opinion, and the verdict is supported by the evidence.

There is nothing in the point that D. C. Freeman, under whom defendant in error claims, surveyed the land since the date of the patent, by course and distance, beginning on the Indian-creek surveys, thereby leaving out the land

claimed by plaintiffs in error. It is not seen that this deprived him of title to the land not included in that survey. The court did not err in refusing to charge the jury, at the request of plaintiffs in error, that the report of the surveyor appointed by the court established *prima facie* the true location of the surveys in controversy. The report was evidence; but we are of opinion that it was entitled to no more weight than the testimony of a witness who knew the same facts. To single it out, and tell the jury it was *prima facie* evidence of the boundaries of the surveys, was calculated to give it undue importance, and thereby mislead them.

There is a motion in the case to strike out the statement of facts upon the ground that documents are copied therein at length, in violation of the rules of this court. This motion was taken under advisement, to be disposed of with the case. The statement is not in accordance with the rules, but we cannot strike it out on this ground. It would perhaps be proper to tax plaintiffs in error with the costs of the surplus matter. But since the judgment will be affirmed, and plaintiffs in error adjudged to pay all the costs, it is unnecessary to consider that question.

There is no error in the judgment, and it is affirmed.

NOTE.

Monuments govern courses, and courses govern distances, in a survey. *Curtis v. Aaronson*, (N. J.) 7 Atl. Rep. 886. Monuments govern courses and distances. *Beaudry v. Doyle*, (Cal.) 8 Pac. Rep. 694. Metes and bounds control courses and distances. *Friend v. Friend*, (Md.) 1 Atl. Rep. 866; and natural landmarks govern magnetic ones. *Hronska v. Janke*, (Wis.) 28 N. W. Rep. 166; but courses and distances will not be made to yield to an unmarked prairie, itself determinable only by running the boundaries of another survey according to courses and distances. *Gerald v. Freeman*, (Tex.) *ante*, 256; and marked lines, to control, must be shown to have been made in the original survey. *Moore v. Whitcomb*, (Tex.) *post*, 373. A requirement in a grant that the boundary lines shall be so run as to include certain cultivated lands is a call for a natural object that will control courses and distances. *Clark v. Hiles*, (Tex.) 2 S. W. Rep. 356.

In a description of real estate a reference to lot and block, according to a recorded plat, will prevail over bounds, courses, and distances given, where the former has greater certainty. *Coles v. Yorks*, (Minn.) 31 N. W. Rep. 353. But, in a case of variance between the recorded plat and the actual survey, the lines actually run and marked on the ground will control, and as to a purchaser are conclusive. *Holst v. Stritz*, (Neb.) 20 N. W. Rep. 307; and corners marked by stakes, stones, or mounds thrown up by the government surveyors will control the plats or field-notes filed in the government land-office. *Johnson v. Preston*, (Neb.) 4 N. W. Rep. 83; *Morrison v. Neff*, (Neb.) 20 N. W. Rep. 254. Also, if a deed refers to a recorded plat of a survey, the stakes and monuments will control. *Turnbull v. Schroeder*, (Minn.) 11 N. W. Rep. 147.

SPRAGUE and others v. HAINES.

(Supreme Court of Texas. May 3, 1887.)

1. FRAUDS, STATUTE OF—SALE OF LAND—PERFORMANCE.

A parol contract by an attorney to remove a cloud from the title to lands, and receive, when the title is cleared, one-half of the land as his compensation, is within the Texas statute of frauds; and a conveyance of the land in pursuance thereof cannot be enforced, though a recovery of the value of such services, and of the money expended by the attorney in the suit to clear the title, may be had.¹

2. INFANCY—ACTION—GUARDIAN AD LITEM.

Where infants are necessary parties to a suit, service of process on them is essential in order to confer jurisdiction on the court, and to authorize the appointment of a guardian *ad litem*.

Appeal from Coleman county.

¹ Respecting the part performance that will take a contract for the sale of lands out of the statute of frauds, see *Brown v. Hoag*, (Minn.) 29 N. W. Rep. 139, and note. Where a contract originally within the statute of frauds has been performed by one party, and the performance accepted by the other, the party accepting will not be heard to plead the statute. *Walker v. Wilmington, C. & A. R. Co.*, (S. C.) 1 S. E. Rep. 366.

J. C. Randolph, for appellants. *H. T. Sims*, for appellee.

GAINES, J. Appellee brought this suit in the court below against appellants as the heirs of W. P. Sprague, deceased, and alleged, in substance, that appellants' ancestor employed him to remove clouds from the title to the lands described in the petition, and agreed to convey to plaintiff, when such services were performed, one-half of the lands to which the title was made clear. The petition averred that the contract was by parol, and that the plaintiff had complied with the agreement on his part by clearing up the title to an undivided half interest in the land described, and prayed for a specific performance by decreeing to him one-half of the said W. P. Sprague's half of the lands, or one-fourth of the whole; and, in case that this could not be done, that plaintiff should have judgment for the value of his services. The plaintiff recovered a judgment in the court below for an undivided one-fourth of three of the tracts described in the petition. The leading question presented by the record is whether or not the contract declared on is within the statute of frauds.

In *Anderson v. Powers*, 59 Tex. 213, a similar agreement was upheld as not being subject to the rule declared in that statute; but, after a careful consideration of the question, we are of the opinion that the correctness of the ruling, as applicable to the facts of that case, cannot be maintained. The court there say that "the title was neither in the appellee nor her husband, but in third parties, and the agreement was not a contract for the sale of the real estate, but was an agreement for its recovery for her by the appellant, in consideration of which he was to receive a certain portion of the land recovered." But, if the appellee in that case had no title to the land, it is not seen how she recovered it in a suit in a court of justice. The principle invoked, though, as we think, not decisive of the question then before the court, has been frequently applied by this court, but to a very different class of cases. A contract by which one agrees to locate a land certificate belonging to another upon public domain, and to obtain a patent to the land so located, in consideration of a promise of the latter to convey him a part of the premises when the title is obtained, is held to be a contract for the joint acquisition of land, and not for its sale, and hence not within the statute of frauds. *Gibbons v. Bell*, 45 Tex. 418; *Evans v. Hardeman*, 15 Tex. 480; *Watkins v. Gilkerson*, 10 Tex. 840; *Smith v. Crosby*, 47 Tex. 121. So an agreement by one to convey to another one-half of the land the former should acquire by virtue of his removal from another state, and settlement in Peters' colony, in consideration of the latter's moving him and his wife to this state, was held to be enforceable, though not in writing. *Miller v. Roberts*, 18 Tex. 16. In none of the cases cited did the party who subsequently acquired the legal title by patent from the state have any interest in the land at the time of the contract. They were all contracts for a joint enterprise to obtain title to land, in which the one party contributed his right to acquire land from the state, and the other his services in furtherance of the common undertaking. The words "any contract for the sale of real estate," as used in the statute, include every agreement by which one promises to alienate an existing interest in land upon a consideration either good or valuable. It is accordingly held in a number of cases that a contract to convey land in consideration of labor or services to be rendered, is within the statute. *Dowling v. McKenney*, 124 Mass. 478; *Baxter v. Kitch*, 37 Ind. 554; *Burlingame v. Burlingame*, 7 Cin. R. 92; *Helm v. Logan*, 4 Bibb, 78; *Jack v. McKee*, 9 Pa. St. 235. The law is thus stated in Browne on the Statute of Frauds, (section 263:) "The effect of the provision, as expounded by the courts, is to render unavailing to the parties, as the ground of a claim, any parol contract, in whatever shape it may be put, by which either of them is to part with real estate." See, also, 3 Pars. Cont. (3d Ed.) 38; Wood, St. Frauds, 405. In *At-*

ken v. Hale, 1 Posey, Unrep. Cas. 318, the commissioners of appeal, in a well-considered opinion, held a contract identical in principle to that under consideration incapable of enforcement because it was not in writing.

We think these authorities conclusive upon the proposition that the contract sued upon in this case cannot be enforced. If the facts be as alleged in plaintiff's petition, he is entitled to recover for his money expended, and the reasonable value of his services, in a proper proceeding in a proper forum. All parties live in the state of Pennsylvania, and it may be doubted whether a judgment can be had against the minors without personal service in this state, unless an attachment be sued out and levied upon the property to satisfy any judgment that may be rendered. The widow having appeared by counsel, and answered, is before the court for all purposes. No question of this character is raised in the case before us, and we do not think it proper to give any opinion in advance.

It is to be remarked that the petition prays citation against the defendants, but no writs or service appear in the record. The service of process upon the minors is essential in order to confer jurisdiction upon the court, and to authorize the appointment of a guardian *ad litem*. The record upon appeal should show that they have been duly served.

The other questions presented in appellants' brief may not arise upon another trial, and need not be considered. Because the court below erred in giving appellee a judgment for the interest sued for by him in the land, the judgment is reversed, and the cause remanded.

MOORE and Wife v. WHITCOMB.

(Supreme Court of Texas. April 29, 1887.)

BOUNDARIES—SURVEY—MARKED LINES.

In a controversy concerning the true boundary of a tract of land which had been surveyed at different times and by different methods, the rule that marked lines shall control in establishing the boundary does not prevail, unless it is shown that they were made upon the original survey.¹

Appeal from Limestone county.

L. J. Farrar, for plaintiffs in error. *Burrow & Kincaid*, for defendant in error.

GAINES, J. The question in this case is as to the true location of the north boundary line of the Richard Rutledge league of land in Limestone county. Appellants claim the north half of that survey, and their title was not controverted in the court below. Appellee, however, acting upon the theory that the land in controversy is not included in the Rutledge two-thirds league, but is vacant, unappropriated public domain, filed a certificate upon it, caused it to be surveyed, and returned the field-notes to the general land-office. The commissioner having declined to issue a patent to him on the ground that his survey seemed to be embraced in the Rutledge grant, he brought this suit in order to determine the question. The Rutledge survey is in a square; the lines varying 30 deg. from the cardinal points of the compass. Appellee contends that its true north boundary is parallel to and some 722 varas south, 30 east, of the north line claimed by appellants. The cause having been tried below without a jury, the court found that the tract in controversy was not included in the Rutledge survey; and appellant now complains that this finding was against the weight of the evidence.

We will state the main facts established by the testimony which bear upon this question. The field-notes of the Rutledge grant call for a mesquite tree

¹Respecting the rule that monuments control courses and distances, see *McAninch v. Freeman*, *ante*, 369.

bearing south, 5 east, 42 varas; and another south, 15 east, 5 varas, as marking its north-west corner; and the evidence shows conclusively that at north-west corner of this survey, as claimed by appellee, was found a mesquite with surveyor's marks corresponding with the former call, and the stump of another corresponding in like manner with the latter. The M. Polk survey, which adjoined this on the west, called also for mesquite trees at its north-east corner; one bearing south, 5 east, 12 varas, and the other bearing south, 15 east, 5 varas, being the same as the calls for the north-west corner of the Rutledge, except as to the distance of one of the bearing trees. There were witnesses who testified that these corners were generally understood to be the same, though the field-notes of the Rutledge called for its west boundary line as running from its north-west corner, and passing the Polk at 178 varas. It was also shown that the Harrison York survey had its south-west corner on the north-west line of the Polk at 1,500 varas from the west corner of the latter survey; that one of the corners of the York was well marked; and that, fixing from that its south-east corner, and running north, 60 east, the distance as called for in the field-notes of the Polk, so as to reach the north-east corner of the latter, the point marked by the mesquite tree and stump were reached. The same point was reached by running from the survey lying south of the Rutledge, and notably from the old Rockett survey, the north boundary of which was called for as the south boundary of the Rutledge in its original field-notes. Lines run from the Robinett survey along the boundaries of intermediate grants adjoining the Rutledge at its north-east corner also led to the same result. It is also shown that, if the lines of the Rutledge were ran as claimed by appellants, the survey would conflict with the Trainery on the west and the Norton on the north; whereas, if they were run as appellee claims they should be, there would be no conflict. Such is substantially the case made by the plaintiff in the court below in order to show that the point marked by the mesquite tree and stump is the true north-west corner of the Rutledge survey, and that the land in controversy was not covered by the Rutledge patent. The strength of this case was, however, somewhat diminished by the fact that lines projected from this corner, as called for in the field-notes of the survey, run through timber, and yet no corresponding marks were found upon the trees.

Appellants' case was based mainly upon the following proof: They showed that at some varas west of the north-west corner which was claimed by plaintiff, a line was found marked for two surveys; one, as was claimed, corresponding in age with the Rutledge; the other more recent, corresponding in age with the Trainery, which had taken the place of the old Polk survey, and called to have its east line coincident with west line of the Rutledge. They also showed that a marked line running north, 60 east, was found upon the ground, which they claimed was the south boundary of the last-named survey. They contend that these lines are the true south and west boundaries of the grant, and that, by projecting them to their point of intersection, the south-west corner is established. Taking this as the true corner, and running north, 30 east, the distance called for in the field-notes, the land in controversy is included in the Rutledge patent. Now, it is contended that, these being marked lines, the court below erred in not giving them a controlling effect in establishing the boundaries of the survey; and the rule is invoked that marked lines must prevail over course and distance.

If it had been shown that these were the lines originally run by the surveyor, this would have established the south-west corner as claimed by appellants. But the field-notes of the adjacent surveys, which were put in evidence, make it manifest that the two surveys which originally bounded the Rutledge on the west and south, respectively, were abandoned, and others located in their stead. It is not improbable, therefore, that the lines upon which appellants rely, may have been run in locating these subsequent sur-

veys. The field-notes of the Rutledge call for an ash 38 inches in diameter, north, 25 east, 7 varas; and another, 23 inches in diameter, north, 37 east, 12 varas, as bearing trees at its south-west corner; and in like manner for an ash 23 inches in diameter, bearing north, 37 east, 6 varas, and an elm 4 inches in diameter, bearing south, 32 east, 8 varas, as marking its south-east corner. This indicates that both these corners were in localities of heavy timber. Yet the witness who testifies to the existence of the marked line claimed by appellants as the south boundary of the survey also testifies that it terminates in the prairie, and that there is no timber at either end. This tends very strongly, if not conclusively, to show that this is not the true south line of the survey. Appellants' case mainly depends upon establishing the south-west corner by this line. Since, as we think, they have failed to show that this was the line originally run, and since the corners made by its extension to the east and west boundaries of the survey could not have been marked by the natural objects called for in the field-notes, their theory of the case is left without a substantial support. The north-west corner, as claimed by appellee, is marked by natural objects, such as were called for in the field-notes. This is also identified as the true corner by running the connecting lines from neighboring surveys lying in three different directions from it. Under this state of the evidence, we cannot say that the court erred in finding that this is the true north-west corner of the survey in question, and that the land in controversy lies outside of that survey, and was, at the time of appellee's location, unappropriated public domain.

But it is also contended by appellants that the judgment in favor of appellee is erroneous, on the ground that the land in controversy, if vacant, was withdrawn from location by the act of July 14, 1879. But appellants' plea of general denial and not guilty were stricken out by the court, and no exception was taken. They filed a disclaimer as to all the land lying outside of the Rutledge survey. It would seem, therefore, as to the vacant land, they would not be permitted to controvert appellee's right. But the land located by appellee consists of four and one-sixth labors, approximately 737 acres; and the statute which appellants rely upon only prohibits the location of tracts of 640 acres or less, except in certain counties, of which Limestone county, where this land is situated, is not one.

We find no error in the judgment, and it is affirmed.

PROCTOR v. WILCOX, Ex'r.

(*Supreme Court of Texas. May 3, 1887.*)

NEW TRIAL—PRACTICE—ORIGINAL SUIT.

When an attorney fails to promptly present a statement for a new trial to the judge before whom the case was tried, and it is not signed and filed in time by reason of a delay in the mail to which he has entrusted it, he cannot obtain a new trial by original suit for that purpose, as ordinary prudence demanded, in such a case, that he should have presented the statement in person, or by attorney or messenger, and not trust to the uncertainties of the mail.

Error from Bell county.

D. H. Hardy, for plaintiff in error. *Rucker, Harris & Saunders*, for defendant in error.

GAINES, J. This was an original action for a new trial instituted in the court below by plaintiff in error against John W. Williamson, the testator of defendant in error. The petition, after setting forth the proceedings of the court in the first action, the evidence adduced upon that trial, the judgment in favor of the defendant, Williamson, and the overruling of a motion for a new trial, alleged that 10 days were allowed for making up a statement of facts; but that, without any fault on part of plaintiff or her counsel, this was

not signed by the judge and filed until the time had expired. The circumstances which led to this result are stated in detail in the petition, and are as follows: The trial was had on the seventh day of October, 1881, and the motion for new trial was overruled, it is to be presumed from the brief of counsel, on the twenty-eighth day of that month, which was the last day of the term. It is alleged that, after the motion was overruled, counsel for defendant was presented with a statement of facts prepared by the attorney for plaintiff, but refused to agree, and that thereupon the order for the 10 days was granted; the judge, at the time, telling plaintiff's counsel that he would be at Waco on October the 29th and 30th, and after that would be at Marlin until November the 6th. It was further averred that ineffectual attempts were made to procure an agreement with defendant's attorneys on the first and second of November, and that on the third, plaintiff's counsel mailed his statement to the judge, directed to Marlin. It was also shown that there were daily mails between the latter town and Belton, where the case was tried, and that it took but a day for the mails to go from the one place to the other. It was further alleged that on the fifteenth of November a statement of facts signed by the judge as of the date of the twelfth of that month was received through the post-office, and filed the next day. A demurrer was sustained to the petition for a new trial, and, plaintiff declining to amend, the cause was dismissed.

We do not feel called upon to decide whether an original petition for a new trial can be entertained in any case upon the ground that the party against whom the judgment has been rendered has been deprived, without any fault on his part, of an opportunity fairly to present his case upon appeal or writ of error to a court having jurisdiction to revise the judgment in such proceeding. We have found no case where such a bill or petition has been held good except that of *Oliver v. Pray*, 4 Ohio, 175, in which the supreme court of the state of Ohio granted a new trial in a cause in which judgment had been rendered in the court of common pleas. But we infer from the report of that case that the supreme court had both original jurisdiction as a court of equity, and appellate jurisdiction over the court in which the trial was originally had. In *Overton v. Blum*, 50 Tex. 417, an original suit for new trial was instituted upon very similar grounds to those upon which the present action was founded. The relief was denied, but upon the ground that the petition did not show that the plaintiff had been prejudiced by the action of the lower court upon the first trial. But, if such an action can be successfully maintained upon any state of facts, it would certainly be necessary for the plaintiff to show that he had not been deprived of his right to properly present his case upon appeal by any fault on his part; and we are of opinion that, after a judgment in the court below, the party desiring to appeal should be held to the strictest diligence in preparing his case for the higher court.

In the case before us three weeks elapsed from the time the judgment was rendered until the motion for a new trial was overruled. The cause had been tried by the judge, and the overruling of the motion might have been anticipated. Nevertheless, after the 10 days had been granted, and half of the time had elapsed, plaintiff's attorney committed to the mail the statement which he is required to present to the judge. Is this proper diligence? We think not. But it also appears that ordinarily, if the statement had reached the judge in due course of mail, an answer, if requested, might have been had on the second or at furthest the third day; so that, in event of a failure to hear from the judge, other steps might have been taken to secure a compliance with the law. But it does not appear that any such answer was requested, and we are of opinion that, in a matter of such importance, ordinary prudence demanded that the statement should have been presented in person, or by attorney or messenger, and not intrusted to the uncertainties of the mail.

In *Essex Co. v. Berry*, 2 Vt. 161, which was a suit in chancery for relief against a judgment by default, the complainants alleged, among other things,

that they mailed a letter in due time to their attorney, instructing him to make their defense, which by some miscarriage, but without fault on their part, he failed to receive, and that they were thereby prevented from putting in an answer. This was held not to have been proper diligence. The court there say: "It was an accident, no doubt, that the letter did not arrive sooner, and just such an accident as common prudence would have guarded against by sending an agent."

Because the petition in the case before us fails to show the proper diligence on part of plaintiff in the effort to procure a statement of facts within the time ordered by law and the order of court, the judgment sustaining the demurrer is affirmed.

TRAMMELL and others v. MOUNT.

(*Supreme Court of Texas. May 3, 1887.*)

1. MECHANIC'S LIEN—FOR WHAT—PREPARATION OF MATERIALS.

Under the mechanic's lien law of Texas a contractor who agrees to prepare stone for and erect the walls of a building for the owner, who is to pay him in installments therefor, is entitled to a lien on the building and land for stone prepared for the building, but never delivered on the premises, nor actually used in its construction, when the owner has notified him that he could not comply with his contract, and he is compelled to cease work.

2. SAME—PRIORITY OF CLAIMS—RECORDING.

Under the Texas lien law, the lien of a mechanic, though not fixed before record of the contract or bill of particulars, when it is fixed, relates back to the time when the work was performed or the material furnished, and hence takes precedence of all claims to the property improved which have been fastened upon it since that time.

3. SAME—FORECLOSURE—DISPOSITION OF PROCEEDS.

Where property that is foreclosed for the payment of a mechanic's lien has been previously sold under attachment proceedings, the purchaser at the attachment sale will be entitled to the surplus of the proceeds arising from the lien sale, in preference to the owner of the premises.

4. WITNESSES—SWEARING—OBJECTION.

Where a defendant allows a witness to testify without being sworn, he waives any objection to his evidence on that account, and cannot obtain a new trial because of its admission.

Appeal from Howard county.

Cowan & Posey, S. H. Cowan, and G. S. Jones, for appellants. No counsel for appellee.

WILLIE, C. J. The appellee sued the firm of Lawson, Smith & Co. to recover an amount alleged to be due him on account of a contract, in which, for a specified sum, the appellee agreed to furnish the work and material necessary to build for the appellants four stone walls of a house of dimensions specified in the contract. He also prayed for the foreclosure of a mechanic's lien upon the improvements made by him, and the lots upon which they were situated. The firm of Thos. Trammell & Co. were made defendants under an allegation that they claimed some kind of interest in the property. Judgment was rendered for the plaintiff for the sum of \$1,361.20, and foreclosing a lien upon the lots and premises concerning which the contract was made. The sheriff was ordered to sell these as under execution; satisfy the lien and costs out of the proceeds of sale; and pay the remainder to the defendants Lawson, Smith & Co. From this judgment the defendants Thos. Trammell & Co. have appealed to this court.

The facts are: Lawson, Smith & Co. entered into a verbal contract with Mount, in which the latter agreed to build the walls of a stone house for Lawson, Smith & Co., furnishing all the labor and material necessary for that purpose, and to finish the work in 90 days from January 12, 1874, they to pay him therefor \$2,300 in such sums as he might need from time to time to carry

on the work, and the remainder at its completion. Mount commenced work, and had provided a large quantity of stone, some of which had been used in building the walls, and the remainder fully prepared for use in this way, when Lawson, Smith & Co. notified him that they were unable to comply with their part of the contract, and Mount was forced to quit work. This was on the eighth of March, 1884, and on the eighteenth of the same month Trammell & Co. had an attachment levied upon the lot upon which the stone house was in the course of being built, and they were subsequently sold in satisfaction of the attachment lien, and bought in by Trammell & Co. On the twenty-fourth of March, 1884, Mount filed with the county clerk, and had recorded, a bill of particulars of the work done and material furnished by him, and its value, and had a duplicate served upon the defendants Lawson, Smith & Co. It was developed by the evidence that about 400 perches of the stone included in the bill of particulars did not enter into the structure of the walls, and that it was not delivered upon the premises; but that it was prepared for use in the building, and left one mile and a half from the place where the walls were in course of construction. It is claimed by the appellants that for this material, and the work done upon it, the appellee has no lien upon the premises. According to the testimony, the work done upon this stone cost \$1.50 per perch, and it is for this amount that the lien is claimed. Our statute says that any person or firm, lumber dealer, artisan, or mechanic who may labor or furnish material to erect any house or improvement, shall have a lien on such house, etc., and shall have a lien on the lot or lots of land necessarily connected therewith to secure payment for labor done, lumber, material, machinery, or fixtures and tools furnished, for construction or repairs. If, therefore, the labor on the stone which was not delivered at the place where the walls were being built was furnished for their construction, the mechanic's lien attached to the property subjected to it by the judgment below, unless it was necessary to the lien that this stone should have actually entered into the construction of the walls.

It is held by some authorities that the lien cannot exist unless the material for the furnishing of which it is sought has actually gone into the improvement of the property for which it was intended, (*Hunter v. Blanchard*, 18 Ill. 318; *Taggard v. Buckmore*, 42 Me. 81; *Schulenberg v. Prairie Home Inst. Co.*, 65 Mo. 295;) by others it is held that, if the material is delivered at or near the building, it is sufficient, (*Esslinger v. Huebner*, 22 Wis. 632; *Neilson v. Iowa F. R. Co.*, 51 Iowa, 190, 1 N. W. Rep. 434; *Beckel v. Petticrew*, 6 Ohio St. 247;) and by others the lien is upheld though the material be not delivered at or near the building, and never enters into its construction, (*Hinchman v. Graham*, 2 Serg. & R. 170, and authority cited.) We are inclined to adopt the latter view in cases where the delivery at the building is prevented by the act or direction of the owner. If he directs, for his own convenience, that the material be delivered at some other place, or, after it is prepared, and nothing is left to be done by the material-men but to take it to the building-spot, the owner violates his contract and refuses to receive it, it seems that justice dictates that through his own conduct the owner should not defeat the lien. The language of the statute does not require such a delivery, nor does it require that the material should actually enter into the construction of the improvement. To furnish materials for the construction of a house and to furnish materials which enter into its construction are very different things. To give our statute the latter construction is to strain its words beyond their usual meaning, and this should not be done for the purpose of depriving mechanics and others of the protection which the statute was evidently designed to give them. We rather incline to a liberal construction in their favor. We have heretofore held that a delivery to the owner, no matter at what distance from the building, transfers the title to the material. *Fagan v. Boyle Ice-Machine Co.*, 65 Tex. 324. It gives the owner of the building complete own-

ership and control over it; and it would be unjust to place it in the power of the person to whom it was delivered or furnished to defeat a lien upon his property through his own wrong in appropriating it to other purposes than those for which it had been furnished. The law certainly did not intend to leave it to the owner to say whether the material-man should have his lien or not, but to compel the lien when the latter had done all that was required of him, though the owner should attempt to defeat it.

The present is a strong case in favor of the mechanic. He made a contract to construct the stone work of a house for a given sum. The parties with whom he contracted failed to perform their part of the contract, and forced him to quit work. Had he completed the work, he would have been entitled to the full sum agreed on, and to enforce a lien to collect it. Under the law, when compelled to desist from the work, he was entitled to a *pro rata* recovery. Why should he not enforce his lien to the same extent? The law gave him a lien as an incident to the contract. Everything that he did in pursuance of that contract was necessarily done towards the construction of the building, and as necessarily carried with it a right to the lien. In the nature of things, much of the work had to be done away from the building. If the contractor had been permitted to go on with his contract, it would have entered into the improvement he had agreed to make. If forced by the owners to stop before he could place the work in the building, it would not change its character. It was still work done under a contract for constructing the walls, and as such should carry with it a lien upon the building. The owner was not thereby relieved from liability to pay for the work done, and his liability under the contract carried with it the mechanic's lien. We think the plaintiff was entitled to his lien for all work done up to the time Lawson, Smith & Co. defaulted in their contract, including the work done upon the stone which was not carried to the premises when the building was taking place. This ruling leaves the ownership of the stone in Lawson, Smith & Co., and renders it subject to their debts.

There is nothing in the objection that the items of the bill of particulars were not dated. All had dates attached to them except one, and it was made apparent by the bill itself that this was done during the continuance of the contract. The lien of a mechanic, though not fixed before record of the contract or bill of particulars, when it is fixed, relates back to the time when the work was performed or the material furnished, and hence takes precedence of all claims to the property improved which have been fastened upon it since that time. This is the effect of the previous decisions of this court. *Huck v. Gaylord*, 50 Tex. 580; *Fagan v. Boyle Ice-Machine Co.*, 65 Tex. 331. The registration does no more than preserve a lien which exists already.

There was no error in overruling the motion for a new trial. The appellants allowed the witness to give his testimony without being sworn, and thereby waived any objections to it on that account.

But there was error in ordering the surplus proceeds over and above enough to satisfy the plaintiff's debt and costs to be paid to Lawson, Smith & Co. The appellants were the owners of the equity of redemption by reason of their purchase at the attachment sale, and as such entitled to that portion of the proceeds of the sale which represented that equity. The equities of the plaintiff and the appellants were before the court for adjustment, and it should have decreed out of the proceeds of sale to the plaintiff enough to pay his debt and costs, and to appellants, who were owners of the property subject to the plaintiff's lien, whatever balance might remain. The judgment will be reformed, at the costs of the appellee, so as to decree to the appellants this surplus of the proceeds. In all other respects it is affirmed.

EDWARDS and others v. BROWN.

(Supreme Court of Texas. May 6, 1887.)

1. HUSBAND AND WIFE—COMMUNITY PROPERTY—BONA FIDE PURCHASER.

In Texas the interests of the husband and wife in community property are equal, whether the deed be taken in the name of either or of both. But, if the property be in the name of the husband alone, a purchaser under him, who has paid value, without actual notice of the wife's interest, will be protected against her claim, or that of her heirs.

2. SAME—DIVORCE—DEVISE.

A husband obtained a divorce from his wife without having the community property divided, the title to which stood in his name. He afterwards married a second time, and at his death devised the property to his second wife. Held, that a purchaser from her for value, who had no notice of the existence of the first wife, was entitled to the property, as against the first wife, or those claiming under her.

Appeal from Hill county.

B. D. Tarlton, for appellants. *Craft & Blanding* and *Ivy & Ivy*, for appellee.

GAINES, J. There is much in the transcript of the proceedings in the court below not necessary to be considered in disposing of this case in this court. As actually tried, it was a suit by defendant in error against plaintiffs in error for the recovery of an undivided one-half interest in a tract of land consisting of 320 acres, patented to Edward W. Brown as assignee of Justin D. Price. It was proved on the trial that Edward W. Brown and Sarah Brown, the plaintiff in the court below, were married in 1848, and were divorced in 1862. The decree of divorce made no disposition whatever of their property, either community or separate. The Price certificate was transferred to the husband in 1852, and the patent to the land in controversy issued to him in 1854. Edward Brown married again, and shortly thereafter died, leaving a will, which was duly probated, by which he devised the land in controversy to his second wife, Mary S. Brown. In 1867, Mary S. Brown married one John Haynes; and in 1871 they conveyed the land in controversy to Victoria M. Edwards, who was then the wife of T. C. Edwards, one of plaintiffs in error. Victoria Edwards died before the institution of this suit, leaving plaintiffs in error as her only heirs. Thomas C. Edwards testified that he bought the land from Haynes and wife, paying for it with his wife's money, and believed she was getting a good title; that he went to Wood county, and examined the will of E. W. Brown, and knew nothing of Sarah Brown or her claim until a very short time before this suit was brought. The court below, in its conclusions of facts, says that there is no controversy about the facts of the case, which is equivalent to finding that Edwards' testimony is true; but found, as a matter of law, that "Sarah Brown's right in the land is and was as fully recognized by law as that of E. W. Brown;" that "her title was a legal title;" and hence subsequent purchasers were bound to take notice, and that "they cannot be innocent purchasers without notice."

In this conclusion the court erred. It is settled law in this state that the interests of the husband and wife in the community property are equal, whether the deed be taken in the name of either, or the names of both, (*Vera-mendi v. Hutchins*, 48 Tex. 531; *Cooke v. Bremond*, 27 Tex. 460; *Mitchell v. Marr*, 26 Tex. 330; *Higgins v. Johnson*, 20 Tex. 389;) and there are decisions of our courts in which the title of the wife or of her heirs in the common estate, held in the name of the husband, is denominated a legal title, (*Johnson v. Harrison*, 48 Tex. 268; *Garner v. Thompson*, 1 Tex. Law Rev. 286.) But, as we take it, by this must be meant the wife or her heirs have beneficial title in fee-simple, which, save as to the husband's power of management and disposition during her life, and power to sell for the payment of community debts after her death, is in no degree subordinate or inferior to

his right. The legal title is in him or the heir of him who is the grantee in the face of the conveyance, although another, such, for example, as a wife or a partner, may have an equal interest in the property conveyed. But it may be further remarked that it does not follow that, because one may have the legal title, another may not acquire a superior equity as a *bona fide* purchaser. The holder of the legal estate by an unrecorded deed cannot prevail over a purchaser from his grantor, who has paid value without notice of the unrecorded conveyance. We think, therefore, that the premises upon which the learned judge below based his conclusion of law upon this proposition are not sound. It may be that, if it had appeared from the patent that it issued to E. W. Brown upon a certificate granted to him as the head of a family, this would have been sufficient to put a purchaser upon inquiry as to the question whether his family did not consist in part of a wife; but the fact is otherwise. The patent shows that it issued to him as assignee of the Price certificate, and there is nothing upon its face to indicate that, at the time he acquired his right, he was other than a single man.

The remark in *Garner v. Thompson, supra*,—an opinion by the commissioners of appeals, adopted by this court,—that the purchaser must take notice of the title papers of the land he purchases, our marital rights laws, the existence of the vendor's family, and their rights to the land, was not called for in the decision of that case, and is not considered authoritative as applied to a case like the present, where there is nothing in the conveyance to indicate that the grantor, at the time of its execution, was a married man. If a vendee is to be required to inquire into his vendor's family history in order to ascertain whether the property was community or not, why should he not be held to inquire into his business history, and be thus affected with notice of secret trusts on behalf of partners or other third parties? But a discussion of the question is no longer necessary. Since the trial of this case in the court below, the precise point now before us was, after elaborate argument on both sides, thoroughly considered in the case of *Hill v. Moore*, 62 Tex. 610; and it is there held, in effect, that, if the property be in the name of the husband alone, a purchaser under him who has paid value, without actual notice of the wife's interest, will be protected against her claim, or that of her heirs. The uncontroverted facts in this case being that Thomas C. Edwards purchased the land in controversy for his wife, and with her money, without any knowledge of the claim of defendant in error, the equity of the heirs of Mrs. Edwards must prevail over that of Mrs. Brown.

The judgment will accordingly be reversed, and rendered in favor of plaintiffs in error for the land claimed by them in this suit, and for all costs both in this court and in the court below.

MYAR v. SNOW and others.

(Supreme Court of Arkansas. May 7, 1887.)

WILL—DEVISE—ESTATE—MORTGAGE.

A devise to A., subject to a preceding life-estate, "to be held by her and her heirs to her sole and separate use; * * * at her death all the same to go to her bodily heirs, should she leave any, but, if she should leave none, then" to B.: held, in any view, not to vest in A. such an estate as to render a mortgage given by her in her life-time valid as against her children after her death.

Appeal from circuit court, Ouachita county.

H. G. Bunn, for appellant. B. W. Johnson, for appellees.

COCKRILL, C. J. This is an action of ejectment, and the question is, what estate did Pauline White, the mother of the appellees, take by the will of her father, William L. Bradley, made in 1858? He devised his entire estate to his wife for life, and after her death provided it should go as follows:

"My step-son, Ira Nunn, to have one-fifth of the entire estate, (except of the slaves,) real, personal, and mixed, to him and his heirs, forever; but, if he should die without direct descendants, then the whole of his share to go to my two daughters and their direct descendants, that is, children or grandchildren, to be held in the same manner, as to sole and separate use, as the shares of my property that I herein give and bequeath to them respectively.

"Item 4. It is my will that my daughter Louisa H. Powder shall have two-fifths of my entire estate, real, personal, and mixed, other than slaves, and she shall have one-half of my slaves, to have and to hold all that I give and bequeath to her to her sole and separate use, not subject to the debts or contracts of her present husband, or of any future husband she may hereafter marry, and at her death all the same to go to her bodily heirs, should she leave any; and, if she should leave none, then the whole of her share to go to her sister, Pauline, to be held by her and her bodily heirs in the same manner as the property I herein give to her.

"Item 4. (2) It is my will that my daughter Pauline L. White shall have the other two-fifths of my entire estate, except slaves, and the other half of all my slaves, to be held by her and her heirs to her sole and separate use, clear from and not subject to the debts or contracts of any husband or husbands that she may hereafter marry; at her death all the same to go to her bodily heirs, should she leave any, but, if she should leave none, then the same to go to her sister, Louisa, and her bodily heirs, to be held by her in the same manner as the property I herein give her."

The case arises under the last-quoted item of the will. Pauline White intermarried with David Snow, and in March, 1881, she and her husband executed a mortgage, with power of sale, upon a part of the lands she took under the will. She died in October of the same year, leaving the appellees, her children; and in 1886 the power of sale was executed, and the appellant, who was the mortgagee, became the purchaser, and received a deed to the mortgaged premises. The action was brought by Pauline's children against him for the possession.

The general rule is that, in a devise of lands to one without words of limitation, the devisee takes an estate for life only, but the intention of the testator to give a fee or a less estate may be gathered from any part of the will. *King v. Ackerman*, 2 Black, 408. Thus the language, "it is my will that my daughter Pauline shall have the other two-fifths of my estate," if standing alone, would have created, at common law at least, an estate for her life only, and the subsequent words "to be held by her and her heirs," if read without reference to what follows, would be sufficient to vest in her a fee-simple in remainder after her mother's life-estate. But, in construing the words of a devise, the whole should be taken together. We are not to give an absolute technical meaning to one part of the language, and then reject all other parts as inconsistent with it. As the former may be enlarged, so it may be restrained and qualified, by what follows. *Sisson v. Seabury*, 1 Sum. 242.

Now, after the words last quoted, which, if left without qualification, would have enlarged the life-estate into a fee-simple absolute, the testator has added: "At her death [Pauline's] all the same to go to her bodily heirs, should she leave any, but, if she should leave none," then over. This clause in effect defines what is meant by the preceding use of the word "heirs," and is a restraint upon its general application. 1 Washb. Real Prop. *73, § 26; *Hope v. Taylor*, 1 Burrows, 268. The term "heirs of the body" has an appropriate technical meaning, as words of limitation, to designate heirs in succession, and it is always to be construed in that sense unless the context shows it was intended as a description of particular persons. *Sisson v. Seabury*, *supra*; *Moody v. Walker*, 3 Ark. 147. In this connection it is said in *Moody v. Walker* that "when certain terms or words have by repeated adjudication received a precise, definite, and legal construction, if the testator in making his

will uses such terms, or similar expressions, they should be construed according to their legal effect; for, if this was not the case, titles to estates would be daily unsettled, to the ruin of thousands." The learned counsel for the appellant concedes, what seems to be inevitable under the rule announced in *Moody v. Walker* and the cases following it, (see *Denson v. Thompson*, 19 Ark. 66; *Watkins v. Quarles*, 23 Ark. 179; *Slaughter v. Slaughter*, Id. 356,) that an indefinite failure of issue was intended by the testator in this case.

Testing the language by these principles, we have a devise to Pauline in fee, with remainder over upon an indefinite failure of issue. But this, under the British statute, inevitably created an estate tail, (4 Kent, Comm. *274, *276; 2 Washb. Real Prop. *264; *Moody v. Walker*, *supra*; *Doe v. Harvey*, 4 Barn. & C. 610, 10 E. C. L. 724; *Bells v. Gillespie*, 5 Rand. 273; *Irwin v. Dunwoody*, 17 Serg. & R. 61; *Caskey v. Brewer*, Id. 441,) which, under the statute of this state, vests a life-estate in the tenant in tail, with remainder in fee-simple in those who would otherwise take the estate upon the death of the tenant. Mansf. Dig. §§ 643, 2522; *Horsley v. Hilburn*, 44 Ark. 458. The appellant's grantor or mortgagor was therefore only a tenant for life, and her conveyance could not confer upon him the right of possession against the remainder-men. See, also, *Chiles v. Bartleson*, 21 Mo. 844; *Butler v. Huestis*, 68 Ill. 594. The rule would be different, as has been frequently announced by this court, if the title to the personal property mentioned were in question; for language which would create an estate tail in lands confers the absolute property in chattels. *Moody v. Walker* and Arkansas cases *supra*. The statute *de donis*, which is the origin of estates tail, and which was enacted in aid of perpetuities, applied only to lands and tenements. 1 Washb. Real Prop. *74, § 29.

But if a definite failure of issue was intended by the devise,—that is, that the event which should determine the estate was to happen in the life-time of one or more of the devisees,—it would not aid the appellant's case; for, though the language would not in that event have created an estate tail, yet it would not vest the fee with absolute power of disposal in the first takers. Its legal import would, in that case, be to vest in them an estate in fee, determinable upon the contingency of either dying without issue living at the time of his or her death. *Richardson v. Noyes*, 2 Mass. 56; *Van Horne v. Campbell*, 100 N. Y. 287, 3 N. E. Rep. 316, 771; *Britton v. Thornton*, 112 U. S. 526, 5 Sup. Ct. Rep. 291; *Smith v. Brisson*, 90 N. C. 284; *Stones v. Maney*, 3 Tenn. Ch. 731; *Abbott v. Essex Co.*, 18 How. 202; *Clark v. Stanfield*, 38 Ark. 847. Had either of the devisees died without descendants, the others, if a definite failure of issue was meant, would have taken by way of executory devise. *Moody v. Walker*, *supra*, page 192, and cases cited *supra*. The intention to benefit the descendants, or the surviving devisees if there should be no descendants, would be incompatible with the idea of vesting in the first taker the power of disposal, as it would render that intention ineffectual. "The cases which hold that an unlimited power of disposition given to the first taker renders an executory limitation nugatory, have no application to such a case; for, in that view, a fee could never be limited by executory devise upon a fee, which always carries the power of disposition, whereas this is one of the characteristics of an executory devise." *Stones v. Maney*, *supra*; *Moody v. Walker*, *supra*, 192. But Mrs. Snow died leaving heirs of her body, and not until then did the fee become absolute. In any view, the title of the appellant failed with her death, and the judgment is right, and should be affirmed. It is so ordered.

WATKINS v. CITY OF EUREKA SPRINGS.

(Supreme Court of Arkansas. May 7, 1887.)

STATUTES—REFERENCE TO TITLE—CONSTITUTIONAL LAW.

The Arkansas act of February 27, 1875, providing for the calling in of their floating indebtedness by counties, cities, and towns, provides, in section 4, that the law governing in cases where counties are authorized to call in their floating indebtedness shall apply and govern in proceedings had by counties, cities, or towns. *Held*, in an action where the provision of the law as to counties, barring a recovery if the holder fails to present his claim, was invoked as a defense, that the section violates the provision of the constitution that "no law shall be revived or amended, or the provisions thereof extended or conferred, by reference to its title only; but so much thereof as is revived, amended, extended, or conferred, shall be re-enacted and published at length."

Appeal from circuit court, Carroll county, Western district.

O. W. Watkins and Joseph M. Hill, for appellant. The appellee *pro se*.

COCKRILL, C. J. In a suit by Watkins against Eureka Springs upon warrants issued by the city, the latter answered, in effect, that the remedy upon the warrants was barred because the holder had neglected to present them for reissue in compliance with an ordinance passed by the city council for that purpose. A demurrer to the answer was overruled. Judgment was rendered for the defendant, and Watkins appealed.

It is urged that the statute under which the city acted in calling in its warrants is nugatory, because, it is said, it is an attempt to extend the provisions of the act regulating the procedure of counties, in the matter of calling in warrants, to cities, without re-enacting the provisions of that act, in contravention of the following provision of the constitution, viz.: "No law shall be revived, amended, or the provisions thereof extended or conferred by reference to its title only, but so much thereof as is revived, amended, extended or conferred, shall be re-enacted and published at length."

The act of February 27, 1875, which is attacked as being inoperative, is as follows, viz.:

"Section 1. That once during the year 1875, and every succeeding year thereafter, the county court of any county, or municipal authorities of any city or incorporated town, in this state, may call in the outstanding scrip or warrants of said county or floating evidence of indebtedness of said city or incorporated town for the purpose of canceling and reissuing the same.

"Sec. 2. That the law governing such proceedings in a county shall apply with equal force to cities and incorporated towns. The council, recorder, and marshal, shall perform the duties laid down for the county court, the clerk, and sheriff, respectively.

"Sec. 3. That, when the scrip or warrants so called in shall be presented to the court or council, it shall be the duty of said court or council to thoroughly examine the same, and to reject all such evidences of indebtedness as in their judgment their county, city, or incorporated town is not justly and legally bound to pay, subject to appeal to the circuit court.

"Sec. 4. That the law now in force governing in cases where counties are authorized to call in their floating indebtedness shall apply and govern in proceedings had by counties, cities, or incorporated towns." *Mansf. Dig.* §§ 1150-1153.

There is nothing in the constitutional provision upon which to found an objection to the first and third provisions of the act. They confer, upon cities, counties, and towns alike, the power to call in their outstanding indebtedness in direct terms, and not by reference to another act. It is not necessary to consider the effect of the act in undertaking to provide an appeal from a city council or board of aldermen to the circuit court, (see *Prairie Co. v. Matthews*, 46 Ark. 383,) or any feature of the act not falling within the objection made.

The second section adopts the method of procedure provided for like cases where counties are concerned, without re-enacting the governing provisions. We are not, however, prepared to assert that, when a new right is conferred or cause of action given, the provision of the constitution quoted requires the whole law governing the remedy to be re-enacted in order to enable the courts to effect its enforcement. And we see no reason for refusing to apply the same rule to special proceedings like this. To prevent that kind of legislation could not have been within the mischief the provision was intended to remedy. It could not have been the intention of the framers of the constitution to put unreasonable restraints upon the power of legislation, and thus unnecessarily embarrass the legislature in its work. *Montgomery Ass'n v. Robinson*, 69 Ala. 415; *Home Ins. Co. v. Taxing District*, 4 Lea, 644. They meant only to lay a restraint upon legislation where the bill was presented in such form that the legislator could not determine what its provisions were from an inspection of it. What is not within the mischief is not within the inhibition. Every intendment is to be indulged in favor of the prerogative of the legislative branch of the government. A doubt of its powers to legislate inures to its benefit. The language of the provision is so broad that a literal construction would hamper legislation almost to the extent of prohibiting it. This was adverted to in *Scoles v. State*, 47 Ark. 476, 1 S. W. Rep. 769, and it was there ruled that a repeal of the exception in a statute, although it practically *extended* the operation of its provisions to the class previously excepted, did not render it necessary to re-enact the general provisions in order to continue them in force. It was said in that case: "It is well settled that this provision does not make it necessary, when a new statute is passed, that all prior laws modified, affected, or repealed, in part, by implication by it, should be re-enacted. If we should so hold, a large part of the laws would have to be re-enacted and republished at every session of the legislature, and some of them many times over. No human foresight or diligence could determine the alteration or modification that would be effected by the acts of a single session. * * * It is the reasonable construction the provision should receive, with a view to give the effect intended by its framers."

The fourth section of the act undertakes, however, to extend the positive provisions of the law applicable to calling in evidence of indebtedness by counties, to cities and towns, by a general reference to the prior law. The chief and most effective of these is the provision barring a recovery if the holder fails to present the evidence of his debt for reissue. Mansf. Dig. § 1149. Without this provision the act is of little practical utility. But can the operation of the provision be *extended*, or the power given by it *conferred* upon cities, by a general reference to the former law? We apprehend that it was just this sort of blind legislation the constitution intends to prohibit when it says the provisions of a law shall not be "extended or conferred" without "re-enacting" the part "extended or conferred." It may be that no legislator was misled by this act, or failed to perceive all that it was desired it should accomplish. Of that we have no means of judging. It is sufficient that the constitution renders such an effort at legislation unavailing. It does not permit the intelligent duty of legislation to be performed like the devotions of the Christian, who was content to point to the lids of a sealed book as containing his prayers and expressing his sentiments, without rehearsing them.

As Watkins did not voluntarily submit his warrants to the city counsel for reissue, they were not authorized to do anything that would bar a recovery. The answer presented no defense. The demurrer should have been sustained. The judgment is reversed, and the cause will be remanded, with instructions to sustain the demurrer.

EKERLY and others v. MOGER.

(Supreme Court of Tennessee. May 4, 1887.)

HUSBAND AND WIFE—WIFE'S SEPARATE ESTATE—CHARGING.

All that is necessary to charge the separate estate of a married woman with her contracts, whether oral or written, is that there should be an express promise or engagement to create such charge upon the separate estate, whether real or personal, and that the method in which such promise is expressed should be within the express or implied powers of the instrument creating the estate. *TURNER, C. J.*, dissents.

Appeal from chancery court, Shelby county.

Wm. M. Randolph, for complainants in error. *W. D. Wilkerson*, for defendants in error.

FOLKES, J. This case presents squarely the question, can a married woman, possessed of a separate estate in personalty and realty, make a valid parol engagement to bind and charge her separate estate which will be enforced in equity against the realty so held, independent of any considerations of benefit or enlargement of her separate estate? So far as we are informed, the question as here put has never, in terms, been adjudged in this state. We have, however, adjudications on the general subject of charging the separate estate of married women, by the light of which we are enabled to answer in the affirmative.

To charge her separate estate in equity, where she has clearly and explicitly (for in this state implication will not suffice) agreed and contracted that it shall be bound, is not to fix a *lien* or incumbrance upon the property. There is nothing in the mere act of writing to charge her estate. If so, in every case there would have to be a description of the property and privy examination. That privy examination is not necessary is expressly determined in *Menees v. Johnson*, 12 Lea, 561, and again in *Warren v. Freeman*, 1 Pickle, —, 8 S. W. Rep. 513. In the latter case, Judge CALDWELL, speaking for the court, says: "Any contract which will authorize a court of equity to subject her separate *personal* property will warrant the subjection of her *lands* held to the same uses; and a privy examination or authentication for registration is no more necessary in the one case than in the other, and is not required in either." In that case the charge was stipulated in the face of the note, but for goods furnished some time before the execution thereof, with no description of the property, and no acknowledgment, which facts were deemed unimportant to the conclusions there reached.

In *Owens v. Dickenson*, Craig & P. 48-54, Lord COTTENHAM says: "The mistaken notion that the wife's contract creates an equitable *lien* or distinct charge upon her separate property is to be found in some of the American decisions, but is wholly rejected by others. This notion is utterly inconsistent with the well-settled rules concerning the extent of the liability, and its enforcement. If there were a lien, it would follow the property into the hands of purchasers, with notice from the wife." Again, he says in the same case: "The view taken of the matter by Lord THURLOW in *Hume v. Tenant* [1 Brown Ch. 16] is correct. According to that view, the separate property of a married woman being a creature of equity, it follows that, if she has the power to deal with it, she has the other power incident to property in general,—the power of contracting debts to be paid out of it; and, inasmuch as her creditors have not the means at law of compelling payment of those debts, a court of equity takes upon itself to give effect to them, not as personal liabilities, but by laying hold of the separate property as the only means by which they can be satisfied."

What has been so often said in the books about the exclusion of parol proof of an agreement or understanding to charge a married woman's separate

estate will be found to rest entirely upon one or the other of two grounds, viz.: *First*, where the *evidence* of the debt or contract was itself in writing. Of course, in such cases, to admit parol proof to show an agreement or engagement that the separate estate was to be charged with the debt or contract, would contravene the elementary rule of evidence which precludes parol proof offered to alter or enlarge the writing entered into by the parties. Such were the cases of *Ragsdale v. Gossett*, 2 Lea, 786, and *Jordan v. Keeble*, 1 Pickle, —, 3 S. W. Rep. 511, and other cases that might be cited. *Second*, where the instrument creating the separate estate in terms, or by necessary implication, limits the *power* of disposition in such manner as to negative the idea of a parol charge. The restraint upon anticipation, when inserted in the instrument creating the separate estate, applies to the wife's contracts, or, more properly speaking, *engagements*, as well as to her *alienations*. The separate property, therefore, which she holds subject to the restraint upon alienation or anticipation, is not liable for any contracts or engagements which she may make. 3 Pom. Eq. § 1123; *Pike v. Fitzgibbon*, 17 Ch. Div. 454, 459, 462, 463.

We do not believe any case can be found in our state where parol proof has been rejected or held insufficient that is not bottomed on one or the other of the propositions just stated. We conclude, therefore, that all that is necessary to charge the separate estate of a married woman with her engagements, whether oral or written, is that there must be an express promise or engagement to create such charge, and that the method in which such engagement is expressed or created must be within the express or necessarily implied powers of the instrument creating the estate.

In the case at bar the express parol contract or agreement to charge her estate is explicit in its terms, and clearly proven; and there is nothing in the terms of the instrument creating the separate estate which imposes, directly or indirectly, any restrictions upon the power or manner of disposition. The instrument creating the separate estate embraced both personal and real property, both of which were in being at the time the contract or engagement was made, and both alike referred to in the agreement. As we have seen, there was no *lien* upon either,—nothing to prevent the married woman from subsequently incumbering either or both, or from disposing of any part or all of either. The realty alone remains, or at least is alone sought to be subjected here. Whatever portion of the property that remains, real or personal, which she held at the time of entering into the engagement, and is included in the bill as filed, (and not the married woman, nor any particular piece of her separate estate,) *is the debtor* in the equitable proceedings to subject the same.

That she may be overreached by false swearing of the party with whom she trades, is not sufficient objection to holding a married woman's separate property bound. In this respect her *property* is in no more jeopardy than is the property and *life* of men, nor of women (if sex is to be considered) who are *feme sole*, holding a general estate. The latter are as liable to be made the victims of perjury as the former. This is inherent in the administration of justice, and the danger is more imaginary than real; for with an opportunity of being a witness in reply, with all the varied tests of truth to be applied under the rules of evidence and of practice, the danger suggested is reduced to a minimum, and is shared in by all in every relation of life.

Again, where is the warrant of law for demanding that such engagements as we are now considering shall be in writing? For the courts to require it now would seem very like an encroachment upon the province of the legislature. Her undertaking is a contract only *sub modo*. It is only an equitable obligation which courts of equity enforce alone against her property, and the courts which *enforce* will be as careful to *protect*. We are unable to discover any rule of law, or any consideration of public policy, that would require a *higher* order of evidence to charge the property of a married woman than is

sufficient to bind the person and the property of an unmarried woman, husband's influence and domination out of the way. Indeed, she is an unmarried woman, as to her separate property, in the character of cases we are considering.

We have examined Mr. Pomeroy's excellent work on Equity Jurisprudence, and in his very full discussion of the subject of charging the separate estate of married women we find nothing militating against the views here expressed; while in Bispham's Principles of Equity (section 102) we find this language in reference thereto: "This liability was at first supposed to exist only when the *feme* had executed some obligations under seal; but the courts have now reached the conclusion that the same liability exists in respect of a mere verbal engagement;" citing in note *Picard v. Hine*, L. R. 5 Ch. 274; *Johnson v. Gallagher*, 3 De Gex, F. & J. 494; *London Bank of Australia v. Lempriere*, L. R. 4 P. C. 572; *Murray v. Barlee*, 3 Mylne & K. 209; *Matthewman's Case*, L. R. 3 Eq. 781; *Shattock v. Shattock*, L. R. 2 Eq. 182,—which cases we have not now the means of examining, but doubt not they will be found to sustain the text of the learned author.

Let the decree be affirmed, with costs.

TURNER, C. J., (*dissenting*.) In dissenting to the majority opinion in this case I will add to the reason given for the dissent in *Warren v. Freeman*, that, if the undertaking of the married woman created a charge upon her estate in any sense, that charge was a lien. The majority opinion takes a distinction between the terms "charge" and "lien," but does not define it. Bouvier defines "lien" to be "a hold or claim which one person has upon the property of another as a security for some debt or charge." "Charge" he defines to be a lien, incumbrance, or claim which is to be satisfied out of the specific thing or proceeds thereof to which it applies. Whitaker, on the Law of Liens, says: "In every case in which property, either real or personal, is charged with the payment of a debt or duty, every such charge may be denominated a *lien* on the property." By these authorities we have the terms "charge" and "lien" used synonymously.

The entire court is of opinion that the agreement of the married woman does not bind her personality; that, if sued for the debt contracted "on the faith of her separate estate," her coverture is a complete defense; and that the only remedy is by a proceeding *in rem* to subject the land. This being so, it naturally and of course follows that by her agreement she has, upon the authorities cited, given a lien upon her land for the payment of her debt; that the land is by her made the debtor,—a hold or lien upon it has been given as security for a debt or charge. I am wholly unable to see by what reasoning the conclusion is reached that the estate is bound, and yet there is no lien. It must be conceded that the security has been given. Whether that security is denominated charge or lien can, in my opinion, make no difference, as in the use of either the property is subject under the contract of the *feme covert*. I do not understand that technical terms at this day are of much value, where the intent and purpose of the parties is clearly ascertainable from the language employed. If, in law, the contract binds the real estate of the *feme*, and it is to be subjected to the debt because of her contract, it must be so because she has incumbered her title, and in this instance incumbered it by parol,—something that cannot be done by men of mature years or unmarried women, because void under our statute of frauds and perjuries. This is the first time that the contract of a married woman undertaking to "charge" her separate estate by parol has been enforced.

If it were an open question, I would not consent to hold a contract good which was not formally executed and acknowledged; the sales of land by parol being voidable at the election of either party, as also a contract to sell. I think this contract should be so declared at the instance of the married wo-

man. It is in fact a contract to sell. It means, if the debt is not paid, you may sell my real estate for its payment. The bill in this case is to sell land in furtherance of a parol contract that it shall be sold on the happening of a contingency, viz., non-payment of a debt at maturity. Our decree is to carry out the parol contract of the wife, who was in law incapacitated to bind herself at all for the debt, and under our statutes not capable of disposing of her lands, except by solemn deed and upon privy examination. Here she does in fact dispose of her real estate by parol, and, it may be, by coercion on the part of her husband. So, whether we call her agreement to buy the goods "on the faith of separate estate" a "charge" or "lien," it now results that she has contracted a parol sale, which is by solemn decree ordered to be executed, and her lands sold. The purchaser will acquire a good and indefeasible title in fee-simple without the stroke of pen and ink on her part evidencing any contract of sale.

I do not agree to the opinion holding that, by such verbal understanding, (if she is to be bound at all,) she is free to dispose of her estate, and thus defeat the creditors. Certainly, if she is bound at all, persons who have notice of her undertaking are bound, and the land in possession of a purchaser with notice is "charged" with the payment of the debt. Notice of its existence at the time of the purchase affects him equally with his vendor, and binds him to her parol undertaking that the land shall be sold upon the failure to pay the debt. If the *feme* die, the heir or devisee takes subject to the charge, with or without notice. While courts and lawyers may with great acuteness of intellect and nicety of argument undertake to prove that the charge upon the land is not a lien or incumbrance, they are completely answered by a glance from cause to effect, and by universal truth, that no strength of reason nor power of mental energy can overcome,—the inexorable, unyielding logic of result as demonstrated by this case; for, while the opinion of the majority is upon the idea that no lien exists, yet, in substance and in truth, it holds there is, and directs a decree for the sale of the land to satisfy it.

STOHER, by her Next Friend, etc., v. ST. LOUIS, I. M. & S. RY. CO.

(*Supreme Court of Missouri.* May 16, 1887.)

1. MASTER AND SERVANT—NEGLIGENCE OF MASTER—RAILROADS.

In an action against a railroad company to recover for the death of a fireman, caused by the track giving way under the train during a heavy rain, *held*, that the sudden giving way of the track was *prima facie* evidence of negligence in its construction, and that, the evidence as to whether the rain was an extraordinary one being conflicting, the case was properly sent to the jury.

2. SAME—CONTRIBUTORY NEGLIGENCE.

In such action the fact that the fireman and engineer were warned against danger from water in the neighborhood of the place where the accident occurred, it appearing, however, that a long train passed safely over the track shortly before their train, *held* to be, at most, only evidence of contributory negligence for the consideration of the jury.

3. NEGLIGENCE—EVIDENCE—COMPETENCY.

In an action against a railroad company to recover damages for its negligence which resulted in the death of plaintiff's father, evidence of the condition of the track at the place of the accident more than three years after it happened, is inadmissible.

4. SAME—DEATH OF PARENT—DAMAGES.

In an action brought by a child against a railroad company to recover damages for its father's death, which was alleged to have been caused by the negligence of the company, the jury are not confined, in settling their verdict, to nominal damages, although plaintiff's evidence does not show what the earnings of the father were at the time of his death. The loss of a parent's care in the education, maintenance, and pecuniary support of the child have, in addition to their moral value, an appreciable pecuniary value, which the jury may consider.

5. DAMAGES—EXEMPLARY—INSTRUCTION.

In an action against a railroad company to recover for the death of a fireman caused by an insufficient culvert, and consequent washing away of the track, where there was neither allegation nor proof of malicious, wanton, or gross negligence, or of any aggravating circumstances, *held*, that the jury were not at liberty to award vindictive or exemplary damages; and an instruction inviting them to consider any aggravating circumstances in the evidence was erroneous.

Appeal from St. Louis court of appeals.

A. R. Taylor and P. Leahy, for respondent. *T. J. Portis and Bennet Pike*, for appellant.

RAY, J. Bertha Stober, an infant, brings this suit by her next friend in the circuit court of the city of St. Louis, to recover damages for the death of her father, Nicholas Stober, who was killed by the derailment of a passenger train on the railroad of defendant, near Bismarck, Missouri, while he was acting as fireman upon the engine then drawing said passenger train. Upon a trial of the cause plaintiff had judgment for damages in the sum of \$5,000, from which the defendant appealed to the St. Louis court of appeals, where the judgment was affirmed, *pro forma*, from which the case was appealed to this court. None of the witnesses testifying in the cause seemed to have been present when the cars were overturned, and the father of the infant plaintiff killed. The railroad track at this place was "an embankment about a foot high, composed mostly of rock and gravel, and built on the solid rock." At a distance from the place of the accident, variously estimated by the witnesses at from 600 or 700 to 1,000 feet, there was a culvert passing through the railroad bed designed and intended to carry off the water that fell and accumulated during rains in the basin situated on the eastern side of the railroad. This culvert was a double-box culvert, each opening four feet by four, and together with the railroad had been constructed and in use for a number of years. During the night of May 9, 1880, there had been a rain-storm, and the water had accumulated in this basin, and so washed the railroad track and weakened the embankment that the same gave way under the engine passing along there at about 8:30 o'clock at night, which said engine was thrown from the track, and the said Nicholas Stober, fireman as aforesaid, was then and there killed.

The petition, so far as material, sets forth the grounds of recovery, in substance, "that said deceased was not guilty of any negligence that directly contributed to cause said injuries and his death, but that the same was wholly caused by the negligence of defendant and its agents in failing to keep its track in repair, and in a suitable condition for the passage of its engines and trains of cars along and over its said track; that, at the place where said engine was thrown from the track, said track was out of repair, and was in a defective and dangerous condition, and unsafe for the passage of engines and cars over same; that said track, at said point, was so defectively and negligently constructed that it obstructed the natural flow and drain of water, and did not allow said water an outlet; that, by reason of said obstruction and want of outlet from rain or other causes, the water would dam up and over said track, thus rendering the same defective, and unsuitable for the passage of engines and cars on said track; that, at the time said engine was thrown from said track, the water, by reason of the said defective structure and condition of said track, had accumulated against and upon said track, and washed the soil from said track, so that, when said engine went upon that portion of said track, it gave way, and said engine was thrown from the track, and killed said Nicholas Stober, as aforesaid, without fault upon his part; and the plaintiff, who is a minor of about the age of eleven months, was the only child of said Nicholas Stober at the time of his death; that no action for damages was ever begun by the widow of said Nicholas Stober; that, by the statute in such cases provided, a cause of action has accrued to the plaintiff;

that, by reason of the death of her father, the plaintiff was and is damaged in the sum of \$5,000, for which she demands judgment."

The answer of the defendant denied the allegations of the petition, except as therein afterwards admitted, and then set up that on and long prior to said May 9th said Stohrer had been a fireman in its employ, accustomed for several years to run on and over said portion of its railroad; "that said track, prior to and up to the date of the accident, was well and skillfully built and constructed, and was in a state of good repair, as was well known to said Stohrer; that, a few minutes prior to the accident, a sudden, violent, extraordinary, and unprecedented rain-storm prevailed at and near the place of the accident, in and during which an amount of rain fell to an extent previously unknown in that part of the country, by reason of which, and of wood and stones thrown against it, the said track, at the place or point where said Stohrer was killed, was moved and gave way, and not on account of any defect or want of strength to withstand all ordinary or usual rain-storms or freshets occurring at said place; that said track was amply sufficient to withstand the flow or fall of water caused by ordinary and usual rain-storms that could be reasonably expected to occur at said point, and had withstood all rain-falls occurring therewith for more than 20 years prior to the happening of said accident; that said Stohrer and one Charles McPherson, who was engineer of the locomotive upon which said Stohrer was fireman, knew of the storm that prevailed and was prevailing at the time of the accident by which said Stohrer was killed, and that it was the duty of the said Stohrer and the said McPherson to take all needful precautions against the effects of the same; that there was no time after the falling of the rain aforesaid, and before the happening of the accident, for defendant's section-men or track-repairers to go over and ascertain the condition of the said track, as Stohrer and McPherson well knew; and that whatever negligence there was in running the engine and cars at said time and place was their negligence, and that the injury and death of said Stohrer was the direct result of his own negligence and that of his co-employee."

The evidence seems to be somewhat conflicting as to the extent and character of the rain-storm during that night, and whether the same was extraordinary or merely severe and unusual; but such as had previously occurred in the region. So we think was the evidence as to the amount of the drainage basin and territory for which the culvert in question was provided as the outlet, and also the evidence in respect to the condition of said culvert, and its sufficiency at that time to carry off the waters naturally collecting at that point during very severe and heavy rains. Whether proper care has been used in the construction of the railroad is, in general, a question of fact, and the sudden giving away of a part of the structure is, if unexplained, some evidence of negligence in its construction. *Shear. & R. Neg. § 443.* A railroad company is bound to use reasonable care in constructing and maintaining its track and road-bed in such condition as to make the same reasonably secure for the use of passengers and employes, and is bound to use like care in providing sufficient culverts for the escape of water collected and accumulated by its embankments and excavations. *Shear. & R. Neg. (3d Ed.) § 444.*

As to the alleged negligence of said engineer and fireman set up in the answer, it is perhaps sufficient to say that no one, whether passenger or employee on that train, testified as a witness in the cause, and that there is no proof in the record as to what their conduct, or that of either of them, was as to the running and management of the said train at that time. The witness Rowland, it is true, testified that on the night of the storm and accident, he heard at Bismarck a conversation going on between the railroad men standing around the register in the office, McPherson among them; that McPherson said: "Boys, you want to look out for water between here and Iron, and especially down there by Dent's, for it is very high;" Dent's is about a mile and a half south of Bismarck, on the main line; that, as he was passing

out of the office, he heard some one of the railroad men say to McPherson, according to his best recollection: "Charlie, you want to look out for high water down there on that straight piece of track,"—referring, as his recollection is, to the water between Bismarck and Irondale. Martin O'Moro, the freight-train conductor, testified that he saw McPherson at Bismarck, and they were talking about the storm; that McPherson told him to look out for water on the track between Bismarck and Iron Mountain, (five miles south;) that McPherson said the storm was very severe, and that the water was over the track, going down the hill, and that the water might wash out the track. But this witness also testified that he got into Bismarck he thinks about 3 o'clock; that his train was the last one that passed over the track at the point of the accident before McPherson's train, No. 2, attempted to pass over it; that his train, he thinks, had 14 loaded cars; that the track, at the place of the accident, when he went over it, seemed to be all right, in good condition. At the most, this evidence could only justify an inquiry by the jury as to the negligence, if any, on the part of said engineer and fireman in proceeding on their journey with their said train.

If these views and estimates of the evidence in the foregoing particulars be correct, the action of the trial court in refusing to give the instruction in the nature of a demurrer to the evidence was right and proper.

Among other errors assigned by defendant is the action of the court in receiving evidence as to the condition of the culvert in question, and the track at that place, long subsequent to the time of this occurrence, when said Stoher was killed. There are several instances of this sort occurring in the evidence given by the witnesses Denton and Poston, and objected to and exceptions taken by defendant at the time. This trial was begun on the twenty-sixth day of October, 1883; and the witness Denton, upon being asked if any overflow of water had taken place at said place since the accident, answered: "Yes; last spring," that is, in the spring of 1883. He was then permitted to describe this overflow, and the condition of the track thereafter. He further testified that after this subsequent overflow, in 1883, he examined the condition of the culverts, and that he found that logs lay in the mouth of said culverts. Dr. Poston, after testifying that he frequently noticed the culvert in passing, further testified that he passed there a few days before the trial, and noticed obstructions of logs, brush, and leaves in the mouth of the culverts. Again, he was asked if he had examined the culvert recently with reference to its bed; and, in course of his answer to that and succeeding questions, testified that the culvert seemed to be considerably stopped up with brush and leaves, and about half full of dead water; that the top of the culvert does not extend more than six or eight inches above the level of the accumulated mud near the mouth; and that considerable mud and brush accumulated there. In answer to the question how long it had been that way, he said he could not say, and did not remember; that he saw it only three or four days before the time he was giving his testimony, in October, 1883, and that it was in very much the same condition. The witness Wood also testified that he had seen the indication and traces that the water had been above the mouths of the culverts, but not before the accident.

Neither of these witnesses testify, as we understand the record, as to the condition of the culvert and track in these respects at and about the time of the accident. Their statements as to conditions so long afterwards should not have been received. Too much time had elapsed since the accident had happened. In many cases it is said that the evidence should be confined to the time, place, and circumstances of the injury, and the negligence existing then and there. *Parker v. Portland Pub. Co.*, 69 Me. 174; *Grand Rapids & I. R. Co. v. Huntley*, 38 Mich. 537. We are not inclined to adhere to this rule in all its strictness. In this class of cases it is often wholly impracticable to produce the evidence of the conditions of things at the precise time of the occur-

rence. It will, we think, ordinarily be sufficient to show the state of facts tending to show negligence in the construction and maintenance of the railroad at the time, or recently before or after, and within such reasonable time as will, from the nature and circumstances of the case, induce or justify a reasonable presumption or inference that the condition is the same and unchanged. This rule is, we think, violated in the admission of the above and other evidence of like import, which showed the condition of the culvert at a period too remote to permit the fair and just inference that it was in the same condition, as to such obstructions, at the time of the accident, a year and even two and three years previous. 1 Greenl. Ev. 491, and note; 2 Starkie, Ev. 381; Shear. & R. Neg. § 448.

Other errors are assigned as to the action of the court upon instructions; and several of these are, we think, erroneous.

The third one given for plaintiff is as follows: "(3) The court instructs the jury that, although they may believe from the evidence that the negligence of the engineer, McPherson, may have contributed to cause the accident by which Nicholas Stohrer lost his life, yet if they further believe from the evidence that the negligence of the defendant, in failing to provide suitable road-bed and culvert, also directly contributed to cause said accident and the death of Nicholas Stohrer, then the negligence of said McPherson is no defense to this action." This instruction, even if otherwise correct, is subject to the criticism, we think, that it does not clearly leave to the jury the question whether or not defendant had failed to provide a suitable road-bed and culvert, but seems to assume that it had not, and to submit to the jury whether its negligence in that respect, which is assumed also, directly contributed to cause said accident, etc.

The fifth instruction given by the court of its own motion is as follows: "(5) If the jury in this case find for plaintiff, then, in assessing the damages, you may award any sum not exceeding \$5,000 that you deem fair and just, having reference to the necessary injury resulting to the plaintiff, Bertha Stohrer, by reason of the death of her father, Nicholas Stohrer, and also having reference to any *mitigating or aggravating circumstances you may find in the case.*" As to this instruction we cannot agree to the claim made in defendant's behalf, that the verdict should be limited to nominal damages, even if the evidence fails to show what the earnings of deceased were at the time of his death. The loss of a parent's care in the education, maintenance, and pecuniary support of children, have, in addition to their moral value, an appreciable pecuniary value. *Tilley v. Hudson River R. Co.*, 29 N. Y. 252; *McIntyre v. New York Cent. R. Co.*, 87 N. Y. 287.¹ In such cases, juries are not confined to any exact mathematical calculation, but are vested with considerable discretion, which the courts will not interfere with unless it has been abused. Shear. & R. (3d Ed.) § 613. But, while the rule thus announced may be proper in certain cases, it is, we think, in some respects inapplicable to a case of this sort. There is, in this case, neither allegation nor proof of any malice, wickedness, wantonness, or gross negligence as to the tort complained of, and there is a total absence of evidence as to any "aggravating circumstances" in the case. The case is not one authorizing vindictive or exemplary damages; and where, as in this case, there was no evidence of willful misconduct, or entire want of care, indicating indifference to consequences, the jury, in determining the compensation in damages, cannot properly consider aggravating circumstances which do not exist. *Graham v. Pacific R. Co.*, 66 Mo. 536; *Perkins v. Missouri, K. & T. R. R.*, 55 Mo. 201; *Doss v. Missouri, K. & T. R. R.*, 59 Mo. 27; *Morgan v. Durfee*, 69 Mo. 469.

For the above reasons the judgment of the circuit court, and well as that of the court of appeals, will be reversed, and cause remanded; and it is accordingly so ordered.

(All concur; NORTON, C. J., in the result.)

STATE v. BLUNT.

(Supreme Court of Missouri. May 16, 1887.)

1. HOMICIDE—EVIDENCE—THREATS.

On the trial of defendant for the murder of his wife, a witness was asked by defendant's counsel if he ever heard any one speak to deceased "about her having acted foolishly in marrying a cripple" like defendant. *Held* that, if the question was intended to prove threats by the deceased against defendant, it was not in the proper form, and should be excluded; and, if it was not intended to show threats, it was irrelevant and inadmissible.

2. SAME—MURDER OR MANSLAUGHTER—INSTRUCTIONS.

On a trial for murder, where the evidence for the state tended to prove murder in the first degree, but the defendant testified in his own behalf that he and his wife (the deceased) had been quarrelling, and that, when they entered his house, she threatened him, and cut at him with a razor which he took from her and cut her with three times, causing her death, an instruction that, if the jury believed his evidence, they should find him guilty of manslaughter in the second degree, *held* proper.

3. CRIMINAL LAW—INSTRUCTIONS—REASONABLE DOUBT.

In a trial for murder, an instruction, "to authorize an acquittal on the ground of reasonable doubt alone, such doubt should be a real, substantial, well-founded doubt, arising out of the evidence in the cause, and not a mere possibility that the defendant is innocent," *held* not ground for reversal.

Appeal from St. Louis criminal court.

Atty. Gen. Boone, for respondent. *J. L. Hornsby*, for appellant.

NORTON, C. J. Defendant on the ninth of December, 1886, was tried in the St. Louis criminal court, and convicted of murder in the first degree, for killing his wife, Mary Blunt, from which judgment he has appealed to this court, and assigns for error the action of the court in refusing to admit certain evidence offered, and in the matter of giving instructions.

During the progress of the trial a witness was asked by counsel for defendant the following question: "Did you ever hear any one speak to Mary about her having acted foolishly in marrying a cripple like Blunt?" The state interposed an objection to the question, which the court sustained; and this is the only complaint made as to the action of the court in rejecting evidence; and it is not well founded, inasmuch as it has no bearing on the questions in issue in the case. If the object of the questioner was to prove threats on the part of the deceased against the accused, the question should have been so framed; and, had the court then refused to allow it to be answered, the case of *State v. Elkins*, 68 Mo. 159, to which we have been cited, would have applied.

The jury were told in an instruction, that "to authorize an acquittal on the ground of reasonable doubt alone, such doubt should be a real, substantial, well-founded doubt, arising out of the evidence in the cause, and not a mere possibility that the defendant is innocent." We have been cited to the case of *State v. Owens*, 79 Mo. 619, as condemning the above instruction because of the use of the word "real." It is sufficient to say of that case that in the recent cases of *State v. Jones*, 86 Mo. 627, and *State v. Payton*, 2 S. W. Rep. 394, it is held that the use of the word "real" in such an instruction was not reversible error. In the case last above cited, the case of *State v. Owens*, *supra*, is referred to, and it is said of it "that, while the use of the word 'real' was much criticised, the judgment was not reversed on that ground."

The court instructed the jury as to murder in the first degree, and as to manslaughter in the second degree. No exceptions were taken to these instructions, nor is any objection to them urged here; but it is insisted that the court erred in not giving an instruction for murder in the second degree, and we are asked to reverse the judgment for that reason, although no such instruction was asked, and although the failure of the court to give an instruc-

tion on that degree of homicide is not assigned as a ground for a new trial in the motion made for that purpose.

This objection makes it necessary to advert to the evidence, which, on the part of the state, tended to show that deceased was the wife of defendant; that they were married in 1881; had two children, and apparently lived contentedly together till about January, 1886, when they began to find fault with each other,—she complaining that he did nothing to support the family, and that she was compelled to work out to support, not only herself and children, but to support him. He complained of her that she would not stay at home, and was too intimate with other men. The evidence tended further to show that this unpleasantness continued till about the middle of May, 1886, at which time defendant told her that he would cut her throat; that after this, and several days before the tragedy, the deceased left her home, and went to her mother's, about one mile from where she had lived with defendant, taking with her the two children, also clothing, etc.; that defendant met her, on the day of the homicide, on her way back to the house where they had lived, to get such of her things as she had left; that they had some words, and went to a police station, where deceased made the request that an officer be allowed to go with her to the house, as she was afraid defendant would harm her if she went with him alone; the request being refused, she started off with him; that both were seen to enter the house; the door was closed with a slam, and a racket, in the language of a witness, was heard as if they were racing, or as if one was running after the other, and screams of "murder, murder," from her were heard six or seven times; that the door soon opened, and deceased came staggering out with three distinct gashes in her neck and throat, from which the blood was running; that defendant came out immediately after her, and, going to a well, dropped something into it, which was afterwards found to be a razor; that he then went around the house, and immediately reappeared with a hatchet in his hand, ran and caught hold of deceased, who in the meantime had approached the porch of a house near by, and led or pulled her back towards the house she left, on reaching the door of which she fell; but recovered, and made her way towards the house of a neighbor, but dropped dead in an alley before reaching it; defendant then locked the door of the house, went to the police, and said he had fixed his wife, and wanted to be locked up; that he told a sergeant of police that he had cut his wife with a knife which he had thrown away, and then got a hatchet and intended to knock her in the head as he did not like to see her struggle so.

Defendant, who testified in his own behalf, stated that, when they got in the house, they continued to talk about their trouble and separation, during which she said to him: "I got you dosed, and I intend to finish you, too;" and again: "Make yourself satisfied. Look how you have been all the winter. If you know what is the name of the solid nigger, you would be hard to catch in this town." He further stated that deceased walked into an adjoining room, and, returning, said: "You were out looking for me; I will fix you now." That their altercation continued a few moments longer, when she struck at him with a razor, which he caught and took from her, and struck her three times with it, cutting her each time. That he then went to the well in the yard, and in lifting the bucket the razor slipped in the well.

If a warrant for any other instruction than murder in the first degree is to be found in the evidence, it must rest on that given by defendant in his own behalf; and we are of the opinion that the trial judge properly held that if the killing occurred under the circumstances detailed by him, that the offense was manslaughter in the second degree, and so instructed the jury, as follows: "If you believe and find from the evidence that the deceased made an assault with a razor on defendant, and attempted to take his life, or do him great bodily harm therewith, and that in resisting such attempt, or any other unlawful act on the part of the deceased, after such attempt may have failed, he

unnecessarily took the life of the deceased, you will find him guilty of manslaughter in the second degree, and assess his punishment in the penitentiary not less than three or more than five years."

Finding no error in the record, the judgment of the criminal court is hereby affirmed.

(All concur.)

RINGO v. ST. LOUIS, I. M. & S. RY. CO.

(*Supreme Court of Missouri.* May 16, 1887.)

RAILROAD COMPANIES—KILLING STOCK—PLEADING.

In an action in a justice's court to recover double damages under Rev. St. Mo. 1879, § 809, for a mare killed on a railroad, it is not necessary that the statement should contain an express averment that the point at which the animal got upon the track was not within the corporate limits of an incorporated city or town; and averments that "said killing took place at a point on said railroad where the same passes through, along, and adjoining cultivated and inclosed farm land, and not in the crossing of a public highway, or at any crossing whatever," and that "at the point aforesaid the mare strayed and got upon the track and was killed," are sufficient, as they by necessary implication negative the presumption that the entry might have occurred within the corporate limits of an incorporated city or town.

Appeal from circuit court, Scott county.

T. J. Portis, for appellant.

BRACE, J. This is a suit commenced in a justice's court to recover double damages under section 809, Rev. St. 1879, for a mare killed on defendant's road by a train of cars. The plaintiff had judgment in the justice's and in the circuit court, and the defendant appeals to this court. The case was tried before the court without a jury.

On the trial the defendant objected to the introduction of any evidence, for the reason that no cause of action was stated. The only ground upon which it is here urged that the statement upon which the case was tried is insufficient is that it is not alleged therein that the plaintiff's mare entered upon the defendant's track at a point not within the limits of an incorporated city or town. The averments in the statement in this respect are that "said killing took place at a point on said railroad where the same passes through, along, and adjoining cultivated and inclosed farm land, and not in the crossing of a public highway, or at any crossing of the road whatever;" and that "at the point aforesaid the mare strayed and got upon the track and was killed."

It is not necessary that the statement should contain an express averment that the point at which the animal got upon the track was not within the corporate limits of an incorporated city or town. It is sufficient if that fact appears by necessary implication from the facts contained in the statement. *Manz v. Railroad Co.*, 87 Mo. 278. It is sufficient if the facts stated negative the presumption that it might have occurred within the corporate limits of an incorporated city or town. *Perriquez v. Railroad Co.*, 78 Mo. 91. The averment that the animal entered upon the track at a point where the railroad "passes along, through, and adjoining inclosed field," negatives the presumption that the entry might have occurred within the corporate limits of an incorporated city or town. *Williams v. Railroad Co.*, 80 Mo. 597. The allegation in this case, that the animal "got upon the track at a point where said railroad passes through, along, and adjoining cultivated and inclosed farm land," by necessary implication negatives any presumption that the entry might have occurred within the corporate limits of an incorporated city or town. *Perriquez v. Railroad Co.*, and *Williams v. Railroad Co.*, *supra*; *Wade v. Railroad Co.*, 78 Mo. 863; *Johnson v. Railroad Co.*, 80 Mo. 621; *Jantzen v. Railroad Co.*, 83 Mo. 171.

The second ground upon which the defendant asks for a reversal of this cause is that there was a failure of proof that the animal got upon the track at a point where defendants were required by law to fence. The defendant on the trial did not demur to the evidence for its insufficiency, nor was the attention of the trial court called to such supposed defect of proof in the motion for a new trial; and that question not having been passed upon by the trial court, is not before us for consideration. *Blakely v. Railroad Co.*, 79 Mo. 388; *McCoy v. Farmer*, 65 Mo. 244, and cases cited.

The judgment of the circuit court is affirmed.

(All concur.)

COLE CO. and others v. MADDEN, and another, Sheriff, etc.

(Supreme Court of Missouri. May 16, 1887.)

1. MORTGAGE—FORECLOSURE—SALE—COUNTIES.

A county, being by law the trustee of the school funds for the benefit of the common schools and the education of minors, loaned a portion of those funds on a bond and mortgage. It became necessary to enforce the mortgage, and an order for the sale of the land was obtained. The county authorities instructed a person to attend the sale, and represent the county's interest by bidding on the land up to the amount of the debt. This person so instructed failed, through inadvertence or mistake, to do, whereby the land was bought in at a grossly inadequate price. Held, that the sale should be set aside upon the application of the county.

2. PLEADING—ADMISSION—EVIDENCE.

The fact that the county court failed to make any record of its appointment of an agent to attend the sale, and to represent it, is immaterial in a proceeding to set aside the sale; defendant, the successful bidder, alleging in his answer that the county court had an agent present who bid on the property.

Appeal from circuit court, Cole county.

Edwards & Davison and *Ed. Silver*, for respondents. *J. C. Fisher* and *McIntyre & Wagner*, for appellants.

RAY, J. This was a proceeding in the Cole circuit court to set aside a sheriff's sale of certain real estate therein mentioned. On November, 1882, as shown by the record, there was due Cole county, for the use of its general school fund, and of the several school townships mentioned in the petition, the principal sum of \$824, and \$162 as interest thereon. This indebtedness accrued on certain school bonds executed by Green C. Berry as principal, and A. C. Scruggs and H. W. Long as sureties, and was further secured by a school mortgage, in the usual form, on a part of "in-lot No. 461," in Jefferson City. On the day aforesaid the county court of said county, under section 7113, Rev. St. 1879, made an order of sale of said real estate under said mortgage, and delivered a copy of same to defendant Wagner, sheriff of said county, under which the mortgaged premises, at the ensuing May term of the circuit court of said county, were sold by said sheriff to the defendant Madden at and for the sum of \$100. The defendant Madden paid the \$100 to the sheriff, and received from him a certificate of purchase at that price. Six days thereafter, and during the same term of said circuit court, and prior to the execution of any sheriff's deed therefor, the plaintiff Cole county, and Scruggs and Long, the sureties of said Berry in said school bonds, commenced this proceeding, by petition in equity in the circuit court of said county, against said sheriff and said purchaser to set aside said sale of said mortgaged premises. The petition alleges that the sheriff's sale to Madden was and is invalid, and ought to be so held. The reasons assigned therefore are, in substance, to the effect following: That Cole county, at the time the sale took place, had no one present to protect its interest, and that of the school funds committed to its charge; that plaintiff had provided an agent to attend said sale, and that his absence therefrom was occasioned by defendant Wagner, as sheriff, in the conduct and management of said sale, and the consequent misappre-

hension of plaintiff's agent in regard thereto, brought about in the manner and under the circumstances therein stated, and fully appearing in the evidence at the trial hereinafter stated; and that, by reason thereof, the mortgaged premises were sacrificed and sold to Madden at and for a grossly inadequate price. The answer of defendants was a general denial, except that there was a sale, and that defendant Madden was the purchaser thereof; and then charged affirmatively that the county had an agent present at the sale who bid on the property, and that, if the property was sold for an inadequate price, it was solely on account of the negligence of plaintiff. The replication denied the new matter set up in the answer. Upon the trial the court found the issues for the plaintiff, and decreed that the sale be set aside, and that the sheriff pay back to Madden the purchase price. After unsuccessful motions for review and in arrest, the defendants appealed to this court.

At the trial it was agreed that the principal and sureties in the school bonds, for which the lot in question was sold to defendant Madden were all insolvent, and that Madden had never received any deed under said sale, and that none had been acknowledged by the sheriff. It also appeared in evidence that said lot, at the time of sale, was worth from \$1,000 to \$1,200 or \$1,300. One witness placing its value from \$1,000 to \$2,000. It further appeared in evidence that, besides the lot in question, certain "farm land" of said Berry was also to be sold, on the same day, under a similar school mortgage, to secure other like bonds of Berry, with other sureties thereon, to the amount of \$1,000; that the sureties on these bonds were perfectly solvent, but that said "farm land" was only worth about \$300; and that at the sale that day made only brought \$255. It is also conceded that the "farm land" was first offered for sale.

As to what occurred at said sales, how the same were conducted, what was done and said by and between the sheriff and the agent of the county, during the progress thereof, in reference thereto, and whether the same occurred during the sale of the farm land or the lot in question, and especially whether the plaintiff's agent was actually present at the sale of the lot in question, or bid upon the same, and, if absent, whether that absence was occasioned by the sheriff in the conduct and management thereof, or by a misunderstanding or misapprehension on the part of said sheriff or agent, or both, as to what was to be done, and when done, or by whom done, the record in the cause presents a sharp and decided conflict between the testimony offered by the plaintiffs and that adduced by the defendants in that regard.

The testimony in chief for plaintiff was, in substance, as follows:

Ed. Silver said: "In May, 1888, when lot in controversy was sold, I was prosecuting attorney of Cole county. Remember the day. It was May 24th. The circuit court was in session during that entire day. I was busy in the trial of an important case in court. In the morning of the day of sale, the sheriff came into the court-room, and said that the county court judges had instructed him to tell me to attend the sale to take place that afternoon under two school mortgage judgments in favor of the county and against Green C. Berry and others. He had, as I took it to be, executions in his hands. I looked at them, and asked what the court wanted me to do, and he said, 'Bid up the debt on the property.' I told him, 'Very well;' but to call me when he was ready to make the sale; and he said he would. After dinner he did call me, and I went outside of court-house, and my recollection is he had not commenced selling the Green Berry property. I was needed in the court-house, being in the trial going on, and I saw Mr. T. M. Winston, Jr., deputy-clerk of the county court, and asked him if he would not stay there at the sale, as he knew more about the matter than I did, and bid on the property at the sale for me, and he said he would. I then went back into the court-room, and in a very few minutes Mr. Winston came into the court-room, and reported that the sale of the farm land was going on, and that he had run it up to what he

thought it was worth; that the securities on the school bond for that tract of land were solvent; and that the county did not want the land when the personal securities were good, and ought not to buy it in. I told him I would go out with him to place of sale to see the sheriff, who was then crying the farm land, and I said to Wagner in substance what Winston had said to me, and that I did not know what to do. Wagner stopped the sale to hear what I had to say. I told him I did not know what to do, and he said, 'I will go and get Joseph Stampfli,' who is, and was at the time, the presiding justice of the county court, 'and bring him up here to see.' I assented to Wagner's proposition. Wagner then stopped the sale. This was pending the sale of the farm land, as I understood, and he (Wagner) started to go out of the gate. Stampfli lives one and a half blocks from the court-house. I don't know whether he went to the gate or not. I immediately turned around on Wagner's saying he would get Stampfli. I next heard afterward, that the Green C. Berry property had all been sold. I don't know just what hour the property was sold. I heard of it perhaps an hour afterwards. I remained in the court-house all the time after that, and am satisfied that Wagner knew I was in there engaged in the trial of a cause, being one of the counsel in the case, and actually assisting in the trial of it. I had no knowledge that Wagner afterwards proceeded with the sale. It was my understanding that he would get Stampfli, and, if he failed, he would call me. He did not say that. I did not know that he had failed to get Stampfli until I heard the property was sold to Madden. Wagner knew I was in the court-room engaged in the trial of *Nicholson Case*. I was not more than forty feet from the place of sale, but inside the court-room, the entire time of sale of both lots, except when out as I have stated. *Cross-Examined*. He notified me in the morning that the sale would take place, and that I was to bid it in, and make it bring the debt. In the afternoon he notified me that he would sell, and I told T. M. Winston, deputy-clerk, to bid in the property. I am sure Wagner suggested that he would get Stampfli. I understood that, if he failed to get Stampfli, he would again call me. I did not understand that from what he said, but from the fact that he knew where I was, and that Stampfli was sent for to advise with me. I don't know whether Winston bid on the lot in question or not,—had bid on the land. Winston may have told me after the sale that he bid on the property. I don't know whether he did or not. I did not revoke Winston's authority in express terms when we went out. We were to call Stampfli, and talk over the matter."

Henry Dulle testified that he thought the lot worth \$1,000. H. A. Swift thought lot in question worth a thousand dollars. In the spring of 1883 the question of the sale of the lot was up, and the court spoke to Mr. Silver to make it bring the amount of the school debt. *Cross-examined*, he said there was no record appointing Mr. Silver agent for the county. What was said to him in the spring was done in open court.

T. M. Winston testified that "in May, 1883, he was deputy-clerk of the county court; that Mr. Silver came into his office about 2 o'clock in the afternoon of May 24, 1883, and said that the sheriff was going to sell under the orders of the county court in the Green Berry school mortgage bonds, and he told me to go and make the land bring the money. He went out. Mr. Wagner was then selling, under the order of the court, the farm land described in the advertisement. Hogg, Robinson, and Gordon were securities on that note, and were perfectly solvent; did not think it advisable to buy in that land. The county did not want the land where personal security was good; bid about \$300 on the farm land, as much as he thought it to be worth. Went and told Silver, and that the securities were good, and that the county did not want the land in that case; that if he wanted anything further to come out, and he did come out, and talked with Wagner and others standing there. Some one suggested that Stampfli be sent for. My recollection is that Raithel, the janitor of the court-house, started for Stampfli, and got as far as the gate,

twenty feet distant, when Henry Dulle stated that Stampfli was not in town and Raithel came back. Don't know who sent him. I had no further connection with the sale. Went back into my office, stayed there awhile, came out, and the sheriff was crying the sale of the lot. Don't remember positively whether he had just started it or not. He was reading the advertisement. I bid fifty dollars on the lot; did not bid especially for any one. I said, 'I will give you fifty dollars to start it.' It was an idle bid; would have taken it if it had been knocked off to me. My understanding is that Raithel went for Stampfli. Don't remember that the sheriff went to the gate, or started to go; don't know who suggested going for Stampfli. My office was at place of sale. Silver opened the door, and gave me the papers, and said, 'Make it bring the money.' I bid on the farm land all it was worth. Silver was in the court-room. My connection ceased when I told Silver to attend to it. Silver went right out with me to the place of sale when I told him I had bid on the land. I gave him back the papers. The conversation about sending for Stampfli occurred just as soon as he got out there. There were 20 or 25 people present. Heard Dulle say that Stampfli was out of town. Was in and out of my office several times. Don't remember when he began to sell. He must have cried the sale of the lot 15 or 20 minutes. He gave parties time to examine title. A. C. Scruggs was right there. I told him after the sale that he was letting the lot be sold when he could save himself. He was present during the sale, and claimed that he did not know that he was on the notes. Lot was knocked off between three and four o'clock. I don't know whether Silver was still outside when Dulle said Stampfli was out of town or not. My fifty-dollar bid was after I had gone in for Silver, and after the conversation about sending for Stampfli."

H. W. Long testified that the lot was worth from \$1,000 to \$2,000; had no notice of sale. C. J. Gundelfinger said he thought the lot worth \$1,200 or \$1,300. It was admitted that Stampfli was out of town on the day of sale.

Defendant's evidence:

W. W. Wagner testified: "I am sheriff of Cole county, and was on May 24, 1883. The judges of the county court told me, I cannot recall the exact day, to tell Mr. Edwin Silver to bid on the property to be sold by me under the order of that court, and that he should make it bring the debt. I promised to tell him. On the twenty-fourth of May, 1883, in the forenoon, I notified Mr. Silver that I would sell the property that day, and he said, 'all right;' to let him know when I got ready to sell; and I promised him I would. On the same day, after two o'clock, I could not find Silver in the court-room; went to the grand-jury room, and found him there. I told him I was then going to sell the Green C. Berry property, and he asked me the total of each debt. We both came down stairs, and went to the court-room desk to ascertain the amounts. One was for \$1,100, and the other for \$900. I went out then and commenced the sale. I first sold the farm land to Mr. Hogg for \$255. I then proceeded to sell the lot in controversy. I was just proceeding to read the advertisement for the sale of the lot, when Silver told me that Tom Winston would bid for him; he being busy in court. Silver handed Winston the papers; went into the court-room. The first bid I got was \$50 from Tom Winston. I think Hogg bid, and it was run up to \$100 by Madden. I cried it for a long time, and then I think I sent for Tom Winston or he came out, and I said, 'aint you going to bid any more?' and he said: 'No, I just wanted to start it;' and I think I told him to go and tell Silver, and tell him about the bid; and Silver came out, and I told him what the bid was, and he said he did not know what to do, and asked me what the county court said. I told him again to bid the amount that was due on it. He said he would rather have the county court judges here, and asked me whether I would not send some one. I said I had nobody to send, and I looked around, and saw old man Raithel, and told him to go down and get Stampfli; and, just as he was on the

rock at the gate, some one said, 'Stampfli is at Liberty, and is not at home.' Raithel did not go. I then turned around, and saw Silver was still standing there, and I think was speaking to T. M. Winston. I said nothing to him, and proceeded to cry the lot. Madden and Gundelfinger went into the circuit clerk's office to examine the records for some time; and when they came out, no one bidding any higher, I knocked off the property to T. B. Madden. I stated several times that it was a shame that the lot was being sold for that sum. Silver was standing there when the party stated that Stampfli was out of town, and I think he stated that I should send after Swift, the other county court judge. I told him I did not have time to run around town to hunt them up. I proceeded to cry the sale. I cried the lot fully half hour or more. Madden gave me the money for it, and I gave him a certificate of purchase. I did not know that Madden was going to bid. There was no bad faith on my part in conducting the sale. I did all I could to make a fair sale, and protect the county. *Cross-Examined.* I would estimate the property at a thousand dollars. I knew that, when I made the sale, I sold the farm land first. Silver may have been out before, but I don't recollect it if he was; saw him only as stated in my evidence."

T. B. Madden testified: "The lot was put up for sale, and I began to inquire about it. A. C. Scruggs, one of the plaintiffs, was present, and located the lot for me. It was going cheap, and I thought something was wrong about the title, and I went into the circuit clerk's office, and asked him about it, and he told me it was being sold under a first mortgage, and was all right. I then bid \$100 on it, and went into the clerk's office again with Gundelfinger, and looked over the title, and found it all right. I came out and waited. Wagner was crying the lot, and it was knocked off to me for \$100, and I paid for it. There were 25 or 30 persons. Silver and A. C. Scruggs were present. Scruggs told me it was a good lot, and I bid on it for that reason. I heard the conversation between Silver and Wagner. Wagner sent Winston for Silver, and Silver came out. Wagner asked him what he was going to do, and something was said about sending for Stampfli. I heard Dulle say that Stampfli was out of town. Silver was standing there when the statement was made that Stampfli was out of town. *Cross-Examined.* My \$100 bid was up as much as half an hour. Winston first bid fifty dollars."

J. W. Madden testified: "Was present at sale of the lot. The sheriff was selling the farm land when I got there, and he next proceeded to sell the lot. Wagner read the advertisement, and commenced the sale as soon as I got there. Winston made a bid of \$50 to start it; then went with my brother into the clerk's office to look up the record. Lusk said it was all right. We went out, and my brother made the bid of \$100. The sheriff cried the sale for some time. Sheriff sent Winston for Silver. Silver came out, and then Wagner and he talked together for some time about the sale. They mentioned the name of Stampfli, and Raithel started towards the street. I think Dulle or Gundelfinger stated that he was at Liberty. Raithel came back. Silver and Wagner again talked together. Wagner proceeded to cry the sale. He cried it some twenty minutes, and then he said, 'sold to T. B. Madden.' Know A. C. Scruggs. We inquired of him about the property. He described it to us. *Cross-Examined.* Dulle and Gundelfinger were on the inside of the gate. I think it was Dulle that said Stampfli was away. Heard Wagner ask about Stampfli while Silver was there. Silver was standing between the walls and the door. Silver was at that sale twice, to my knowledge. Silver handed Tom Winston the papers, and I think Wagner was reading the advertisement when Silver came out. I think the farm land had been sold. I was six or eight feet from Wagner. Either Silver or Wagner asked after Stampfli. Silver was there when it was knocked off to my brother."

W. H. Lusk testified that he was circuit clerk; that Madden came into his office to inquire about title to the lot while they were crying the sale. Told

him it was perfectly good. They were 20 or 25 minutes looking into the title.

Edwin Silver, recalled by plaintiff, said: "I went out to court-house door when Wagner said he was going to begin the sale. Came back into court-room, when I made arrangement with Winston, and was not out again until Winston called me out. Was only outside the two times during the sale. Was out the last time but a few moments, when Winston told me that he had bid as much as the country land was worth. I went out at once. When I got to outside door of court-house, saw Wagner standing a little distance to the left of the door. Going out, I approached him, telling what Winston said about the country land; that the securities were good; that W. had bid it up to its value; that I did not know just what to do. Wagner had been crying the sale, and stopped when I said the above. It was then suggested to send for Stampfli, and it was my recollection that Wagner proposed it. I assented to it, and it was understood that Stampfli should be sent for to advise with me as to bidding more on the land than Winston bid. Wagner started as if to go himself for Stampfli. I turned around and went back into the court-room, and heard no more of the matter until I heard the sale had been made to Madden for the lot at \$100. I think now that I do remember of Raithel being sent for Stampfli, but did not hear him recalled, or hear any one say that Stampfli was at Liberty. I left under the impression that Stampfli was in the city, and would be brought to the court-house, where I could confer with him before sale should be proceeded with. The testimony of Wagner, that he told me that Winston had bid fifty dollars on the lot, and that he, Wagner, insisted on my bidding more, is wholly untrue. I remember distinctly what occurred when I was outside of the court-house, and know that what Wagner says as to my being present when he was crying that lot off, and of my refusal to bid, is incorrect. It is impossible for it to have occurred. I recollect what did occur while I was out there, and know the above did not occur; I know that I would not have permitted the lot to have sold for \$100 in my presence; know that there was no \$50 or \$100 bid while I was outside; and the first I heard of either was after the sale of the lot. Wagner never stated, in my presence, that it was a shame that the lot should go for \$100. He never told me that he would not run all over town to hunt up county judges, but, on the contrary, exhibited a perfect willingness to send for Stampfli. If Swift's name was mentioned, it was done when we spoke of sending for Stampfli, but I do not remember it. *Cross-Examined.* I knew Wagner was going to sell the lot that day. He told me so in the morning, and after dinner before beginning the sale. * * * I knew there were two of those school mortgage judgments against G. C. Berry's property. I now think I remember of Raithel going or starting for Stampfli, but did not know of his being recalled. Raithel and myself were going in different directions,—he out the gate, and I into court-room."

A. C. Scruggs testified that he was present at the sale of the lot. Did not know he was on the school bonds until after the sale. Was there to protect the interest of Mr. Gordon, who was surety on the bond secured by mortgage on the country land, the sale of which first took place. The sheriff was crying off the lot in town 15 or 20 minutes. Silver told Tom Winston to bid up the country land, and, as I understood, the lot also, to amount of the debts. Silver then went into the court-room, and Winston bid \$300 on the farm land. Silver came out again, and may have said something to Wagner the second time he came out, but I did not hear him. Something was said about sending for Stampfli. Silver was out there the second time but a few minutes. Did not see him while they were selling the lot. Think conversation about sending for Stampfli was before the lot was sold. Heard nothing about sending for Swift. *Cross-Examined.* Was there during the sale of the whole of it. My best recollection is that Silver was not there when the lot was put up. Did not advise Madden to bid.

Defendant recalled Henry Dulle, who testified: "Was present when the lot was sold. Silver was there when the sheriff was crying the lot. I was not there when the land was sold. Winston bid \$50 on the lot. Am county collector. *Cross-Examined.* Something was said about sending for the prosecuting attorney. After Silver came out, Tom Winston told him he had 'bid fifty dollars on the lot. Think S. said, 'I don't know what to do.' Some one said, 'Send for Stampfli.' I said he was at Liberty. Don't know whether Silver went into the court-room at once after Raithel started; don't think sale was stopped at all. We were all together in the crowd. Silver was there when I stated that Stampfli was out of town. It took a long time to sell the lot."

C. J. Gundelfinger, recalled by defendant, said: "Was present at the sale of the lot. Remember that it was sold to Madden. Silver was present during the sale of the lot. Wagner sent for him. The farm land was first sold. It must have taken one and one-half hours to sell the farm land and lot. Think both were sold between two and three and one-half o'clock. Wagner gave me lots of time to examine titles. I saw Silver once. He came out by himself. I know he was busy, and he was excited and was in a hurry. Heard about sending for Stampfli. Silver said some of the judges ought to be present. He went back in a few minutes. Silver suggested, before going, to send for Judge Stampfli. That is my recollection. Raithel started, and got to the gate, 15 or 20 feet. I called him back. Silver vanished, and was not there again. Heard Winston make \$50 bid before Silver got there. The \$100 bid by Madden was made after Silver left."

W. W. Wagner, recalled, said: "Mr. Silver was sent for after Winston made the \$50 bid. He was in the court-room when Winston made this bid. Had no other sales that day."

Such, *in extenso*, was the mass of testimony submitted to the chancellor at the trial below, and we are now asked to review his findings, and reverse his decree, for the reason that they are for the wrong party, and not supported by the evidence in the cause, and for the further reasons that the petition failed to state a cause of action, and that the court erred in overruling defendant's motions for review and in arrest. Such also is the substance of appellants' motions for review and in arrest filed in the court below, and here pressed upon our attention both by brief and argument of counsel.

There are really but two questions presented by this entire record; one of fact, and the other law. The question of fact controverted by the parties, it will be seen, is whether the plaintiff's agent was absent from the sale in question; and, if so, whether that absence was occasioned by the means and in the manner charged in the petition. The question of law in dispute is, conceding the facts charged to be proved, do they entitle the plaintiff to the relief asked?

It may be conceded in the outset that it is utterly impossible, and would be futile to attempt, to reconcile the positive and direct contradictions between the witness for plaintiffs and those of defendants except upon the theory of mistake in those particulars in which they conflict with each other. It is not contended in briefs or arguments of counsel that there has been any willful misstatement of facts, or that any of the witnesses are not trustworthy, but it is earnestly insisted by each party that its version of the facts are true; and it was left to the chancellor, in such circumstances, to search out and arrive at the probable truth as best he could.

It will be observed that there is no substantial disagreement about many of the facts of the transaction. It is not disputed that the lot in question was sold at a grossly inadequate price, and practically sacrificed; that the sale of the farm land first took place, and that of the lot afterwards; that Silver was called out of the court-room pending one or the other of said sales, and held an interview with the sheriff in reference thereto; that Silver, for some rea-

son, expressed a doubt as to his duty in the premises, and what he ought to do in regard thereto; that to relieve him of his embarrassment, and enable him to decide what to do, either he or Wagner suggested that Stampfli, the presiding justice of the county court, who lived close by, be sent for, to confer and advise with Silver as to said sale *then* pending, and his duty in the premises; that some one, probably Raithel, the janitor of the court-house, was directed by the sheriff and started to go for Stampfli, and got as far as the court-house gate, some 20 feet distant, when some one said Stampfli was out of town, and the messenger thereupon returned; that shortly thereafter the sale, which had been temporarily suspended, was resumed. Just what length of time this interview and abortive effort to procure the attendance of Stampfli lasted, does not clearly appear. One of the main controversies, however, between the parties, was whether this episode or interview between Silver and the sheriff occurred pending the sale of the farm land or the lot in question. Silver and Winston affirm, with great positiveness and distinctness, that it took place while the farm land was being sold. In this they are corroborated by the testimony of Scruggs. On the other hand, Wagner, the sheriff, and Madden, the purchaser, perhaps with equal confidence, assert that it occurred pending the sale of the town lot. In this they were corroborated by the other witnesses for defendants, some three or four in number. Under such circumstances, what was the chancellor to do? Was he to count the number of witnesses, all of whom are conceded to be reputable, or might he with propriety, in connection therewith, turn to the attending facts and circumstances that are undisputed, and see what light, if any, they throw upon the vexed question? In this connection, it is conceded or not disputed that the sureties on the bonds for the farm-land debt were perfectly solvent, while the farm land mortgaged and being sold therefor was only worth about \$300, and actually sold that day for only \$255, while the debt secured was \$1,000. It is also conceded that the sureties in the town-lot debt (as well as Berry, who was principal in both debts) were totally insolvent, while the town lot itself was worth from \$1,000 to \$1,200 or \$1,300,—more than sufficient to pay that debt. It must also be remembered that Silver had been directed by the county court, or its judges, to attend these sales, and make the mortgaged premises bring their respective debts.

There may be good reason why Winston and Silver might well pause and hesitate to comply strictly with the directions of the county court, and bid up the farm land to the amount of that debt, since they both knew, as the evidence shows, that that land was not worth half the debt, and that the personal sureties therein were perfectly solvent. Indeed, they would have been derelict in duty, and justly censurable, if they had done so under the circumstances. On the other hand, if Silver was a man of ordinary intelligence and business capacity, neither of which is questioned, there can be no reason in the world why he should doubt as to his duty, or for a moment hesitate to make the lot in question bring the full amount of that debt. From all the evidence, he must be presumed to know, what is not disputed, and that which all the other witnesses in the case seem to have known, that the lot in question was well worth more than the debt, and that both the principal and sureties in that debt were all insolvent. These facts and circumstances, it must be conceded, tend to show that the said interview between Silver and Wagner, the talk about sending for Stampfli, the temporary suspension of the sale, and the presence of Silver, spoken of by the witnesses, must have been pending the sale of the farm land, and not that of the lot in question. These facts and circumstances doubtless did not escape the observation of the chancellor, and might well weigh with him in making up his decision. It is also conceded that, on the day these sales were going on at the door of the court-house, Silver was busily engaged in a trial then in progress in the courtroom, and for that reason requested Winston to take his place at the sale.

The facts and circumstances attending the entire transaction tend to show, with reasonable certainty, that Silver, during these sales, was not out of the court-room more than twice,—once when the sale was about to begin, when he handed Winston the papers, and requested him to attend sale and bid on the lands, and immediately returned to the court-room; the second time, when notified by Winston what he had done, and “that if he wanted anything further, to come out.” His stay on this occasion, also, appears to have been brief. After a short conference with Wagner about sending for Stampfli to advise with him, and the starting of the messenger to bring him, he seems to have hurried back to the court-room, where his professional services required his presence. It is further conceded that the sale of the lot in question, after it commenced, was pending for a considerable length of time before it was finally concluded. In the language of one witness, “lots of time to examine the title” was given by Wagner to Madden and his friends, to inquire of the clerk and examine the records to ascertain whether the title was all right. Madden, the purchaser, says his “\$100 bid was up as much as half an hour.” The sheriff says he “cried the lot fully half an hour or more.” Madden’s brother said the sheriff “cried it some twenty minutes.” C. J. Gundelfinger, recalled by defendant, said: “Was present at the sale of the lot. Remember that it was sold to Madden. Silver was present during the sale of the lot. Wagner sent for him. The farm land was first sold. It must have taken one and one-half hours to sell the farm land and lot. Think both were sold between two and three and one-half o’clock. Wagner gave me lots of time to examine titles. I saw Silver once. He came out by himself. I know he was busy, and he was excited, and was in a hurry. Heard about sending for Stampfli. Silver said some of the judges ought to be present. He went back in a few minutes. Silver suggested, before going, to send for Judge Stampfli. That is my recollection. Raithel started and got to the gate, 15 or 20 feet. I called him back. Silver vanished, and was not there again. Heard Winston make \$50 bid before Silver got there. The \$100 bid by Madden was made after Silver left.”

While the defendant’s witnesses are quite positive that they saw Silver out of the court-room and present pending the sale of the lot, yet they all couple his presence with his said interview with Wagner as to his doubts as to his duty about the bidding, and the said suggestion of sending for Stampfli to confer with him on that subject. If the facts and circumstances (other than the positive statements of witnesses) tend to show that said conference with Wagner must have been pending the sale of the *farm* land, they would, for the same reason, tend to show that the time they saw him (Silver) must also have been *pending that sale*, and not the sale of the lot. Silver’s comprehensive review of what happened, and how it occurred, when recalled in rebuttal, besides being emphatic in its denials of defendants’ witnesses as to his presence at the sale of the lot, appears to be in harmony, in other respects, with the attending facts and circumstances, and is as follows: Edwin Silver, recalled by plaintiff, said: “I went out to court-house door when Wagner said he was going to begin the sale. Came back into court-room when I made arrangement with Winston, and was not out again until Winston called me out. Was only outside the two times during the sale. Was out the last time but a few moments, when Winston told me that he had bid as much as the country land was worth. I went out at once. When I got to outside door of court-house, saw Wagner standing a little distance to the left of the door. Going out, I approached him, telling what Winston said about the country lands; that the securities were good; that W. had it bid up to its value; that I did not know just what to do. Wagner had been crying the sale, and stopped when I said the above. It was then suggested to send for Stampfli, and it was my recollection that Wagner proposed it. I assented to it, and it was understood that Stampfli should be sent for to advise with me as to

bidding more on the land than Winston bid. Wagner started as if to go himself for Stampfli. I turned around, and went back into the court-room, and heard no more of the matter until I heard the sale had been made to Madden for the lot at \$100. I think now that I do remember of Raithel being sent for Stampfli, but did not hear him recalled, or hear any one say that Stampfli was at Liberty. I left under the impression that Stampfli was in the city, and would be brought to the court-house, where I could confer with him before the sale should be proceeded with."

There is another circumstance tending to complicate the matter, and further add to its grave difficulties, which requires attention at our hands, and that is found in Winston's connection with the sale of the lot in question. It is conceded that he was requested by Silver to attend the sales, and bid on the lots for him. It is also conceded that, in point of fact, he was present about the time that the sale of the lot was commenced, and actually made the bid of \$50 on it. All the explanation of this matter is found in what Winston himself says about it. That part of his testimony bearing on this point, as will be seen by reference to his evidence, is to the effect following: That he "bid about \$300 on the farm land, as much as he thought it was worth. Went and told Silver that the sureties were good, and that the county did not want the land in that case; that if he wanted anything further to come out. He did come out, and he talked with Wagner, and others standing there. * * * I had no further connection with the sale. Went back into my office. Stayed there awhile. Came out, and the sheriff was crying the sale of the lot. Don't remember positively whether he had just started it or not. He was reading the advertisement. I bid fifty dollars on the lot. Did not bid especially for any one. I said 'I will give you fifty dollars to start it.' It was an idle bid. Would have taken it if it had been knocked off to me. * * * Silver opened the door, and gave me the papers, and said, 'Make it bring the money.' I bid on the farm land all it was worth. Silver was in the court-room. My connection ceased when I told Silver to attend to it. Silver went right out with me to the place of sale when I told him I had bid on the land. I gave him back the papers. The conversation about sending for Stampfli occurred just as soon as he got out there. * * * My fifty-dollar bid was after I had gone in for Silver, and after the conversation about sending for Stampfli." In this same connection, Silver, on cross-examination, said: "I did not revoke Winston's authority, in express terms, when he went out. We were to call Stampfli, and talk over the matter."

This explanation and statement of Winston is not controverted or denied by any of defendants' witnesses. If he is to be believed,—and no effort was made to impeach him, or any other witness at the trial,—it certainly tends to show that he, at least, considered his agency and connection with the sale terminated and was at an end when he told Silver, after bidding on the farm land, "that if he wanted anything further to come out." In this connection, Winston further said: "I bid on the farm land all it was worth. Silver was in the court-room. My connection ceased when I told Silver to attend to it. Silver went right out with me to the place of sale when I told him I had bid on the land. I gave him back the papers." All this tends to show that thereafter Winston did not consider himself any longer the agent or representative of Silver in this transaction. He may have misapprehended both Silver's expectations and Wagner's suppositions in that behalf; but certain it is, if he is to be believed, he was not present and bidding on the lot in question for and on behalf of the county when he made the \$50 bid in question.

The chancellor, who tried the cause, had all the witnesses before him; could see their manner and bearing, as well as hear their language; was doubtless well acquainted with all of them; and, after due consideration of the whole case, found the issues for the plaintiff, and rendered a decree accordingly. Appellant's counsel insists with much earnestness that the finding and de-

crec is not supported by the evidence in the cause. After a patient examination of the entire record, and a careful consideration of the whole case, we have not been able to agree with counsel in his estimate and value of said evidence, but, on the contrary, are of a different opinion, and so hold accordingly. So much as to the question of fact presented by the record.

The question of law, as before observed, is chiefly whether the petition and the finding of the court entitle the plaintiff, Cole county, to the relief asked and actually given. It is insisted for appellant—*First*, that inadequacy of price alone is not, of itself, sufficient to set aside a sheriff's sale otherwise fair and regular, and that public policy requires that such sales should be upheld, although occasional hardships may attend them; *second*, that in no case will such relief be granted where it appears that such inadequacy of price was occasioned by or coupled with the negligence of the party complaining, and in no way chargeable to any failure of duty on the part of the sheriff in the conduct of the sale.

As to the first point, respondent concedes that while, as a general rule, this may, be true, yet there is "abundant authority" for the proposition that where gross inadequacy of price is coupled with accident, mistake, or misapprehension, caused by a purchaser or others interested in a sale, or by the officer conducting the sale, equity will interpose and set aside the sale. Rorer, Jud. Sales, (2d Ed.) §§ 549, 566; *American Wine Co. v. Scholer*, 85 Mo. 496; *Strong v. Catton*, 1 Wis. 471; *Lefevre v. Laraway*, 22 Barb. 168; *Howell v. Hester*, 4 N. J. Eq. 266; *Beckwith v. Mining Co.*, 87 N. C. 155; *McKee v. Logan*, 82 Mo. 528; *Parker v. Hannibal & St. J. R. R.*, 44 Mo. 421; 2 Story, Eq. Jur. § 1334; Rorer, Jud. Sales, §§ 1086, 1087, 1095; *Nelson v. Brown*, 23 Mo. 13; *State v. Moore*, 72 Mo. 285.

As to the second point, respondent says that authorities are not wanting to the effect that where the property of infants, or trust-estate, is sacrificed by the negligence of guardians or trustees, equity, in proper cases, will interfere for their protection, and set aside sales thus improvidently made; and, further, that, to a certain extent, officers in selling property under execution are treated by the law as agents for both plaintiff and defendant, and bound to protect the interests of both; that they are not bound to accept a bid without reserve; and that, if they can see that a sacrifice of property will be prevented by delay, they may, in their discretion, return "no sale, for want of bidders," and be protected in so doing. Rorer, Jud. Sales, (2d Ed.) § 566; *Lefevre v. Laraway*, 22 Barb. 168; 2 Story, Eq. Jur. § 1334; *Conway v. Nolte*, 11 Mo. 75; *Shaw v. Potter*, 50 Mo. 281; *State v. Moore*, 72 Mo. 285; 2 Story, Eq. Jur. § 1334. In the case at bar, it will be observed, in this connection, that the county, by law, is but the trustee of the school funds in question for the benefit of common schools and the education of minors, and that the justices of the county court are but its agents in the management and preservation of said funds for such uses and beneficiaries. It will be noted, also, in the same connection, that Wagner, the sheriff, conducting the sales in question, and speaking thereof in his examination, said: "I stated several times that it was a shame that the lot was being sold for that sum. * * * I would estimate the property at a thousand dollars. I knew that when I made the sale." These facts are only mentioned because they appear in the case, and may serve to characterize, to some extent, the nature of the property being sold, as well as the duty and discretion imposed upon the officer, in the conduct and management of said sale. We will not say that it was the duty of the sheriff, with his knowledge and convictions in the premises, to have suspended the sale; but that, if he had seen proper to do so, as he might have done, his discretion, in our judgment, would have been proper and commendable. *Conway v. Nolte*, 11 Mo. 75; *Shaw v. Potter*, 50 Mo. 281.

There is one other objection, made here for the first time, and deserving of brief notice only. It is insisted for appellant that there was no record entry

by the county court of the appointment of Silver as its agent; that the court is one of record, and, as such, can only speak by its record, and therefore Silver was not its "duly authorized" agent, within the meaning of section 7115, Rev. St. 1879. Of this objection it is sufficient to say that the defendants, having alleged affirmatively in their answer "that the county court had an agent present, that he bid on the property," etc., will not now be heard to deny his authority to act as such in the premises. In their motion for review the defendants again allege "that the sale was entirely fair, and made with full notice to the agent of the county." It is now too late to raise that objection, even if well taken, under the circumstances of the case.

Looking at the case, therefore, in all its aspects, we are of opinion that the objection of appellants as to the sufficiency of the petition, and the propriety of the chancellor's finding and decree upon the evidence before him, is not well taken. We are further of opinion that, upon the whole case, the judgment is for the right party, and should be affirmed, and it is accordingly so ordered.

(All concur.)

RAMSEY v. HENDERSON.

(Supreme Court of Missouri. May 16, 1887.)

1. EJECTMENT—EVIDENCE—PLEADINGS.

In an action of ejectment, title to lands described in the pleadings only is to be considered in issue. Evidence of title to other lands is not admissible.

2. LANDLORD AND TENANT—NOTICE TO QUIT.

Where a tenant enters upon land and subsequently denies his landlord's title, *held*, that he is not entitled to notice to quit.

Appeal from circuit court, Greene county.

T. J. White and *J. P. McCammon*, for respondent. *F. S. Sheppard*, for appellant.

RAY, J. This is an action of ejectment, in the usual form, by plaintiff to recover from defendant the possession of a parcel of ground described in the petition as "the north-west quarter of lot thirty-seven, Stephens' addition to the city of Springfield, Mo." The answer of defendant, and portions of the evidence deemed material and pertinent to the action of the court upon declaration of law, will be noticed hereafter in the progress of the opinion. The case was tried by the court without the aid of a jury, and a finding and judgment had in favor of plaintiff for the recovery of the possession of the premises described in the petition, from which judgment the defendant has appealed to this court.

The paper title to said lot 37, read in evidence by plaintiff, seems to be formal and regular in all respects. No question is, we believe, made in that behalf. The defendant acquired her possession, in the first instance, about the years 1872 or 1873, as the tenant of plaintiff. Both plaintiff and defendant so testify. Defendant testifies that subsequently she held under a verbal contract of purchase. In 1881, Shepard bought lots numbered 34, 35, and 36 in said addition, and claimed, according to a survey and measurement made to establish the corners of his lots, that the defendant had built her cabin and dug her well on the south part of his said lot 36, which, according to the plat offered in evidence, lies immediately north of lot 37. Shepard shortly afterwards sued defendant in ejectment, and recovered, the suit being undefended, and thereafter sold the south-west quarter of lot 36 to defendant at and for the sum of \$30. A proper chain of title to said lot last mentioned was read in evidence by defendant at the trial.

The claim was made in defendant's behalf at the trial, and is renewed here, that this lot, to-wit, the S. W. $\frac{1}{4}$ of 36, was the land plaintiff sues for and was really seeking to recover, although it was described in the petition as the N.

W. $\frac{1}{4}$ of lot 37. As the pleadings in the cause then were, we do not see how this claim and evidence in that behalf was competent or admissible. Parties are bound by their pleadings. Courts cannot disregard them, or give relief in conflict with and inconsistent with their statements of facts and admissions.

The petition in the case, as we have seen, described the lot sued for as "the north-west qr. of lot 37." The answer in the case, we may observe, embraces two defenses: *First*, it says: "For answer, defendant admits the possession of the north-west qr. of lot 37, Stephens' addition to the city of Springfield, and denies every other allegation in plaintiff's petition contained." So far as this first defense, therefore, is concerned, the only issue is as to the right to the possession of the ground, which is described in the answer, as well as in the petition, as the "north-west qr. of lot 37," in said addition.

The second and "equitable defense" set up in the answer charges that defendant verbally contracted to buy from plaintiff the west half of lot 37, "but that the tract of land plaintiff showed to defendant really consisted of the south-west qr. of lot 36, and the north-west qr. of lot 37, in the addition aforesaid; and *the same is the tract of land sued for by plaintiff in this action.*" It further charges that defendant "has made improvements of value on the north-west qr. of lot 37." It also charges that some one else is in possession, by purchase and deed from plaintiff, of the S. W. $\frac{1}{4}$ of lot 37, (which is the other quarter of the west half of lot 37 alleged to have been contracted for as aforesaid,) and that the title thereto has failed. It also charges that defendant has been evicted by superior title from the S. W. $\frac{1}{4}$ of lot 36, which is the said quarter lot bought of Shepard, and prays a decree vesting title in her to the N. W. $\frac{1}{4}$ of lot 37, and for an accounting, and for judgment for excess of payments.

This, then, being in substance the answer, we are at a loss to see what said lot 36 has to do with the case. It is not described in the petition, nor was it embraced in the verbal contract; and defendant says plaintiff did not own it, and has nothing to do with it; and the answer admits in both defenses, as we have seen, that defendant is in possession of the N. W. $\frac{1}{4}$ of lot 37, the lot described in the petition. The issues thus made under this second defense to the petition are, we think, whether there was any verbal contract of purchase of the W. $\frac{1}{2}$ of lot 37; and, if so, whether there had been a failure of title and consideration in respect to the S. W. $\frac{1}{4}$ of lot 37, and what the damages, if any, the defendant was entitled to on that account. The title to lot 37, including the S. W. $\frac{1}{4}$ of 37, was shown to be in plaintiff, and no conveyance from him for said S. W. $\frac{1}{4}$ of 37 was shown, although the answer alleged, as we have seen, that he had so conveyed. The plaintiff, it would seem, therefore, was in position to execute and specifically perform the verbal contract, provided the court had found it had been made and entered into. Under the description of the land given in the petition, and the admission in the answer, plaintiff was entitled, under his title read in evidence, to recover the possession, unless the court found he made and failed to perform the verbal contract set up in the answer to sell and convey the W. $\frac{1}{2}$ of said lot 37, or had at least agreed to convey the N. W. $\frac{1}{4}$ of 37. The question of most importance and merit in the case was in reference to the alleged verbal purchase of the half lot, and whether defendant held possession thereunder, or as the tenant of the plaintiff. Plaintiff and defendant were the only witnesses testifying in that behalf, and they contradicted each other, and with this conflict in their evidence the trial court found for plaintiff. Under such circumstances, its finding will not be disturbed or interfered with by this court. These views make it unnecessary, we think, to notice the several surveys offered in evidence by the parties.

We deem it necessary to say but little about the action of the court upon declarations of law. Those given at plaintiff's instance announced, in sub-

stance, the doctrine that if defendant had entered as plaintiff's tenant, and had denied and repudiated plaintiff's title, she was not entitled to notice to quit. These instructions were supported by evidence in the cause, and afford no ground for reversal. The first asked for defendant declared the survey made by the county surveyors inadmissible; but the evidence of a survey made by defendant's grantor before the controversy arose was admissible. The second was that if the land sued for by plaintiff was believed, on the evidence, to be a part of lot 37, the defendant was plaintiff's tenant at will, as a verbal vendee, or from month to month, and entitled to notice to quit. These were the only ones refused, and the court's action in that behalf was, we think, manifestly correct. Even if the first was correct, its refusal was, we think, under the pleadings and facts of the case, without prejudice to the defendants; while the second is too narrow, and, even if otherwise correct, wholly ignores the evidence as to the disclaimer of plaintiff's title by defendant.

Finding no error in the record calling for a reversal, we affirm the judgment; and it is so ordered.

(All concur.)

CITY OF ST. LOUIS v. PROVENCHERE and others.

(*Supreme Court of Missouri*. May 16, 1887.)

MUNICIPAL CORPORATIONS—ASSESSMENTS—VALIDITY.

The charter of the city of St. Louis (article 6, § 5) provides the method by which property shall be assessed for benefits conferred by the opening of a street, and directs commissioners to assess contiguous property benefited thereby, which assessment shall be a lien on the property so charged. *Held*, under these provisions, that, where one person owns several lots, a separate assessment of the amount of benefits to each lot is necessary, and commissioners have no authority to group the several lots and assess them in gross.

Appeal from St. Louis circuit court.

L. Bell, for appellant. *P. W. Provenchere*, for respondents.

BRACE, J. This action was brought upon a special tax-bill to recover the amount of benefit assessed in gross upon several contiguous lots of the defendants, upon the opening of a street in the city of St. Louis. The case was tried by the court without a jury, and the law of the case was declared as follows: "The court declares the law to be that if the lot or tract of ground described in plaintiff's petition as charged with said special tax-bill, and against which said assessment was made, and against which said bill was issued, is composed, and at and before all the times mentioned in plaintiff's petition was composed, of several distinct and separate lots of ground, all lying in and being part of 'Provenchere's addition;' that a plat of said addition is, and at and before all the times mentioned in plaintiff's petition was, of record, duly recorded in the office of the recorder of deeds in said city of St. Louis; and that said lots are all unimproved,—then plaintiff cannot recover." The court found for the defendant, and rendered judgment in his favor, from which plaintiff appeals, and assigns for error the giving of said declaration. The facts hypothetically stated in the declaration are undisputed. The commissioners assessed the benefits to lots 68 to 74, in Provenchere's addition to the city of St. Louis, as one lot, at the sum of \$77.20, and the tax-bill sued on is in accordance with the assessment. The defendants are the owners of all of said lots.

Section 5, art. 6, of plaintiff's charter, prescribes the method by which a citizen's property shall be assessed for supposed benefits to be conferred by the opening of a street, in order to raise a fund for the payment to the owners of the value of and damages to lands to be taken for such proposed street, by which it is made the duty of the duly-appointed commissioners, first having ascer-

tained such values and damages for the payment thereof, "to assess against the city the amount of benefit to the public generally, and the balance against the owner or owners of all property which shall be especially benefited by the proposed improvement, * * * to the amount *that each lot* of said owner shall be benefited by the improvement. The sums to be paid by the owners of property specially benefited by the improvement, as ascertained by the commissioners, shall be *a lien on the property so charged*, and shall be collected," etc. There can be no question that the provisions of this section require a separate assessment of the amount of benefit to each lot, and provide that that amount only shall be a lien on such lot, and the commissioners had no authority to increase the burden on any such lot by grouping together a number of lots, and assessing them in gross, the effect of which would be to make the amount assessed upon the whole number of lots a lien on each, which amount would have to be paid in full before any one of them could be discharged therefrom, since the courts are without power to make an apportionment. The owner had a right to have each of these lots assessed specifically for the benefits to each of them, so that he might redeem any one of them by paying the tax specifically levied thereon,—a right of which he would be deprived if the mode of assessment adopted in this case should be sanctioned. The circuit court held that the assessment of the lots collectively, instead of separately, rendered the assessment invalid, and that no recovery could be had upon the tax-bill issued thereon; and in this we think no error was committed.

The general principle governing in said cases is thus stated in *Cooley on Taxation*, 401: "When two parcels are owned by the same person, if the statute requires a separate assessment, obedience to the requirement is essential to the validity of the proceedings. It cannot be held in any case that it is unimportant to the tax-payer whether this requirement is complied with or not. It is made solely for his benefit; * * * and, where a requirement has for its sole object the benefit of the tax-payer, the necessity for a compliance with it cannot be made to depend upon the circumstances of a particular case." *Nason v. Ricker*, 63 Me. 381; *County Com'rs v. Mining Co.*, 61 Md. 545; *Bruce v. McBee*, 23 Kan. 379; *Haggood v. Morten*, 28 Kan. 764.

Under the provisions of city charters authorizing assessments of taxes for street improvements, the St. Louis court of appeals has uniformly held that, although lots may be contiguous and belong to the same owner, they must be separately assessed, and, if assessed together, the assessment will be error, and a recovery cannot be had upon a tax-bill issued upon such an assessment. *Kefferstein v. Holliday*, 8 Mo. App. 569; *Miller v. Anheuser*, 4 Mo. App. 436; *Christian v. Taussig*, 8 Mo. App. 602; *Kemper v. King*, 11 Mo. App. 116. And the provisions in no clearer terms require a separate assessment of each lot than does the section under consideration.

The judgment of the circuit court is affirmed.

(All concur.)

STATE v. SNEED.

(*Supreme Court of Missouri. May 16, 1887.*)

1. SPECIAL JUDGE—POWERS OF—NEW TRIAL.

Rev. St. Mo. § 1879 authorizes the election of a special judge in certain criminal cases, and confers on him all the powers of the regular judge during the trial of the particular case for which he is elected, but provides that, upon the conclusion of that trial, his power shall instantly cease. *Held* that, if the judgment rendered by him is reversed, on appeal, he still has authority to hear the case upon the new trial.

2. HOMICIDE—PROVOCATION—INSTRUCTION.

Upon a trial for homicide, it is the duty of the court to define what is lawful or just provocation only when there is evidence in the case of such provocation; and, if there is no such provocation, the court should tell the jury so.

3. SAME—"DELIBERATELY."

The word "deliberately" was defined to the jury as signifying an act done in cold blood, and not in a sudden passion caused by a lawful or reasonable provocation. Held not erroneous.

Appeal from criminal court, Jackson county.

Atty. Gen. Boone, for respondent. *Jenkins & Clarke*, for appellant.

NORTON, C. J. The defendant was tried and convicted of murder in the first degree at the August term, 1886, of the criminal court of Jackson county, and, his motion for new trial being overruled, he has appealed to this court, and assigns as his first ground of error that the special judge who presided at the trial was not elected as required by the statute, and had no authority as judge to try and sentence defendant. It appears from the record that Hon. H. P. WHITE was the judge of the criminal court of Jackson county, and that at the August term, 1884, of said court, defendant made an affidavit under section 1877, which rendered said judge incompetent to preside at the trial, whereupon an election was ordered and held under section 1878, Rev. St., which resulted in the election of Hon. I. K. SHELLEY, as special judge, who proceeded to try the cause, which resulted in the conviction and sentence of defendant for murder in the first degree, which judgment, on appeal to this court, was reversed, and the cause remanded for trial to said criminal court; and when called for trial at the August term, 1886, of said court, said SHELLEY, who had been elected special judge to try the case as above stated, proceeded to preside at the trial, resulting, as before stated, in the conviction of defendant.

It is claimed by counsel that under section 1879, Rev. St., the power of the special judge to try the cause was exhausted when he signed the bill of exceptions in the trial had at the August term, 1884. The above section is as follows: "The special judge, elected as provided in the next preceding section, shall, immediately after his election, take an oath to support the constitution of the United States and of the state of Missouri, and to hear and try the particular cause or motion pending, without fear, favor, or partiality; and such special judge shall possess *during such trial or hearing, and in relation thereto only*, all the powers, perform the duties, and be subject to the same restrictions, as the judge of said court, but shall have no power whatever in any other cause than the one specified in the order of record; and, *upon the conclusion of the trial* of said cause in said circuit or criminal court, *his power and duties as such special judge shall instantly cease and determine.*"

We are of the opinion that the trial referred to in the italicised words of the section above mean a trial in its legal sense; that is, a trial had according to the rules of law. The trial had in August, 1884, was not such a trial, but was, in the judgment of this court, a mistrial, and hence the cause was remanded for trial. Suppose, as suggested by Justice SHERWOOD during the oral argument, the special judge had sustained defendant's motion for a new trial on the ground of error committed in the trial had, could there be any question as to the right of the special judge to have proceeded and tried the cause? We think not. And the same result would follow whether the new trial was granted by the special judge, or, as it was, by this court in reversing the judgment and remanding the cause. This, we think, is made apparent by section 1998, Rev. St., art. 21, which is devoted to appeals and writs of error in criminal cases, and is as follows: "The court to which any criminal cause shall be remanded for new trial shall proceed therein in the same manner as if such cause had not been removed into the supreme court."

The case of *Lacy v. Barrett*, 75 Mo. 469, to which we have been cited, has no bearing on the question we have been discussing.

It is next insisted that the court erred in refusing to give instructions for murder in the second degree and manslaughter in the fourth degree. We are

of the opinion that the evidence did not call for either of such instructions. On the part of the state, the evidence disclosed substantially the following state of facts: That deceased and defendant on the twenty-sixth July, 1884, drank together at a saloon in Kansas City; that deceased was greatly under the influence of liquor, and, while standing at the bar, defendant slipped the watch of deceased from his pocket, and, on discovering that his act in so doing was approved by two others, handed the watch to the saloon keeper to be kept for deceased; that, soon after this, defendant was seen standing outside of one of the doors of a grocery or saloon in which deceased was at the time, as if watching for some one, and was heard to remark: "Damn you, you will not get away from me this time." Soon after this, one Sutherland, with deceased, whom he was to get to go to his home, came out of the saloon, and started, being followed by the defendant; that deceased insisted on returning to get something more to drink, and did so against the protestation of his companion, Sutherland; that, upon retiring to the saloon, defendant followed deceased in, went up, and caught him by the coat, and deceased turned to him and said: "I want you to let me alone. I have nothing for or against you." Thereupon defendant turned squarely to deceased, and, putting his hand on his pocket, said: "I will shoot you so d——d full of holes they will make a sifter of you." Soon after this, deceased came out of the saloon, and started towards his home; the defendant following after him some distance behind, and who, according to the evidence of Mr. Brink, after getting within a few feet of deceased, called him a G——d——son of a bitch, which caused witness, who had passed them, to turn around, and on doing so he saw defendant draw his revolver from his hip pocket, and shoot the deceased; that, when defendant applied the above epithet to deceased, he turned round, and told defendant to keep away from him, and this is evidently the remark made by deceased to which the cross-examination of this witness refers. According to the evidence of another witness, Miss McMahan, the deceased was going down Twenty-third street; that defendant started after him, and called to him to hold on, and deceased turned, and said, "What do you want?" To which defendant replied, "God damn you, wait, and I will show you what I want with you," and pulled his revolver out of his pocket, and walked rapidly after him. The evidence on the part of the state showed that deceased, when shot, had no weapon on his person, and that his hands were hanging down by his side, and that the shot which killed deceased was planted in his breast near the right nipple, and passed through the liver.

The following version of the difficulty is given by the defendant in his evidence: "I started from the saloon to the water-works. As I started, I came up to this street, and turned down here to the water-works to go west. There was a man in the street ahead of me. When I got to him I saw it was Loomis. I spoke to him. I said, 'Where are you going?' He said, 'I am going to the water-works.' I said, 'I am going there too;' and *we walked side by side a few steps*; when he reached around me that way, I said, 'What do you mean by doing that?' He said, 'I have been laying for you. I want to get you away from the crowd to kill you, and I am going to give it to you now.' He made a plunge at me like that. I saw he had a knife in his hand. Then I drew my pistol. My revolver is a double action, and I fired without taking aim. I fired more to scare him than anything else. *Question.* Did you or didn't you intend to hit him? *Answer.* I shot more to scare him than anything else, and to keep him away from me. *Q.* When you went down the street, did you go out there with the intention of shooting him? *A.* No, sir; I did not."

If the deceased was killed under the circumstances detailed by the witnesses on the part of the state, the crime of murder in the first degree was fully made out, and there is nothing in the evidence which required the court to give instructions upon any other grade of homicide. If, on the other hand,

the deceased was killed under the circumstances detailed by defendant, the law of self-defense justified him in the killing.

The instructions given by the court in regard to murder in the first degree are such as have been repeatedly approved by this court and are unexceptionable; and the instructions given on behalf of defendant gave him the full benefit of the law of self-defense and of reasonable doubt.

In defining the word "deliberately," the jury were told "that it signified done in a cool state of the blood; that is, not in a sudden passion caused by a lawful or reasonable provocation, or by some just cause of provocation. And the court instructs you that, under the evidence in this case, there is no evidence tending to show the existence of any such passion or provocation." It is only the duty of the court to define what is lawful or just provocation when there is evidence in the case of such provocation; and, if there is no such evidence, the court should tell the jury so, as it did in the instruction of which defendant complains. In the case of *State v. Talbott*, 73 Mo. 347, a conviction for murder in the first degree was upheld, although in the definition of the word "deliberately" the words "without reasonable provocation, or some just cause of provocation," were left out; and it was upheld on the distinct ground that there was no evidence of any such provocation. In the case before us there is no evidence of any act or word on the part of deceased tending to show such provocation. The evidence of defendant as to what was said and done by deceased, if believed by the jury, constituted a complete defense, and the jury were, in effect, so told by the court in the instructions given on his behalf.

It is also insisted that the court erred in overruling defendant's application for a continuance. We think it was properly overruled, because it failed to show proper diligence. The witness wanted, it is stated, was in Virginia; he lived in Jackson county; it is not shown when he went; no subpoena had been issued for him; and all the evidence of this witness having a bearing on the case would have been inadmissible, had he been present, for the reason that it was proposed to show by him what defendant said after the killing took place.

It is also insisted that the court erred in refusing to instruct to the effect that, before the jury could convict the defendant, they must believe, not only that he killed Loomis as charged, but that he killed Orlean Harris Loomis. Under section 1820, Rev. St., this instruction was properly refused, if for no other reason than the one there given.

Two juries have passed on this case, and reached the same verdict, and, after a careful examination, we find nothing to justify an interference with the judgment; and it is hereby affirmed, in which all concur.

STATE *ex rel.* SPECKERMAN *v.* ALLEN, Judge, etc.

(*Supreme Court of Missouri.* May 16, 1887.)

APPEAL—PROBATE COURT—MANDAMUS.

A probate court rescinded its order appointing the relator guardian of a minor, and refused to grant him an appeal to the circuit court. *Held*, that, as the rescinding order was a final judgment, the relator was entitled to an appeal from it as a matter of right, and might have a peremptory *mandamus* from the circuit court compelling the probate judge to grant the appeal.

Appeal from circuit court, Madison county.

J. Perry Johnson and *D. A. McIntyre*, for appellant. *Edwards & Cahoon*, for respondent.

BRACE, J. This was a proceeding by *mandamus* to compel the respondent, judge of the probate court of Madison county, to grant an appeal to the circuit court of said county from an order of said probate court revoking the

appointment of relator as guardian of John Dasch, a minor. A demurrer to the return of respondent to the writ was overruled, peremptory *mandamus* refused, and judgment for costs against the appellant rendered.

The respondent in his return admits that at the May term of said probate court, and on the thirteenth of May, 1884, one Wilhelmina Schmidt filed in said probate court her petition to have the order of the probate court of Madison county, theretofore made, appointing the relator, John Speckerman, guardian of said minor, revoked and rescinded; that on the fourteenth of May, 1884, the relator filed his answer to said petition, and that said Wilhelmina on the same day filed her replication to said answer; and that said court proceeded to hear and try the matters and issues presented by said petition, answer, and replication, and did, on the sixteenth of May thereafter, after hearing parties, witnesses, and arguments, order that said order of the twenty-fourth of April, 1883, be revoked, set aside, and for naught held; admits that the relator on the same day prayed for an appeal from this order to the circuit court of Madison county, filed his affidavit therefor, and tendered a good and sufficient bond, and that an appeal was refused him; that in March, 1883, George Dasch, then residing with his infant son, John Dasch, in Madison county, Missouri, died, leaving his said son, aged six years, in a helpless condition, in said county, without a legal or natural guardian residing in the state of Missouri; that on the twenty-fourth of April, 1883, the following order was entered upon the records of the probate court of said county by the respondent:

"IN THE PROBATE COURT OF MADISON COUNTY, MISSOURI.—In Vacation.
April 24, A. D. 1883.

"In the Matter of John Dasch, Minor Heir of George Dasch, Deceased.

"It appearing to the satisfaction of this court that John Dasch is a minor under the age of fourteen years, and resides in Madison county, Missouri, and that he has no legal or natural guardian, it is therefore ordered by the court that John Speckerman be, and he is hereby, appointed guardian of the person of the said John Dasch, minor heir of the said George Dasch, deceased, and that, before entering upon the duties of his office, he is required to enter into a bond to the state of Missouri, for the use of John Dasch, with two or more securities to be approved by the court, in the sum of fifty dollars, conditioned for the faithful discharge of his duties according to law."

—That the said Speckerman then filed his bond as such guardian, which was approved by the respondent, said approval appearing only by the following entry on said bond: "Approved by the court this twenty-sixth day of April, 1883. N. B. ALLEN, Judge of Probate." Respondent avers that said appointment of said Speckerman as guardian as aforesaid was made and entered by him in vacation of said probate court, and that his approval of said bond was in vacation of said court, and "that neither said order of appointment nor said bond were ever afterwards by the said probate court at any of its terms specially approved;" and that it was shown by competent evidence in the proceeding between Wilhelmina Schmidt and the relator, at the May term, 1884, of said court, that said minor then, and at the time of making of said order of appointment and of the approval of said bond, had living a mother, to-wit, the said Wilhelmina, residing in the state of Illinois.

These facts, exhumed from a mass of argumentation and immaterial statements contained in the return, are relied upon as the grounds upon which relator's prayer for an appeal was denied, in effect saying to him that, "having decided these issues correctly in the case tried before me, you have no right of appeal." The demurrer to the return should have been sustained. Whether the order of April 24, 1883, was valid or invalid, whether the determination of the probate court on that or any other issue raised in the proceeding was

right or wrong, could afford us no ground for refusing respondent the right to appeal,—the only means provided by law by which he could have those questions passed upon by a superior tribunal. It is foreign to the subject and purpose, as it is inconsistent with the nature of the proceedings by *mandamus* to review judicial proceedings; and in this case, whatever they may have been, and whatever effect the action of the probate court may have had on the rights of the parties contestant, and who had submitted those rights to the exercise of its jurisdiction, could not be inquired into or reviewed by the circuit court in this proceeding, and could not afford any ground for refusing the writ. High, Extr. Rem. c. 8, §§ 147, 150, 188, 189, 190; *State v. Norton*, 20 Kan. 506; *Potter v. Todd*, 73 Mo. 101. The probate court had jurisdiction of the subject-matter of the issues raised before it by the parties to the proceeding. Const. art. 6, § 34; Rev. St. 1879, § 1176. The court took cognizance of the case, and rendered judgment. Its order “revoking, setting aside, and for naught holding” the order of April 24, 1883, was a final determination of the issues raised by the relator in his answer in that proceeding, from which an appeal would lie to the circuit court of Madison county. Rev. St. 1879, §§ 292, 2616. It is no answer to say the order rescinded was a nullity. Whether it was or not was an issue raised in the case, and decided by the probate court, and that decision relator had a right to have reviewed. It is no answer to say that it was not a final judgment or order because it did not finally determine the guardianship of said ward, but simply opened the way for relator or some one else to come in and be appointed as such guardian. It determined finally all the rights claimed by the relator under that order in his answer, so far as it was in the power of the court to determine them in that proceeding.

The judgment of the circuit court is reversed, and the cause remanded; and it is ordered that a peremptory writ of *mandamus* be issued by said circuit court to the respondent, or his successor in the office of probate judge of Madison county, commanding him to grant relator's appeal.

(All concur.)

CHICAGO & A. R. Co. v. MADDOX and others.

(Supreme Court of Missouri. May 16, 1887.)

INJUNCTION—ORDER OF COURT—HIGHWAYS.

In Missouri, the orders of the county court, in proceedings to appropriate property for the purpose of laying out a county road, are subject to remedy by appeal, and an injunction will not lie to restrain the execution of such orders on account of errors in the proceedings.

Appeal from circuit court, Audrain county.

This suit was in equity, to restrain defendants, one of whom was a road overseer, from opening a new county road across plaintiff's railroad, on the ground that no proceedings for establishing the road had been taken against plaintiff or its property; nor had any damages been assessed or paid plaintiff on account of the appropriation of its property and rights. The facts, as they appear upon the record, are that plaintiff had operated its road, and had the same fenced across section 26, township 50, range 9, in Audrain county, since 1869; that the county court of said county, in 1882, upon proceedings had, established a new county road through said section, and across said railroad; that the commissioners appointed to assess damages on account of said road failed to assess damages to plaintiff on account of crossing its track and right of way, nor did they report that plaintiff was not entitled to damages, nor did plaintiff relinquish the right of way, nor was any compensation paid to plaintiff, or to the treasurer to its use. The circuit court held that plaintiff was not entitled to compensation, nor were proceedings against it necessary. Plaintiff's bill was dismissed, and it appealed to this court.

Macfarlane & Trimble, for appellant. *T. B. Buckner*, for respondents.

SHERWOOD, J. The plaintiff had no standing in a court of equity to enjoin the defendants from tearing its fences in obedience to the order of the court lawfully issued. If, as is alleged in the reply, the commissioners appointed for the purpose of assessing damages assessed none to plaintiff, and made no report on the subject of plaintiff's damages, this furnishes no ground for the interposition of a court of equity, for the reason that the statute affords a remedy by granting an appeal; the rule being, as has so often been announced by this court, that, where the law affords a remedy ample and adequate, equity declines to interfere. *Shelbina Hotel Ass'n v. Parker*, 58 Mo. 327; *Kelly v. Hurt*, 74 Mo. 561; *Bobb v. Graham*, 89 Mo. 200, 1 S. W. Rep. 90.

This results in affirming the judgment.

(All concur.)

CITY OF ST. LOUIS v. JOHANSEN.

(Supreme Court of Missouri. May 16, 1887.)

MUNICIPAL CORPORATIONS—ASSESSMENTS—VALIDITY.

Appeal from St. Louis circuit court.

L. Bell, for appellant. *L. Wilcox*, for respondent.

BRACE, J. This action was on a tax-bill for benefits assessed against real estate of the defendant, under section 5, art. 8, of plaintiff's charter, upon the opening of a street in St. Louis. In the case of *City of St. Louis v. Provenchere*, ante, 410, (decided at this term of the court,) it was held that, under the provisions of said section, a separate assessment of the benefits to each lot must be made, and, when several contiguous lots of the defendant were assessed together as one lot, no recovery could be had. This case is on all fours with that, the only difference being in that case six, and in this two, lots were assessed together as one lot.

The judgment of the circuit court for the defendant is affirmed.

(All concur.)

v. 4s. w. no. 7—27

STATE v. CALFER and others.

(Supreme Court of Missouri. May 16, 1887.)

INDICTMENT AND INFORMATION—VERIFICATION—JUSTICE OF PEACE.

A prosecution before a justice of the peace for assault and battery and disturbing the peace cannot be sustained when the information, though filed by the prosecuting attorney, is not verified by his oath or affidavit, as required by Rev. St. Mo. § 2028.

Appeal from circuit court, Clark county.

On the twelfth day of December, 1883, one Oscar O. White, a private citizen, filed an information, verified by affidavit, before a justice of the peace, charging Oliver O. and George Falker with an assault upon him, the said Oscar O. White; and also in the same information charging Frank Calfer and Ed. Falker, the appellants, and several others, with disturbing the peace. Thereupon the prosecuting attorney filed an information in two counts, which was not verified by oath or affidavit, in one of which he charged appellants and a number of others with assaulting the said Oscar O. White, and in the other he charged the same parties with disturbing the peace.

J. W. Reed and W. L. Berkheimer, for appellants.

This prosecution cannot be sustained. While the information is properly made by the prosecuting attorney, it is not verified by his oath or affidavit as required by law. Rev. St. § 2028; *State v. Hayward*, 83 Mo. 303. While the above decision of this court only expressly construes sections 1762, 1763, Rev. St., relative to the filing of informations before courts of record, substantially the same provisions are to be found in the statute relative to the filing of informations before justices of the peace, except that the latter does not permit prosecutors to file informations on information or belief. *Vide* Rev. St. §§ 2025, 2026, 2028. While these sections have been held unconstitutional, the ruling of the court only went to the person who filed the information, and not to the statute requiring the making of an affidavit by the prosecutor.

B. G. Boone, Atty. Gen., for respondent.

NORTON, C. J. Defendants were prosecuted by information before a justice of the peace, and on their appeal to the circuit court of Clark county judgment was rendered against them, from which they have appealed to this court. The information, though filed by the prosecuting attorney, is not verified as required by section 2028, Rev. St.; and, as is conceded by the attorney general, the prosecution cannot be maintained under the ruling of this court in the case of *State v. Hayward*, 83 Mo. 303; and the judgment is therefore reversed; in which all concur.

ROTHSCHILD v. WABASH R. Co. and others.

(Supreme Court of Missouri. May 16, 1887.)

1. CARRIERS—RAILROAD COMPANIES—DISCRIMINATION.

In an action brought against a railroad company by a shipper charging defendant with discriminating against plaintiff in rates, *held*, that upon the meager evidence the trial court might well find that plaintiff did not ship his cattle over the road of defendant corporation, or its predecessor, or, if it did, that such corporation was not shown to be a party to the discriminating arrangement.¹

2. APPEAL—REVIEW—QUESTIONS OF FACT.

On appeal in an action at law tried by the court, the findings of fact cannot be interfered with unless they are against the undisputed evidence. The weight of evidence cannot be passed upon by the higher court.

Appeal from St. Louis court of appeals.

¹ Respecting discrimination by common carriers, see *Indianapolis, D. & S. R. Co. v. Erwin*, (Ill.) 8 N. E. Rep. 862, and note; *Menacho v. Ward*, 27 Fed. Rep. 634, and note; *Hays v. Pennsylvania Co.*, 12 Fed. Rep. 314, and note.

Patrick & Henry and C. H. Krum, for appellant. W. H. Blodgett, for respondent.

BLACK, J. This suit was commenced against both the Wabash Railway Company and the Wabash, St. Louis & Pacific Company, but dismissed as to the former. The petition, in substance, states that the defendant is a common carrier; that between August 1, 1877, and January, 1878, the plaintiff shipped by the defendant's road, from East St. Louis to Jersey City, 247 car-loads of cattle, and was required to pay the defendant therefor \$130 per car; that Nelson Morris, Samuel W. Allerton, and Timothy Eastman were, at the same time, shippers of cattle over the defendant's road from the same point to the same point; that, by virtue of a secret arrangement, the defendant agreed with these three persons to and did ship their cattle at a much cheaper rate; that the amount to be paid by them was dependent upon an accounting; and that they only paid \$60 per car-load; and, because of the unjust discrimination, plaintiff asks judgment for \$16,800.

On the trial it was stipulated that prior to 1879 the St. Louis, Kansas City & Northern Railway Company was a corporation under the laws of this state, owning and operating a railroad from Kansas City to St. Louis, in this state; that from January, 1877, to November, 1879, the Wabash Railway Company was a corporation organized under the laws of the states of Illinois, Indiana, and Ohio, and as such owned and operated a railroad from East St. Louis, in the state of Illinois, through said states, to Toledo, in the state of Ohio; that on the tenth November, 1879, these two corporations were consolidated under the name of the Wabash, St. Louis & Pacific Railway Company, the present defendant. It is alleged in the defendant's answer, and for all the purposes of this case stands admitted, that plaintiff brought a suit against the *Toledo, Wabash & Western Railroad Company* for damages on the same cause of action stated in this case, and in which suit he had a verdict and judgment for \$14,820, which remains unpaid.

This case was tried by the court without a jury. After the evidence was all in, the court, at the request of the plaintiff, gave an instruction, but found the issues for the defendant. That instruction, which was the only one asked or given, is as follows: "The court declares the law to be that a railroad company is bound to receive and carry without discrimination in its charges for the same service, and that, if the evidence shows that defendant (or the Wabash, which is the predecessor of the defendant) charged plaintiff more for carrying his cattle from East St. Louis to Jersey City than he charged S. W. Allerton, Nelson Morris, or T. C. Eastman for a similar service, then plaintiff is entitled to recover the excess or overcharge so paid by him." It will be seen the court declared the law as asked by the plaintiff on the trial, and as he contends for in this court, but found the facts against him. It is this finding of the facts only that is now here for review. We cannot interfere with the trial court in its finding of the facts in these actions at law unless the finding is against the undisputed evidence. It is scarcely necessary to say that this court cannot pass upon the weight of the evidence in actions at law. This is a matter for the trial judge or jury, as the case may be tried.

The evidence shows that Eastman, Morris, and Allerton were extensive shippers of cattle from East St. Louis and Chicago to New York. In 1875, they made an arrangement, at New York city, with the three trunk lines, to-wit, the New York Central, the Pennsylvania Central, and the Erie, to even up the live-stock tonnage between these lines. The Erie was to have 25 per cent., and each of the other roads 37½ per cent. These persons were required to make special purchases and shipments when necessary to maintain the agreed division of business, whether the market justified it or not. On the other hand, the "eveners," as they are called, were to and did receive a compensation or commission on all stock shipped by them and other persons over

these roads, ranging from ten to twenty dollars per car-load. It is said one purpose of the arrangement was to maintain uniform rates for the shipment of cattle to New York. The "eveners' contract" was in operation when the plaintiff shipped the 247 car-loads. The plaintiff, it will be remembered, first recovered a judgment against the *Toledo, Wabash & Western Railroad Company*. In this case, in a very brief way, he says he shipped the cattle by the "Wabash Railway." In the same connection he speaks of Mr. McBeth as the stock agent of the "Wabash & Western Road" with whom he used to make rates. The freight-bills were in evidence, but they are not in this record. It is impossible to say from this record whether the cattle were shipped from East St. Louis by the Wabash Railway Company, or by the *Toledo, Wabash & Western Railroad Company*. It may be they are different names of the same corporation, but it does not so appear from anything in this record, and until it does appear we must assume that they were different corporations.

Again, there is some evidence tending to show that the *Toledo, Wabash & Western Railroad Company* as a connecting line to one of the trunk roads came in and agreed to share in paying the compensation to the "eveners," but it is very indefinite; and there is little or no evidence to show that the Wabash Railway Company was a party to that agreement. Under the meager evidence the court might well have found that the plaintiff did not ship his cattle over the last-named road; and, if he did, that the evidence was insufficient to show that that corporation was a party to the "eveners'" arrangement with the three trunk lines. If the Wabash Railway Company is not shown to be liable in this case, then, of course, the present defendant, its successor, cannot be made liable.

Important questions of law are discussed in the briefs on the one side and the other, but we have been unable to see that they are properly before us for consideration. The respondent contends also for the conclusive effect of the finding of facts made by the court.

For the reasons before stated, the judgment of the court of appeals, affirming the judgment of the circuit court, is affirmed.

(All concur.)

TURNER and another v. LORD.

(*Supreme Court of Missouri. May 16, 1887.*)

1. VENDOR AND VENDEE—ACTION ON BOND—BURDEN OF PROOF.

Where one sues on a bond for title to land, the production of the bond, and proof of failure to execute the deed, makes out a *prima facie* case for plaintiff, and where defendant sets up as a defense that the consideration for the execution of the bond was plaintiff's undertaking to secure the assignment to defendant of a certain patent right, but that the assignment tendered defendant was not valid, because executed by one as agent who had no authority to bind the owner of the patent, *held*, that the burden of proof, as to such failure of consideration, and want of authority of the agent, was on defendant.

2. DAMAGES—PENAL BONDS.

In actions upon penal bonds with collateral conditions, the plaintiff can never recover more in the shape of damages than the penalty, and this is true, not only of official bonds, but of other bonds also.

Appeal from circuit court, Greene county.

Buckley & Hutchin, for respondents. *F. H. Sheppard*, for appellant.

BLACK, J. This is a suit for damages for breach of a bond, whereby the defendant acknowledged himself indebted to the plaintiff Turner in the sum of \$200, conditioned as follows: "The condition of the above obligation is such that if the above-bound *Isaac L. Lord*, his heirs or legal representatives, shall and do upon, [here are six blank lines in the original instrument,] make, execute, and deliver, or cause to be made, executed, and delivered, unto said *H. O. Turner*, his heirs and assigns, a good and sufficient deed of general war-

ranty, such as will be sufficient to convey, assure, and confirm unto the said *H. O. Turner*, his heirs or assigns, a good and indefeasible estate in fee-simple, clear of all incumbrances, *except taxes*, of and in the following described real estate, to-wit," etc.

It is alleged, and the proof shows, that Turner assigned to the other plaintiff, *H. F. Howell*, a one-half interest in the bond and property. The answer states that defendant executed the bond upon the condition that Turner would, within a reasonable time, make to plaintiff a valid assignment of the sale right of one Patton to manufacture and sell a patent churn in certain counties; that this agreed condition was to have been inserted in the bond as the consideration thereof, but was omitted by mistake; that Turner never performed the condition, but on the seventh August, 1883, sent to defendant a pretended assignment of the patent, which he refused to accept, and that the delay was owing to the laches and neglect of Turner. Prayer for reformation of the bond, and that it be declared void.

There is no evidence that the alleged agreement was to be inserted in the bond, or that the bond was to be written out otherwise than it appears. It is therefore a bond in a penal sum for the conveyance of real estate. The answer seems to have been treated also as a plea of an entire failure of consideration, and upon that issue the proof is that, at the date of the bond, Turner sold to defendant the patent, and then, by agreement of the parties, deposited with Robert Howell an assignment of the patent to be delivered to defendant as soon as he should execute the deed to Turner. Defendant then only had a mortgage upon the lot, and was to foreclose, get the title, make the deed, and take up the assignment. Thus matters stood until 1883, when defendant promised to execute the deed, but, on reflection, declined so to do, and hence this suit.

1. It is certain that this suit is not barred by any statute of limitations, and, even if the doctrine of laches could have any application, none is shown. It devolved upon the defendant to make the deed before he could complain of delay. The delay was his own, not that of the plaintiffs.

2. The defendant produced in evidence the assignment which appears to have been executed by Patton by his attorney in fact, *H. O. Turner*, and it is contended the assignment is worthless for want of authority in Turner. It is no doubt true, as decided in *Sone v. Palmer*, 28 Mo. 539, that, where a party relies upon an instrument purporting to have been executed by an agent, he must prove the agent's authority. But the plaintiff here did not produce the assignment. It was not necessary for him to do so. He declared upon a bond, the production of which, and proof of a failure on the part of the defendant to make the deed, made out a *prima facie* case. The defendant did not even show that the assignment was not accompanied with a power of attorney, nor did he offer any evidence tending to show a want of authority. The burden of proof in this behalf was upon him.

3. The proposition that a debt or demand for damages cannot be split up, and suit maintained by the assignee of a part only, is well settled. *Burnett v. Crandall*, 68 Mo. 413; *Loomis v. Robinson*, 76 Mo. 488. It is otherwise where the debtor consents to the partial assignment. *Fourth Nat. Bank v. Noonan*, 88 Mo. 372. But these principles can have no application to this case, for here the suit is for the whole demand. If the point sought to be made is that Howell should not have been a party plaintiff, then the answer is that no such question is made by the pleadings, and it is not before us for consideration.

4. The judgment in this case was for \$208.66, and it is contended the judgment is excessive, because it exceeds the penalty of the bond. This is a bond, not for the payment of a certain sum of money, but for the performance of certain conditions, *i. e.*, the conveyance of the land. The measure of damages in such cases is the same as the measure of damages for the breach of the con-

tract agreed to be performed and set out as the condition upon the performance of which the bond is to be void. *Hirt v. Hahn*, 61 Mo. 496; *Kansas City Hotel Co. v. Sauer*, 65 Mo. 289; Sedg. Dam. (6th Ed.) 487. But it was said in *State v. Sandusky*, 46 Mo. 377, the general principle is that, in actions upon penal bonds with collateral conditions, the plaintiff can never recover more in the shape of damages than the penalty. And in *Farrar v. Christy's Adm'rs*, 24 Mo. 453-474, it was held that in these penal bonds the recovery would be limited to the penalty. It appears to be conceded that this is true in respect of official bonds, but we do not see that that can make any difference. In the case last cited the bond was not an official one.

Other questions are presented in brief filed for appellant, but we do not regard any of them as well taken. As the respondents offer to remit the \$8.66, they will be allowed to do so, and the judgment will be affirmed for \$200. The costs in this court will be taxed to respondents.

(All concur.)

STATE v. O'HARRA.

(Supreme Court of Missouri. May 16, 1887.)

1. HOMICIDE—MURDER—DEGREES.

In Missouri, those cases of murder at common law in which there was no specific intent to kill, but in which the law presumes the intent to kill, which are not declared manslaughter, or specifically made murder in the first degree by statute, are cases of murder in the second degree, and, where there is evidence in the case tending to show that the killing was with malice aforethought, but without deliberation, an instruction for murder in the second degree ought to be given.

2. SAME—INSTRUCTION—"DELIBERATELY."

An instruction in a trial for murder that "by the term 'deliberately' is meant done in a cool state of the blood; it does not mean brooded over or reflected upon for a week or a day or an hour, but it does mean an intent to kill, executed by a person not under the influence of a violent passion suddenly aroused; and the passion here referred to is that, and that only, which is produced by what the law recognizes as a just cause of provocation, or of a lawful provocation; and the court instructs the jury that in this case there is no evidence tending to show the existence of any such passion, or of a just cause of provocation, or of a lawful provocation,"—is erroneous, where the evidence shows that the deceased and defendant had been quarreling, and wishing each other evil, and that while defendant attacked deceased, he claimed to have struck the fatal blow not intending to kill her, and while both parties were fighting.

Appeal from St. Louis criminal court.

Atty. Gen. Boone, for respondent. *Geo. Bullock*, for appellant.

BLACK, J. The defendant was indicted for killing *Mary McCollier* by striking her with a beer-glass. The trial resulted in a verdict of guilty of murder in the first degree. From the evidence it appears that of three adjoining second-story rooms, all opening upon a veranda reached by a single flight of stairs communicating with a rear yard, the defendant and his wife occupied one; the deceased, her son and daughter, occupied another; and a *Mr. Smith* and wife occupied the third. The defendant and the son of the deceased had been in the habit of drinking together, and on several occasions had created a disturbance by their boisterous conduct. The deceased complained to the defendant, and remonstrated against such actions. All this led to a quarrel between them, and it is shown that they were on unfriendly terms down to the tragedy in question, which occurred on a Sunday evening just after the lamps had been lighted. *Mrs. Smith*, who was on the veranda at the time, testified that defendant and his wife came out of their room. The defendant then directed his wife to go back to their room. It is claimed that he intended to go and collect some money due him. On the way down the stairs he turned around, and, addressing himself to the deceased, who was sitting on the veranda in front of her room, said that his prayer was that the curse of the

Almighty might rest upon her, and that she would get paralyzed. She said something in a low voice, which the witness did not understand. The defendant said, when at the bottom of the steps: "If I hear anything more from you, I'll come up there and fire you over the banisters." He then went back, caught the deceased by the waist, and attempted to execute his threat. In the struggle she got loose, and ran to her room, threatening to call a policeman. The defendant followed, and, as he entered the door, seized a beer-glass. She cried out, "Don't hit me with the glass." The witness did not see what transpired in the room, but it appears he hit her, driving pieces of the glass into her head, and breaking the skull and brain structure, from which she died in a few days.

Defendant, in his own behalf, testified that as he was going down the steps deceased said she hoped to God he would break his leg; that he replied in language which is substantially the same as that attributed to him by the other witness; that he thought she was in a fighting trim, and he would go up and see if his door was locked. He says: "When I got up stairs Mrs. McColler was on the south side. She was in a fighting attitude, and I ran up to her and caught hold of her arms. We tussled, and she jerked me towards her door,—she jerked away; that pulled me forwards towards her door, when she got a club in her hand;" that he then caught the glass, and hurled it at her, not intending to kill her, and then went down the stairs. On the cross-examination he says he went up-stairs to see if his door was locked, and to tell his wife to keep it locked; that deceased came at him, and he caught her by the wrists; that he did not follow her into the room, but she jerked, and that pulled him in.

The court instructed as to murder in the first degree, justifiable homicide in self-defense, and manslaughter in the third and fourth degrees.

The chief grounds of complaint are that the court failed to instruct upon murder in the second degree, and erred in its definition of "deliberately," which is as follows: "That by the term 'deliberately' is meant done in a cool state of the blood. It does not mean brooded over or reflected upon for a week or a day or an hour, but it does mean an intent to kill, executed by a person not under the influence of a violent passion suddenly aroused; and the passion here referred to is that, and that only, which is produced by what the law recognizes as a just cause of provocation, or a lawful provocation; and the court instructs the jury that in this case there is no evidence tending to show the existence of any such passion, or of a just cause of provocation, or of a lawful provocation." It is the last clause only of this instruction to which objection is made.

This instruction seems to be formulated after the one suggested in *State v. Ellis*, 74 Mo. 207, 220; but it is there clearly stated that such an instruction may be given when there is *no evidence* of sudden passion, and enough is there said to show that the portion of this instruction complained of is not proper where there is evidence of such passion. Passion suddenly aroused from a lawful provocation will reduce a homicide from murder to manslaughter, because there is then no malice aforethought. 2 Bish. Crim. Law, (7th Ed.) § 679; *State v. Curtis*, 70 Mo. 595-599; *State v. Ellis*, 74 Mo. 207-215. The instructions given in this case upon the subject of manslaughter are based, in part, upon the fact that the killing was done in the heat of passion. The clause of the instruction in question plainly states that there is no evidence in the case of violent passion suddenly aroused, or of a lawful provocation. It in effect destroys the instruction upon the subject of manslaughter, for the jury might well have concluded that it was an assertion that there was no evidence of heat of passion in the case.

The court should have instructed on the subject of murder in the second degree, and it may be stated that the qualification to the instruction as to the meaning of "deliberately" was practically a refusal to instruct as to murder

in the second degree. If the defendant is guilty of murder in the first degree, it is not because the case comes within any of the specific cases mentioned in section 1232, Rev. St. 1879, but because it comes within the words "any other kind of willful, deliberate, and premeditated killing." In such cases, the killing, to be murder in the first degree, must have been accompanied with an intent to take life. The *killing* must be premeditated. *State v. Holme*, 54 Mo. 153. Mr. Wharton says, when speaking of these statutes classifying murder: "Murder in the second degree includes all cases of common-law murder where the intention was not to take life, of which murder, when the intent was only to do great bodily hurt, may be taken as a leading illustration." Whart. Crim. Law, (8th Ed.) § 388. Now, in this case, if the evidence of defendant is worthy of belief, and it must be treated as the evidence of any other witness for the purpose of giving instructions, it might well be concluded that he did not intend to take the life of the deceased, though he was bent upon doing her some great bodily harm,—though actuated by malice aforethought. The act, then, being the wrongful killing of a human being with malice aforethought, but without "deliberation," as that word is now defined by this court, would be murder in the second degree. It may be said there can be no murder in either degree when there is no intent to kill; but this question received a full consideration in the case of *State v. Wieners*, 66 Mo. 13, where it is shown that in many cases, where the act is malicious and manifestly dangerous to human life, and does produce death, the law will presume an intent to kill. Modifying the conclusion there stated on page 27 to suit the present statute, it may now be said: Of murder in the second degree are also all those cases of murder at common law in which there was no specific intent to kill, but the law presumes the intent to kill, which are not declared manslaughter by our statute, and are not specifically made murder in the first degree by the section of the statute before cited. We conclude there was abundant evidence in this case tending to show that the killing was from malice aforethought, but without deliberation, and that an instruction for murder in the second degree ought to be given.

The judgment, for the reason before stated, is reversed, and the cause remanded for a new trial.

(All concur.)

JASPER CO. v. MICKEY.

(*Supreme Court of Missouri. May 16, 1887.*)

1. SWAMP LANDS—CONFIRMATION TO STATE—IMPEACHING.

Where swamp land in Missouri is confirmed to the state by the report of the United States secretary of interior, and a patent for the same is issued from the state to a county in it, the county is invested with a complete title, behind which the defendant, in ejectment by the county for the land, cannot go, and show, by parol or otherwise, that the land in fact was not swamp land, and that the secretary of the interior made a mistake in confirming the selection of the same as swamp land.

2. SAME—PATENT—EVIDENCE.

Such evidence is inadmissible also under Rev. St. Mo. 1879, § 6204, art. 3, c. 122, relating to "swamp lands," and providing that all patents issued, as required by that act, shall be received and read as evidence in all courts in the state as *prima facie* evidence of title in the counties where overflowed or swamp land lies.

3. SAME—VENDOR'S LIEN—TAX TITLE.

A judgment foreclosing the vendor's lien retained by a county upon swamp lands sold by it, filed before the rendition of a judgment in favor of the state, in a suit by it to enforce its lien for taxes upon the same lands, passes to the county whatever equitable interest the purchaser from the county had in the lands, and gives it a better title—the county not being a party to the suit by the state—than the purchaser at the tax sale took therefrom.

4. ESTOPPEL—BY RECORD—EJECTMENT.

Where a county is not a party to a suit to foreclose the lien of the state for taxes on swamp land patented by it to the county, and by the county sold, with a reser-

vation of the title until the purchase money is paid in full, a decree in that suit works no estoppel, as against the county, to bring ejectment against the purchaser at the sale, where the price has not been paid in full. Neither the vendee of the county, nor the purchaser at the tax sale, takes, under such circumstances, more than a right to a deed.

5. JUDGMENTS—COLLATERAL ATTACK—PUBLICATION OF SUMMONS.

Under the Missouri practice, a notice in an order of publication, bearing date February 10, 1877, and notifying the defendants to appear at the next term of the court to be holden "at Carthage, in the county and state aforesaid, on the first Monday, A. D. 1877, and on or before the third day thereof," etc., should not be construed, for the purposes of collateral attack of the decree rendered thereon, to mean that the defendants are to appear on the first Monday in January, 1877, where it is a matter of judicial notice that the court in which the suit is pending held its next term on the first Monday in May, 1877.

6. SAME—FAILURE OF SERVICE.

Where judgment is taken against one of several defendants, who was neither served with summons, nor brought into court in any other manner, the judgment, although properly rendered against the others, should be regarded as of no effect when sought to be taken advantage of in a collateral proceeding.

7. EJECTMENT—IMPROVEMENTS—PROCEDURE.

The only way for a defendant in ejectment, in Missouri, to obtain the value of improvements made by him in good faith, is to proceed as provided in Rev. St. 1879, §§ 2259, 2260, after judgment against him for possession.

Appeal from circuit court, Lawrence county.

J. W. McAntire, for respondent. *C. H. Krum*, for appellant.

NORTON, C. J. This suit is by ejectment, to recover the possession of certain land in Jasper county described in the petition. On the trial, plaintiff had judgment, from which the defendant appeals, and all the points relied upon by defendant for a reversal of the judgment are the same as those discussed in the case of *Jasper Co. v. Wadlow*, 82 Mo. 172, where it is ruled that none of them were well taken; and on the authority of that case the judgment in this case is hereby affirmed.

(All concur.)

MONTGOMERY Co. v. AUCHLEY and others.

(Supreme Court of Missouri. May 16, 1887.)

1. BONDS—ACTION—PLEADING.

In an action on a bond, or on any unsealed instrument which by statute imports a consideration, it is not necessary to set out the consideration.

2. SAME—CONSIDERATION—SUBSEQUENT SURETY.

Under the Missouri statute a bond to secure a loan of the school fund by a county court must contain an agreement for such additional security as may from time to time be ordered by the court; and, where a bond is signed by a surety as such additional security, it relates back to the date of the original execution of the bond, and no new consideration is required.

Error to Montgomery county.

J. M. Barker, for plaintiff in error. *E. Rosenberger*, for defendant in error.

BLACK, J. This suit is based upon a bond executed by Hilterbrand, Bachman, and Gliser, dated November 25, 1868, by which the obligors promised to pay to the county, for the use of the school fund of a designated school township, \$330 on or before the first January then next ensuing, with 10 per cent. interest. The bond contains the following additional stipulations: "And in case of default in the payment of the interest, or failure in the principal in this bond to give additional security when thereto lawfully required, then the principal and interest shall become due and payable forthwith, and all interest not punctually paid shall bear interest at the same rate as the principal." The petition sets out the bond both according to its tenor

and legal effect. It is also alleged, among other things, that in 1877 the obligors were in default, and that they were lawfully required to give additional security; that in pursuance of the order, and for "other and divers good and valid considerations," the defendant Auchley, at the request of the said obligors, and on the twenty-eighth February, 1877, executed the bond to the plaintiff "by then signing the same under his hand and seal." It is also alleged that defendants paid the interest up to January 1, 1888, and that the bond is entitled to a credit of \$30 for proceeds of sale of mortgaged real estate. The defendants Auchley and Bachman demurred to the petition, on the ground that it did not state facts sufficient to constitute a cause of action. From a judgment sustaining the demurrer, the plaintiff sued out this writ of error.

That the demurrer was improperly sustained as to the defendant Bachman is not controverted; but it is contended that it was properly sustained as to Auchley, because it appears from the petition that he signed the bond some eight years after it was first executed and delivered; that, when he signed the bond, the consideration had passed between the original parties; and that his contract arising from signing and sealing it was without consideration and of no validity.

1. Generally, in cases of simple contracts, the consideration should be formally and expressly pleaded. But this rule has no application to contracts under seal and negotiable instruments, for they import a consideration. 1 Chit. Pl. 262; Bliss, Code Pl. § 268. By force of our statute, (Rev. St. 1879, § 663,) non-negotiable instruments also import a consideration. *Taylor v. Newman*, 77 Mo. 257. This statute also applies to a large class of contracts in writing which do not come under the designation of negotiable or non-negotiable notes or bills; and in all cases to which the statute applies it is not necessary to plead the consideration. *Caples v. Branham*, 20 Mo. 244. The defendant's undertaking is alleged to be under seal. If not sealed, the contract is one within the statute, and it was not necessary to set out the consideration in the petition; or that plaintiff should make proof of it in the first instance. If the defendant relies upon a want of consideration, he should plead it.

2. But, aside from the mere question of pleading, the demurrer was improperly sustained. The defendant Auchley, by signing and sealing the bond, meant something. It was as much as if he had prepared an independent instrument reciting the former bond, and the stipulation therein to give further surety, and the order of the court, and, in consideration of all that, obligated himself to stand bond for the payment of the debt. No doubt but that it is the well-settled rule of law that one who signs a note after it has been executed and delivered, and after the consideration has passed between the original parties thereto, incurs no liability by reason of signing the same, unless there be independent proof of a new consideration. *Pfeiffer v. Kingland*, 25 Mo. 66; *Williams v. Williams*, 67 Mo. 662; *McMahan v. Geiger*, 73 Mo. 145. But the circumstances will often show that, although the note or other contract was signed after the delivery of the instrument, it was the original understanding that the further security would be given; and, if such additional security is given pursuant to the original agreement, then it relates back to the inception of the first contract, and in such cases no new condition is required. *Motes v. Bird*, 11 Mass. 436; *Hawkes v. Phillips*, 7 Gray, 284. The law gives to the county courts the care and management of these school funds. They are required to loan the same and take security, both real and personal. The bond must contain an agreement for additional security, as is stipulated in the present one, and the courts are authorized from time to time to require such additional security. Gen. St. 1865, c. 46, §§ 65-71.

It is therefore clear that the agreement in this bond between the original parties for additional security, when demanded, was a part of the considera-

tion for the loan of the money. When Auchley signed the bond to comply with the order of the court, he simply did that which the obligors had engaged to do at the outset. We do not think it material that he made no promises when the bond was first executed and delivered; for he must have known that he was but carrying out the original agreement when he did sign it. His undertaking stands not upon any new consideration, but it is to be deemed a part of the original contract, and he must stand bound as if he had signed the bond before its delivery. Any other conclusion would nullify the statute, for the law contemplates additional personal, as well as real, security.

The judgment is reversed, and the cause remanded.

(All concur.)

BRADLEY and others v. MISSOURI PAC. RY. CO.

(*Supreme Court of Missouri. March 21, 1887.*)

1. HUSBAND AND WIFE—CONVEYANCE OF WIFE'S LAND—HUSBAND SOLE GRANTOR.

The signing, sealing, and acknowledgment, by a married woman, of a deed conveying land owned by her in her own right, will not operate to pass her estate, where her name does not appear in the body of the deed, and there is nothing in it to show that the husband, who is the sole grantor, is a married man.

2. LIMITATIONS OF ACTIONS—RUNNING OF THE STATUTE—HUSBAND AND WIFE.

A deed of land in Missouri, belonging to a married woman in her own right, conveyed by her husband by a deed in which he was sole grantor, executed in 1853, prior to the passage of the act (Gen. St. 464, § 14) now known as Rev. St. 1879, § 3295, providing that "no conveyance made, during coverture by the husband, of * * * any interest in such real estate, shall be valid, unless the same be by deed executed by the wife jointly with the husband," etc., though void as to the estate of the wife, is competent to pass the interest of the husband as tenant by the curtesy initiate; and, the right of action to recover the land being suspended during his life, the statute of limitations begins to run, as against the wife and her heirs, from his death, and not from the date of possession taken under the deed.

3. EJECTMENT—WHEN IT LIES—LAND TAKEN BY RAILROAD—ESTOPPEL.

As against a railroad company which entered upon land, and laid its tracks under a deed of purchase purporting to convey the fee, but passing only the curtesy of the husband of the owner, the wife or her heirs are not estopped from bringing ejectment to recover the land after the death of the husband.¹

4. SAME—MATTER IN PAIS.

Nor are they estopped from maintaining the action by the fact that the land sued for has been foreclosed under a mortgage given by the original owner, and has passed into the hands of a corporation formed by the consolidation of several companies, and has been mortgaged for large sums of money to its entire value; it appearing that, while those proceedings were going on, the plaintiffs in ejectment were living in a distant state, and it not being shown that they encouraged or knew of what was being done.

Appeal from circuit court, Pettis county.

BLACK, J. This is an action of ejectment. The land sued for is used and occupied by the defendant as a right of way, and for side tracks and depot purposes at Smithton station, in Pettis county. The 80 acres of which the land in question is a part was patented to Lucy A. Price. In 1853, her husband, Argillon Price, conveyed the same to Edwards, who conveyed the same to Combs in 1857, and the latter conveyed the land in question to the Pacific Railroad Company in 1860, and by virtue of various deeds the defendant has acquired the title of that company. Edwards and Combs had continuous possession of the 80 acres, under their deeds, from 1853 to 1860. At the latter date the Pacific Railroad took possession of the land in question, and it, and those claiming under it, have ever since used and possessed the property for the purposes before stated. Argillon Price died in April, 1875.

¹A purchaser of a tenant takes only the rights of the tenant, and his possession is that of the landlord. *Green v. Wilson*, (Ky.) 2 S. W. Rep. 564, and note.

Lucy A., his widow, died in April, 1877. The plaintiffs are their heirs, and this suit was begun in December, 1881.

1. The ground of this controversy lies in the fact that the deed to Edwards purports to be the deed of Argillon Price only. The name of Lucy A. Price does not appear in the body of it, nor is there anything in the body of the deed to show that he was a married man. It concludes: "In testimony whereof I have hereunto set my hand and seal," etc. The deed, however, is signed by her and her husband, and acknowledged by her on the twenty-second July, 1853, and by him on the fourteenth September, 1853. The wife, as will be seen, owned the property in her own right, and the fact that she signed her name to the deed, and acknowledged it before a proper officer, does not make it her grant. The party in whom the title is vested, must use appropriate words to convey the estate. Signing, sealing, and acknowledging a deed by the wife in which her husband is the only grantor, will not convey her estate. *Whiteley v. Stewart*, 63 Mo. 360; *Agricultural Bank of Mississippi v. Rice*, 4 How. 225; *City of Cincinnati v. Newell*, 7 Ohio St. 37. Whether it would be sufficient to release her dower in her husband's estate we do not determine.

2. This deed was made prior to the passage of the statute which now appears in Rev. St. 1879 as section 3295, and the effect of the deed must therefore be determined without regard to that statute. Mr. Price was a tenant by the curtesy; and, though the deed was ineffectual to convey the estate of his wife, still it operated as a conveyance of his life-estate. *Reaume v. Chambers*, 22 Mo. 36; *Beal v. Harmon*, 38 Mo. 435; *Allen v. Ranson*, 44 Mo. 266. Although the defendant, and those under whom it claimed, have had actual possession since 1853,—a period of nearly 28 years,—still that possession commenced with the date of the deed of Mr. Price, which, as we have seen, conveyed his life-estate. During his life, Mrs. Price could not have maintained an action for the possession of the property. *Reaume v. Chambers*, 22 Mo. 36; *Miller v. Bledsoe*, 61 Mo. 96; *Roberts v. Nelson*, 87 Mo. 229. No cause of action accrued to her until her husband's death, and until that event the statute of limitations did not commence to run against her or her heirs. *Dyer v. Brannock*, 66 Mo. 391; *Dyer v. Whittier*, (May, 1886,) not yet reported. He died in 1875, and the statute commenced to run at that time, but the period of ten years did not elapse between that date and the commencement of this suit, so that it is clear that the statute of limitations constitutes no defense to this action.

3. The further point is made that, inasmuch as the Pacific Railroad Company acquired the right to construct its road on the land, and having done so, ejectment will not lie, and the plaintiff must resort to some other proceeding to secure compensation for the land thus used for railroad purposes. In *Kanaga v. Railroad Co.*, 76 Mo. 207, the land was the general property of the wife. It was there held that, if the husband had acted in a manner to estop him from asserting his right to the possession of the land upon which the road had been built, then she was also estopped. But that case is not an authority here—*First*, because the suit was prosecuted during the life of the husband, and what right the wife or her heirs might have after the death of the husband was not before the court and not considered; *second*, because that case, in so far as it holds the wife estopped by the acts *in pais* of the husband, is overruled by *Mueller v. Kaessmann*, 84 Mo. 318. In this respect the *Kanaga Case* was ruled to be in conflict with the statute before mentioned, and by which the rights of the wife there were to be determined.

Where the owner of land, it has been held, does not insist upon prepayment of the damages or other considerations for the right of way, but by his acquiescence or license induces or permits the company to take possession and construct the road, he cannot maintain ejectment thereafter for the land, because of a failure to pay the damages or other considerations. *Provolt v.*

Railroad Co., 57 Mo. 256; *Baker v. Railroad Co.*, Id. 265. But, clearly, these cases are not in point here. It was the owner who permitted or induced the company to construct its road in advance of payment who was denied right to recover in ejectment. Here Mrs. Price had no right or power to object. She could assert no rights as against the company until the expiration of her husband's life-estate. In *Walker v. Railroad Co.*, 57 Mo. 275, it was held that if the company proceed to build the road upon land to which it had not acquired the requisite title by condemnation, or by a conveyance from the owner, or by permission from him, it would be liable to be ousted by ejectment. Where the company enters without right, mere inaction on the part of the owner, it was said, could not be tortured into an acquiescence or license for the company to proceed, though he was informed that the company had entered for the purpose of constructing its road. So an action of ejectment will lie against a city for land wrongfully taken by it, and converted into a street, and improved and used as such. *Armstrong v. City of St. Louis*, 69 Mo. 309. In *Chicago & A. R. Co. v. Smith*, 78 Ill. 98, the owner of a life-estate had been notified of the appointment of commissioners to assess damages, but the notice was not sufficient as to the remainder-man, and it was held that they might, at the expiration of the life-estate, and after demand made for the premises, recover in ejectment.

We are cited by appellant to *Austin v. Rutland R. Co.*, 45 Vt. 238. That was an action of ejectment by remainder-men to recover property previously used for railroad purposes. The company had acquired the life-estate, and constructed their road on the property, but there had been no appraisal or payment of damages to the plaintiff. The action, it was held, could not be maintained. Considerable stress was placed upon a statute of that state, and in respect of which the court say: "This seems to contemplate that the company might have two years after such entry, taking possession, and using in which to get such damages appraised pursuant to the provisions of section 17. It seems difficult to suppose that it was contemplated at the time that *in the mean time* they should be liable to be ousted by action of ejectment." We have no such statute in this state. Our constitution prohibits the taking of private property for public use without just compensation. Under such a provision, and our statutes with respect to the condemnation of the property, it was held at an early day that the company could not enter for the purpose of constructing the road until the damages were paid or secured to the owner. *Walther v. Warner*, 25 Mo. 277. The Vermont case has other features which distinguish it from the present one, but enough has been said to show its inapplicability here. Indeed, the judgment there is made to stand upon the peculiar features of the case then before the court.

Our statute, which authorizes the appropriation of private property to public use, and provides for the assessment of damages, contemplates that the company will take the initiatory steps therefor. The property can only be taken by pursuing the provisions of the law. In this case the state of the title was known, or might have been known, by an examination of the recorded deeds, when the road was first constructed. The interests of these plaintiffs, derived from their mother, might have been condemned at that time. As this was not done, the defendant cannot rightfully hold onto the property until the damages are assessed and paid to or into court for the plaintiffs, and ejectment is the proper remedy.

4. The record shows that the railroad property was sold under foreclosure of a mortgage in 1875; and, through Baker, this defendant became the purchaser. Since that, this and several other companies were consolidated, and the entire property has been mortgaged for large sums of money,—perhaps to its entire value. But these facts constitute no estoppel as against Mrs. Price. At the time of her and her husband's death, and for a long time prior thereto, they resided in the state of California; and the plaintiffs, it would seem, are

non-residents. There is no evidence that they, or any of them, encouraged or knew of the doing of these things relied upon as an estoppel. The large debt upon the property shows that the present suit is the practical remedy to pursue.

The judgment of the circuit court is therefore affirmed.
(All concur.)

STATE v. VINCENT.

(Supreme Court of Missouri. May 16, 1887.)

1. CRIMINAL PRACTICE—APPEAL—REVIEW—RECORD.

A motion to dismiss an indictment on the ground that another indictment was pending for the same cause must be made part of the record by a bill of exceptions, or the action of the lower court in overruling it will not be reviewed on appeal.

2. CRIMINAL PRACTICE—SUCCESSIVE INDICTMENTS.

Under Rev. St. Mo. § 1808, providing that the state, pending an indictment, may file a new indictment for the same offense, and that the first indictment shall be deemed to be suspended and shall be quashed, a motion to dismiss the second indictment on the ground that the first indictment is pending is properly denied, whether or not the first indictment has been quashed.

3. INDICTMENT—PRESENTMENT—RECORD—APPEAL.

Where the record on appeal shows that the grand jury, after being sworn and charged, retired, and, upon a subsequent date, returned to the bar, and through their foreman delivered an indictment, it sufficiently appears that the indictment was presented by the foreman in open court, and in compliance with Rev. St. Mo. § 1797; it is not necessary that the names of the jurors should be again repeated.

4. SAME—FORM—DIFFERENT COUNTS.

Where the first count of an indictment states that "the grand jurors of the state of Missouri within and for the body of the city of St. Louis now here in court, duly impaneled, sworn, and charged, upon their oath present," etc., and the third count recites "and the grand jurors aforesaid, upon their oath aforesaid," etc., the latter sufficiently refers to the first count, and shows on its face that the jurors were impaneled and sworn to inquire of offenses within and for the city of St. Louis, although, if the indictment had failed to allege these facts, the indictment would have been valid under Rev. St. Mo. § 1821.

5. SAME—DESCRIPTION OF PLACE.

Where the first count of an indictment shows that the city of St. Louis is within the state of Missouri, the words in another count charging that the crime was committed "at the city of St. Louis aforesaid," are sufficient to show that the offense was committed in the state of Missouri.

6. FORGERY—POSSESSION OF FORGED INSTRUMENT—INDICTMENT—CHECK.

An indictment of a defendant under Rev. St. Mo. § 1388, for having in his possession a forged check knowing it to be forged, with intent to pass it as true and genuine, that describes the instrument as follows:

"No. 58,094.

UNION NATIONAL BANK,

"NEW ORLEANS, February 23, 1884.

"The National Park Bank, New York: Pay to the order of George Vincent, sixty-five-hundred dollars, (\$6,500.)

S. CHALABON, Cashier."

—Is sufficient, as such an instrument is in effect a check, although purporting to be drawn by one bank upon another.

7. SAME—INDORSEMENT.

An indictment under Rev. St. Mo. § 1388, charging defendant with having in his possession a forged check with intent to pass it as true and genuine, knowing it to be false, need not allege that he indorsed the check, which is described as payable to his order.

Appeal from St. Louis criminal court.

Atty. Gen. Boone, for respondent. J. C. Fisher, for appellant.

BLACK, J. The defendant was indicted and convicted, under section 1388, Rev. St., for having in his possession a forged check knowing the same to be forged, with intent to utter and pass the same as true and genuine. Numerous objections are made to the record, and what is hereafter said will be in answer to them.

1. The motion to dismiss on the ground that there was an indictment pending against the defendant for the same cause when this one was found, and which was overruled, is not preserved in any bill of exceptions; nor does it appear that any exception was taken to the action of the court. It has been several times held that a motion to quash an indictment must be thus preserved, or the action of the court thereon will not be reviewed. *State v. Thruston*, 88 Mo. 271; *State v. Gee*, 79 Mo. 313; *State v. Wall*, 15 Mo. 208. With much greater reason should such a motion as this be made a part of the record by a bill of exceptions. It may, however, be stated that the statute recognizes the right of the state to file a new indictment for the same offense, and declares that the one first found shall be deemed to be suspended by the second, and shall be quashed. Section 1808, Rev. St. It is a matter of no consequence in proceedings upon the second indictment whether the first be in fact quashed or not. *State v. Eaton*, 75 Mo. 586; *State v. Arnold*, 2 S. W. Rep. 269, (not yet reported.)

2. The record shows that the grand jurors were sworn, and, having received their charge, retired to consider, etc., and under a subsequent date it recites: "On this day the grand jury return to the bar, and through their foreman deliver the following indictment as a true bill, to-wit." This shows clearly enough that the indictment was presented by the foreman in open court, and is in full compliance with section 1797, Rev. St. It was not necessary that the names of the jurors should be again repeated.

3. The recital in the third count, "and the grand jurors aforesaid, upon their oath aforesaid," sufficiently refers to the first count, wherein it is stated that "the grand jurors of the state of Missouri within and for the body of the city of St. Louis, now here in court duly impaneled, sworn, and charged, upon their oaths present," etc. The indictment, therefore, shows on its face not only that the jurors were duly impaneled and sworn, but that they were impaneled and sworn to inquire of offenses within and for the city of St. Louis. Had the indictment failed to allege that the grand jurors were impaneled, sworn, or charged, the omission would not have rendered the indictment invalid. Section 1821, Rev. St.

4. It sufficiently appears from the words of the first count of the indictment before quoted that the city of St. Louis is within the state of Missouri; and the words of the third count, "at the city of St. Louis aforesaid," show that the offense charged was committed in the state of Missouri.

5. The instrument set out in the indictment, both by its purport and its tenor, is in the following words and figures:

"No. 56,094.

UNION NATIONAL BANK,

"NEW ORLEANS, February 23, 1884.

"*The National Park Bank, New York*: Pay to the order of George A. Vincent sixty-five hundred dollars, (\$6,500.)

"S. CHALABON, Cashier."

It is contended that the instrument is a draft or bill of exchange, and not a check, as alleged in the indictment. It is an order drawn upon a bank for the payment of a sum certain to a named person, and is payable instantly on demand. In legal effect it purports to be drawn on funds of the maker in the bank. It is therefore, according to the definition or description given by Mr. Daniel, a check. Daniel, Neg. Inst. (3d Ed.) § 1566. Had it been drawn by an individual upon a bank, and not by one bank upon another, there could be no doubt but it would be properly designated a check. But it is none the less a check because drawn by a bank. Morse, Banks, (2d Ed.) 164. Such instruments, it is believed, are well known as banker's checks.

6. It is true, the indictment does not allege that the defendant had indorsed the checks, nor was it necessary that it should have so stated. The statute declares, so far as applicable to this case, that every person who shall have in his possession any such falsely made, altered, or forged check, knowing the

same to be falsely made, altered, or forged, with intent to utter or pass the same as true, or to cause the same to be uttered or passed with intent to defraud, shall, etc. The offense under this statute was clearly made out, without the allegations that defendant had indorsed the check; nor was it necessary to make proof of that fact. Proof that it had been indorsed by the defendant would be strong evidence tending to show an intent to pass or utter and to defraud; but that is not the only means by which such proof can be made.

Other matters are urged for a reversal of the judgment, but they are either founded upon a mistake as to what the record shows, or as unsubstantial as those before noted. The judgment is therefore affirmed.

(All concur.)

VETH v. GIERTH.

(*Supreme Court of Missouri. May 16, 1887.*)

SPECIFIC PERFORMANCE—EVIDENCE—SALE OF LAND.

A court of equity will not decree specific performance of a contract if not clearly established, and will let in the defendant to defend himself by a class of evidence, in resisting a decree, when the plaintiff would not be permitted to establish his case by the like evidence. The court refuses specific performance in this case because the contract was not established with the requisite degree of clearness; the evidence showing that the plaintiff understood that there was an absolute sale, while the defendant understood that he was taking the land upon condition only that it turned out as represented, with the right to return it, and recover the purchase money, if it did not turn out so.

Appeal from Jefferson county.

Dinning & Byrnes and *L. R. Tatum*, for appellant. *Fred Wislizenus*, for respondent.

NORTON, C. J. This suit was brought to enforce the specific performance of an alleged contract for the sale of 320 acres of land in Jefferson county to the defendant.

The petition substantially alleges that in July, 1883, plaintiff, by verbal contract, sold to defendant said land at and for the price of \$2,250, \$400 of which was paid, and the remainder to be paid on the second October, 1883; that defendant went into possession of the premises under the contract, and was still in possession, but refused to pay the deferred payment. It also alleges that plaintiff brings into court his deed conveying said premises to defendant, and asks the court for judgment for said deferred payment, and that it be decreed to be a lien on the land.

Defendant in his answer, after setting up the statute of frauds, states, in substance, that in July, 1883, he entered into negotiations with plaintiff for the purchase of said land; that plaintiff falsely reported to him that all of said land was tillable except 10 acres; that a certain spring was on the said land; that a certain orchard was wholly upon said land; that a certain road was a public road, and that the land was less than six miles from the town of De Soto in Jefferson county; that \$2,250 was agreed upon as the price of the land; that the only agreement made was that defendant would take the land at that price, provided if, after investigation and informing himself as to these representations, he concluded to do so, and that, after thus informing himself, if he concluded not to take it, plaintiff was to repay the \$400 which defendant let him have about the time, or soon after, the price was agreed on, and the contract was to end; that defendant had simply an option to take the land at that price if, after entering on it, he found it to be as represented; that this was the twenty-eighth of July, 1883; that defendant, finding the representations to be untrue, notified plaintiff on the second day of August, 1883, that he would not take the land, and has since that time always been willing to

surrender the land in his possession, consisting only of about five acres. The answer prays the court to decree that plaintiff repay the \$400 received by him, and that it be declared a charge on the land.

The court found for defendant; rendered judgment in his favor for \$400, making it a lien on the land.

Veth, the plaintiff, testified in his own behalf to the following effect: That Gierth, the defendant, came to his (Veth's) house, in St. Louis, wanting to buy a farm, wanting to move out in the country, and Veth went with him to Jefferson county to see the land described in the petition. It was in July. Veth showed him all over the premises. That Veth told Gierth that he did not know exactly where the lines were; that he, Veth, would have the land surveyed; that they went from the land to De Soto, and then back to St. Louis; that Veth told him that, if he was going to buy, he wanted him to give him an answer pretty soon, as, if he did not sell, he wanted to rent the place out. He (Gierth) said he would decide next day. The next day he came to plaintiff's house. There were present two other persons, Mr. Koeninger and Mrs. Koeninger. I asked him \$2,500 for the place. He said it was too much. He offered \$2,250, and said he would have the surveying done himself next winter if Veth would let him have part of the crop. He wanted Veth to throw in a gun, and then Gierth would have the land surveyed, and pay the taxes for 1883, and Veth gave him the gun. Gierth paid \$400, and was to pay the balance on second day of October, 1883. Mr. Piesch had a deed of trust, and he (Veth) paid him the \$400 that was paid on the farm. Veth took the deed to Gierth's house, and Gierth wanted the deed, but Veth refused to deliver without payment. Gierth went into possession under the contract of purchase, and is still in possession. He further testified that the land was as good farming land as any in Jefferson county; that there are perpetual springs on it; that two years before he had been offered by a peddler, whose name he did not know, and who has since died, \$3,000 for the land.

Mrs. Koeninger, the daughter of plaintiff, testified that she was present at the interview between plaintiff and defendant, and gave substantially the same account of it as that given by her father.

Fink testified that he was a tenant of Veth's for 1883, and moved defendant, at the request of his son, to the place, the last of July or first of August of that year, and gave him possession, and that he was still living in the house.

Knopp testified that defendant lived in the house on the 40-acre tract which is separated from the other 280 acres of the land; did not know that he occupied anything more than the house; that there are 20 acres of tillable ground on the 320 acres.

George and John Piesch testified that, about the last of July, they held Veth's note for about \$400, secured by deed of trust on the land in question, and that Veth, in presence of defendant, paid them \$400 in discharge of the note, which amount had been received from defendant by Veth. What was said on that occasion was spoken mostly in the English language, which defendant did not understand, and we attach no importance to their evidence, inasmuch as it only tended to show that they agreed to release, and did release, the land from the deed of trust, on receiving the above payment.

Defendant, who had arrived in this country from Germany six or eight weeks previous to the time when the alleged contract was made, and who could neither speak nor understand the English language, testified substantially as follows: "Mr. Veth and I went to see the land in July. Veth told me the taxes on the land were \$24 per year; that there were excellent springs on the lands; that there was a good road; that it was but six miles to De Soto. He pointed to the fenced land, and said it was all his. He told me that but eight acres was rock land; that there was lead ore on the land, containing ninety-five per cent. lead; that I could make a splendid business in lead, and took me to the 'lead mines.' The second day after that trip I had a talk

with Veth. We then agreed on \$2,250 as the price, provided everything was all right. Veth told me he needed money, or he would not sell. At the time I had not finally examined the property, or this would not have happened. Shortly afterwards I gave Veth \$400, and told him that it was a loan until August 2d; that I wanted to go and see if everything was correct as represented by him. Veth agreed to that. He gave me a written paper, which I supposed to express what we had agreed on. My son told me afterwards what the paper really was. I moved on the land August 1st, and found out that Veth's representations were false. I wrote to Veth on August 2d, and told him I would give \$1,000 for the land; no more. I never touched the 280 acres. So far as they are occupied, Jacob Smith is in possession. I have no claim on the land. Shortly after, I came to St. Louis, and called on Veth, charging him with his misrepresentations. During the interview he made a drawing, representing the springs and other advantages; which drawing I hereby produce. After this interview I wrote a final letter to Veth, breaking off negotiations. I told Veth I would take time to look at the land before I gave him the \$400. Veth did not explain or translate the receipt. I thought it was a promissory note. I did not consider our negotiations as constituting a binding contract until the papers were exchanged. So I understood the law in Germany. If everything had turned out as Veth represented, I would have taken the land, and it would not have been too dear. I did not move from Veth's house, because I have bought a neighboring tract since repudiating this transaction, and am building a house on that which I shall move into."

Dover testified that a large portion of the orchard shown Gierth is not on Veth's land, and that the spring is also over the line.

McCormack valued the whole tract at \$800 or \$900. There is no lead on the land.

Herman Smith is in possession of the cultivated portion of the 280-acre tract, and has never spoken to Gierth.

J. T. McMullen: "The good spring is not on the Veth tract. There are some seeps, but no real springs, on the 280-acre tract. About forty of the 320 acres is tillable. One thousand dollars would be a good price."

Louis Kleinschmidt: "Fifty or sixty acres are tillable. The land is worth \$800 or \$900. There is no perennial spring on the 280 tract."

We think it apparent, from all the evidence, that the contract alleged to have been made has not been established by that degree of clearness which would justify its enforcement. While the plaintiff understood it to be an absolute contract of sale for \$2,250, \$400 of which was to be paid in hand, and the remainder on the second of October, 1883, the defendant, on the other hand, understood that he was to take the land at that price if, on further examination by him, it should turn out to be as represented, and that if, on such examination, he did not find it to be as represented, that the \$400 paid was to be repaid, and the trade at an end.

From the fact that plaintiff testified that the land was as good farming land as any in Jefferson county, which was contradicted by the evidence of disinterested witnesses that only from 20 to 60 acres of the whole tract was tillable, and that no one of them valued it at more than \$1,000; and from the fact that he also testified that there were perpetual springs on the land,—three in number,—in which he was also contradicted,—we may well give credence to the evidence of defendant to the effect that he had the option to decline taking if he found the representations made to him were untrue; which option he promptly exercised in a few days after going on the land, and ascertaining that but a small part of it was tillable, that the spring pointed out as being on the land was not on it, that a part of the orchard was on another's land, and the springs on the 280 tract were not perpetual.

A court of equity will not decree specific performance of a contract if not

clearly established. *Paris v. Haley*, 61 Mo. 458; *Taylor v. Williams*, 45 Mo. 80. The principles announced by sections 769, 770, vol. 2, Story, Eq., apply peculiarly to this case. It is there said: "It is important to take notice of a distinction between the case of a plaintiff seeking a specific performance in equity, and the case of a defendant resisting such a performance. We have already seen that the specific execution of a contract in equity is a matter, not of absolute right in the party, but of sound discretion in the court. Hence it requires a much less strength of case on the part of a defendant to resist a bill to perform a contract than it does on the part of the plaintiff to maintain a bill to enforce a specific performance. When the court simply refuses to enforce specific performance, it leaves the party to his remedy at law. An agreement, to be entitled to be carried into specific performance, ought to be certain, fair, and just in all its parts. Courts of equity will not decree specific performance in cases of fraud or mistake, or of hard and unconscionable bargains, or when the decree would produce injustice, * * * and, generally, not in any case where such a decree would be inequitable under all the circumstances." "But courts of equity do not stop here, for they will let in the defendant to defend himself by evidence to resist a decree when the plaintiff would not always be permitted to establish his case by the like evidence. Thus, for instance, courts of equity will allow the defendant to show that, by fraud, accident, or mistake the thing bought is different from what he intended."

Judgment affirmed, in which all concur.

BISHOP'S RESIDENCE CO. OF THE M. E. CHURCH v. HUDSON, Collector, etc.

(*Supreme Court of Missouri*. May 16, 1887.)

TAXATION—EXEMPTION—CHURCH PROPERTY.

A house and lot purchased as a place of residence for the bishops of the Methodist Episcopal Church who may from time to time reside in St. Louis, are exempt from taxation under Rev. St. Mo. § 6659, which provides that all property used for purely charitable purposes shall be exempt.

Appeal from St. Louis circuit court.

Taylor & Pollard, for respondent. *L. Bell*, for appellant.

NORTON, C. J. This is a proceeding in equity to enjoin defendant, as collector of the city of St. Louis, from instituting suits to enforce the payment of certain tax-bills for the years 1881, 1882, and 1883, assessed upon lot 11 and east half of lot 12, of block 12, in Stoddard's addition, and also known as block 1028 of the city of St. Louis.

It is alleged in the petition that plaintiff organized as a corporation in the year 1875, under article 8, c. 37, Wag. St., that being the law then in force relating to benevolent or charitable corporations; that the object of the corporation was to raise a fund and purchase a lot, and erect thereon a suitable parsonage for the use and occupancy of such bishops of the Methodist Episcopal Church as might from time to time be designated to reside in the city of St. Louis; that the sole object and aim of said church is to promulgate and advance the Christian religion in this and foreign lands, and said parsonage was intended to be used as a residence of the bishops of said church, who are ministers of the gospel and general superintendents over the various churches in this and other countries connected with said church; and that the entire life and labor of such bishops are given exclusively in building up the societies of said church, preaching the gospel, and administering the sacraments. It is further alleged that, after its organization, the corporation, by voluntary subscriptions, purchased the real estate above mentioned, and that the deed thereto vests the title in plaintiff, and contains the following declared trust: "In trust that said premises shall be kept and maintained as a place of resi-

dence for the use and occupancy of the bishops of the Methodist Episcopal Church of the United States of America, who may from time to time be located in the city of St. Louis, subject to the uses and discipline of said church, and from time to time authorized and declared by the general conference of said church." That, soon after said purchase, plaintiff, by charitable contributions, erected thereon a residence, which ever since has been occupied as the residence of Bishop Bowman, a bishop of said church, designated by the general conference of said church to reside there; that neither plaintiff nor any one else receives rent or other compensation for such occupancy. It is then averred that, by reason of said facts, said property is exempt from taxation; but that, notwithstanding, the board of assessors of the city of St. Louis did assess said property in the name of the "Methodist Episcopal Church," which is not the true owner, for the years 1881, 1882, and 1883; that said tax-bills are a cloud on plaintiff's title; that defendant, as collector, is threatening to enforce said tax-bills as a lien upon said property by suit, from the doing of which the court is asked to perpetually restrain him.

The answer of defendant is a general denial, and on trial the court rendered judgment for plaintiff in conformity with the prayer of the petition, from which the defendant has appealed.

By section 6, art. 9, Const., the legislature was authorized to pass section 6659, Rev. St., exempting from taxation for state, county, and local purposes all property used for purely charitable purposes; and, as the allegations of the petition as above set forth are sustained by the evidence introduced on the trial, the controlling question raised by the record is whether the property in question is used for such a purpose. While the courts have been at a loss to give a general definition of a charitable use, embracing all gifts, grants, and devises for charitable uses, the following authorities establish the proposition that the purpose to which the property in question is devoted is a charitable use, and is therefore, under our statutes, exempt from the taxation sought to be enforced against it.

In sections 119 and 122, Blsp. Eq., in speaking of what are charities, it is said: "Gifts for repairing a church, for building an organ gallery, for repairing a parsonage, for the worship of God, for the advancement of Christianity among the infidels, for the dissemination of the gospel, for the benefit of ministers of the gospel, are good charities." In section 1164, Story, Eq., it is said: "Money given to maintain a preaching minister is a charity, within the equity of the statute of Elizabeth concerning charities." So, in section 701, Perry, Trusts, it is said: "Gifts for the benefit of ministers of the gospel are charities."

Gifts for repairing parsonage houses, for maintaining preaching ministers of the gospel, have been held to be charities in the following cases: *Sohler v. St. Paul's Church*, 12 Metc. 250; *Attorney General v. Bishop of Chester*, 1 Brown, Ch. 444; *Cory Universalist Soc. v. Beatty*, 28 N. J. Eq. 570; *Price v. Maxwell*, 28 Pa. St. 35. In the case of *Schmucker v. Reel*, 61 Mo. 592, decided previous to the adoption of our constitution, it is held that a voluntary grant to a church of land as a place for interment of the dead was a charity, and was enforced as such.

If a gift for repairing a parsonage, as is held by the authorities herein cited, is a charity, it follows that a gift for erecting and maintaining one for the benefit of an indefinite number of preachers of the gospel, as in this case, viz., "such bishop or bishops as may be designated to reside in St. Louis from time to time shall be permitted to occupy the same free of rent," is no less a charity.

For the reasons given, the judgment of the circuit court is hereby affirmed. (All concur.)

PRITCHARD v. HEWITT.

(Supreme Court of Missouri. May 16, 1887.)

1. APPEAL—HARMLESS ERROR—INSTRUCTIONS.

The refusal of the trial court to give an instruction upon a particular issue asked by appellant, and to which he was clearly entitled, is no ground of reversal where the jury finds for appellant upon that issue.

2. NEW TRIAL—TORT—DAMAGES.

In personal actions founded upon tort, and sounding merely in damages, a new trial will not be granted on the sole ground of smallness of damages, unless, under all the circumstances, the verdict appears to have been the result of either passion, prejudice, or partiality.

3. SAME—ASSAULT AND BATTERY.

In an action of assault and battery, the jury awarded plaintiff one dollar as damages. *Held* that, while the evidence showed that defendant was not justified in making the assault, yet, as it also showed that plaintiff was not without fault, the verdict would not be disturbed.

Appeal from De Kalb county.

S. G. Loring, for plaintiff in error. *Ramey & Brown*, for defendant in error.

BRAOE, J. This was an action commenced by the plaintiff in the circuit court of De Kalb county to recover damages of the defendant for maliciously assaulting, shooting, and wounding the plaintiff, which resulted in a verdict for the plaintiff for one dollar. The defense was *son assault demesne*. After an unsuccessful effort for a new trial, the plaintiff, having saved his exceptions, brings the case to this court by writ of error, and assigns for error: (1) That the court refused to give instructions Nos. 7 and 8 for plaintiff; (2) that the court gave the instructions asked for the defendant; (3) that the court overruled plaintiff's motion for a new trial.

The refused instructions, Nos. 7 and 8, asked for by the plaintiff, and the instruction given by the court for the defendant, were all upon the issue joined upon defendant's plea,—that plaintiff first assaulted him, and that, in resisting that assault, he used no more force than was necessary to resist such assault, and protect himself from great personal injury; and, as that issue was found for the plaintiff by the jury, no harm resulted to him from the action of the court in that behalf, even though it be conceded that plaintiff's refused instructions were correct, and that the one given for the defendant is obnoxious to the criticism placed upon it. The action of the court in giving the one, and in refusing the others, would therefore be no ground for reversal. *Gregory v. Chambers*, 78 Mo. 294; *Morris v. Railroad Co.*, 79 Mo. 367.

On the quantum of damages for plaintiff the court gave the following instruction: "If the jury find for the plaintiff, in estimating his damages they will take into consideration the physical injury inflicted, and the bodily pain and mental anguish endured, together with the loss of time occasioned, and all expenses incurred shown by the evidence in and about the treatment of his case; also any and all such damages which it appears from the evidence will reasonably result to him from said injuries in the future." The plaintiff insists that a new trial should have been granted, for the reason that the jury disregarded this instruction in the assessment of his damages at one dollar. The rule is that in personal actions founded upon tort, and sounding merely in damages, a new trial will not be granted on the sole ground of smallness of damages.

Mr. Graham, in his work on New Trials, after stating the rule and reviewing the cases, thus states his reason for the rule: "The reason for holding parties so tenaciously to the damages found by the jury in personal torts is that, in cases of this class, there is no scale by which the damages are to be

graduated with certainty. They admit of no other test than the intelligence of a jury, governed by a sense of justice. * * * To the jury, therefore, as a favorite and almost sacred tribunal, is committed, by unanimous consent, the exclusive task of examining the facts and circumstances, and valuing the injury, and awarding compensation in damages. The law that confers upon them this power, and exacts of them the performance of the solemn trust, favors the presumption that they are actuated by pure motives; * * * and it is not until the result of the deliberation of the jury appears in a form calculated to shock the understanding, and impress no dubious conviction of their prejudice and passion, that courts have found themselves compelled to interpose." 1 Grah. & W. New Trials, (2d Ed.) 451.

The rule has been adhered to in the more recent cases that have come under our observation, and has been recognized approvingly in *Gregory v. Chambers*, 78 Mo. 294, and *Watson v. Harmon*, 85 Mo. 443, and the principle upon which it is founded sanctioned by very many cases decided by this court, where new trials have been refused in cases where reversals have been asked on the ground of excessive damages. Of course, it goes without saying that actions *ex delicto*, wherein the damages may be measured with some degree of certainty, are not within the rule, and that those cases where the damages, under the circumstances, are such as to shock the "understanding," and induce the conviction that the verdict was the result of either passion, prejudice, or partiality, are exceptions to this rule. The case under consideration is clearly within the rule. No standard is furnished in the evidence by which this damage would be measured with any reasonable degree of certainty, and nothing in the case to warrant the conclusion that the verdict was the result of passion, prejudice, or partiality. The jury were of the vicinage of the parties, and doubtless acquainted with both the parties and the witnesses. It was their exclusive province to weigh the evidence, and pass upon the credibility of the witnesses. They, and the learned judges who refused to grant a new trial, had better opportunities of seeing the transaction in its true light and colors, than we have in the record before us. Nevertheless, in that record we can see how the jury might well, from the evidence, have found that, although the defendant was not justified in his action, yet that the plaintiff also was not without fault, and come to the conclusion that, under all the circumstances, it was not a case for substantial damages. It is not a case of that flagrant character that would warrant the intervention of an appellate court. The judgment of the circuit court is affirmed.

(All concur.)

STILLWELL, Trustee, v. GLASSCOCK.

(Supreme Court of Missouri. May 16, 1887.)

CONTRACT—PUBLIC POLICY—TAXATION—DRAINAGE.

Defendant subscribed to a fund for reclaiming and protecting the lands embraced within the Sny Island levee drainage district. The fund was to be used to enforce the prompt payment of taxes on lands located within the district by purchasing the lands assessed at delinquent tax sales. *Held*, that there was nothing in the contract from which it could be inferred that the subscribers harbored any intention of combining together to depress bidding at the tax sales, or in any other reprehensible manner to take any unlawful advantage, and the contract was therefore a valid one.

Appeal from Hannibal common pleas court.

G. A. Mahan, for appellant. T. H. Bacon, for respondent.

SHERWOOD, J. Action on a contract of subscription signed by defendant and a large number of other land-owners, including plaintiff, in the Sny Island levee drainage district, in the state of Illinois; each subscriber setting the sum subscribed opposite his name, the defendant thus subscribing the sum

of \$100, the purpose of the subscription being the maintenance and repairs of the levee, and a more perfect reclamation and protection of the lands embraced within the Sny Island levee drainage district. Plaintiff and defendant and others were owners of these lands, which lands were imperfectly protected from overflow of the waters of the Mississippi river by a levee. The levee was maintained by taxes assessed against these lands situated within the Sny Island levee drainage district, and the fund was subscribed by defendant to be used in aid of and to enforce the prompt payment of these taxes, by purchase of lands so assessed at delinquent tax sales, and thus furnish the money to repair and maintain the levee, and protect the land. Amos J. Stillwell was appointed trustee to receive the funds subscribed, and apply the same to the purchase of lands at such delinquent tax sales. He accepted the trust, purchased lands at these delinquent tax sales, and contracted other debts in the execution of the trust, relying upon the faithful payment of this subscription. The defendant failed to pay the amount he had subscribed, and plaintiff brought this suit. The defendant successfully demurred to the petition, setting forth, in substance, the foregoing facts, on the ground that the petition did not state facts sufficient to constitute a cause of action, and the plaintiff appeals here.

The ground relied on in this court to sustain the action of the court below is that the contract made is contrary to public policy. I discover nothing in the facts stated to warrant this conclusion. There is nothing in those facts from which it can be inferred that the subscribers harbored any intention of combining together to depress bidding when the tax sales should occur, or in any other reprehensible manner to take any unlawful advantage. Their enterprise and venture, it may well be supposed, they anticipated would result profitably to themselves, and would promote the principal object set forth in the contract of subscription, to-wit, the maintaining of the Sny Island levee, thus protecting their large landed interests from disastrous overflow. If other land-owners than themselves did their duty, and paid their proper proportion of the taxes assessed for the common protection, no lands would be sold for taxes, and no injury could result. If, on the contrary, other land-owners failed to bear their share of the common burden, it was entirely proper that they should be compelled to pay the penalty for their dereliction of duty; and I see no reason, founded on either law or morals, why it was not as competent for the subscribers to bid in such lands at tax sales, if done openly and above board, at public vendue, as it was for any one else to do the like. The law encourages the largest competition at all sales made under its mandates; and, so long as the principle already announced is not transgressed, those whose office it is to administer the law will have no call to bestride the "unruly horse" of public policy. *Potter's Dwar. St.* 215; *Richardson v. Mellish*, 2 Bing. 229.

The case of *Biser v. Dameron*, 88 Mo. 82, bears no resemblance to the one at bar.

The authorities cited by plaintiff fully support the views herein announced, and judgment reversed, and cause remanded.

(All concur.)

MOORE v. HARRIS and others.

(*Supreme Court of Missouri. May 16, 1887.*)

1. TAXATION—DEED—SUFFICIENCY OF.

The deed of a tax collector conveying land purchased at a tax sale, which fails affirmatively to show that all the proceedings required by law to be taken before a sale could be made, have been taken, is void. The general statement that the proceedings have been taken "according to law," or "in manner and form as directed by law," is not sufficient. The facts themselves must be set forth.

2. DOWER—DEED—RELEASE.

The deed of a dowress, made before dower has been assigned to her, passes only a right or interest which may be enforced in equity, and not the legal title; except, only, where she releases her dower to the terre-tenant, or one in possession of the lands, or to whom she stands in privity of estate.

Error to circuit court, Scott county.

L. Brown, for defendants in error. *Wilson Arnold* and *D. H. McIntyre*, for plaintiff in error.

SHERWOOD, J. Ejectment for lot 63 in the town of Benton. Both parties claim under Elizabeth Crow, as the common source of title. To show title in himself, the plaintiff, after showing title in Albion Crow, the husband of Elizabeth Crow, by a commissioner's deed, dated October 28, 1845, next offered in evidence a deed from the collector of Scott county, Thomas S. Rhoades, to Elizabeth Crow, dated October 28, 1867, professing to convey to the grantee therein the lot in controversy, as the property of Albion Crow, and as sold because of delinquent taxes.

Plaintiff next offered in evidence a deed for the lot in question, from Elizabeth Crow to himself, dated March 25, 1868, which deed, so far as necessary to copy it here, is as follows: "Know all men by these presents, that I, Elizabeth Crow, of the county of Scott and state of Missouri, have this day, for and in consideration of the sum of seven hundred dollars, to me in hand paid by Joseph H. Moore, of the same county and state, *granted, bargained, and sold*, and by these presents do *grant, bargain, and sell*, unto the said Joseph H. Moore the following described real estate, situate in the county of Scott and state of Missouri; that is to say, the south-east quarter of the north-east quarter of sec. 14, and the undivided half interest in the west half of the south-west quarter of sec. 12, in township 28 north, range 13 east, it being 40 and undivided half of 80 acres. Also, all the right, title, and interest which I have of, in, and to lots 91 and 121, in the town of Commerce, in said county of Scott; and also lot *sixty-three*, in the town of Benton, in said county of Scott."

The next link in the chain of plaintiff's title was a deed to Elizabeth Crow, acknowledged October 29, 1870, executed by plaintiff as administrator of Albion Crow, and conveying the lot in question.

The claim of the defendant Harris is based on a warranty deed for the lot aforesaid, executed November 30, 1877, by Elizabeth Crow to Mary J. Harris, wife of said defendant Harris.

1. The deed of the collector of Scott county for the lot in dispute, executed to Elizabeth Crow in 1867, was worthless, and conveyed no title, and was void on its face, in consequence of its failing affirmatively to show that all the prerequisites which the law had prescribed, as to the fact of notice having been given of the delinquency of the land for taxes, had been complied with prior to judgment rendered by the county court; and in consequence of its failing affirmatively to show that advertisement had been made of the intended sale of the land for taxes in the precise method required by the statute. The statements made by the collector in his deed, that these things—these jurisdictional facts—had been done "*according to law*," or "*in manner and form as directed by law*," go for nothing in the estimation of the courts. The *facts done* must, in such cases, be set forth, in order that the courts may determine whether the respective officers and courts have acted "*according to law*." *Lagroue v. Rains*, 48 Mo. 536; *Spurlock v. Allen*, 49 Mo. 178; *Large v. Fisher*, Id. 307.

The bill of exceptions shows that this deed was admitted in evidence, despite the objections of the defendants. The judgment for plaintiff, however, recites that it was finally excluded from the consideration of the jury, by order of the court. This recital, if true, should have been preserved by the bill of exceptions, the office of which is to preserve all matters of mere exception. I

judge, however, from the first instruction asked by, and refused, the defendants, that the court did not regard the collector's deed as void on its face. It was thus void, as already seen from the authorities cited, and no title passed to Elizabeth Crow by reason thereof.

2. I now come to consider the effect of the deed to plaintiff of date March 25, 1868, whose recitals have already been in substance set forth; for on this deed plaintiff's paper title exclusively depends. I think it quite too plain for argument that the statutory covenants of "grant, bargain, and sell" do not extend to nor include the lot in question. If this be true, then the deed just mentioned, so far as concerns lot 63, is in effect a bare quitclaim deed, and no after-acquired title of Elizabeth Crow could inure to the benefit of plaintiff. Besides, it already appears that at the time the deed of March 25, 1868, was made, the only title Elizabeth Crow had in the premises was that of a dowress, whose dower remains unassigned. The authorities agree that in such case, that the legal title of a dowress does not pass by her deed. The only right or interest thereby passing is one which may be enforced and effectuated in equity. 1 Washb. Real Prop. (4th Ed.) 303; 2 Scrib. Dower, 40, 43. Of course these remarks are not intended to apply to the case of a dowress who releases her dower right to the terre-tenant, or one in possession of the lands, or to whom she stands in privity of estate. Washb. *supra*; Scrib. Dower, 40.

The only right or interest, therefore, which plaintiff acquired by reason of his deed, as aforesaid, was one vesting in action only, so far as the views of a court of law are concerned. What a court of equity would do in the premises does not matter, as in this action the plaintiff must recover on the legal title, and not on uneffectuated equities.

3. Nor did the plaintiff gain any title to the premises by reason of the operation of the statute of limitations, since his possession was not adverse and continuous for the requisite statutory period. *Wilson v. Albert*, 89 Mo. 537, 1 S. W. Rep. 209.

As this cause was not tried in conformity to the views here announced, the judgment is reversed, and the cause remanded.

(All concur.)

GARRETT v. GREENWELL, Adm'r, etc.

(Supreme Court of Missouri. May 18, 1887.)

1. JUDGMENT—RES ADJUDICATA—PLEA IN ABATEMENT.

Matters put in issue on the trial of a plea in abatement in an attachment suit are not to be considered as *res adjudicata* where the case is afterwards tried on its merits; overruling *Stewart v. Nelson*, 79 Mo. 522.

2. TRESPASS—TO PERSONALTY—STATUTORY ACTION—INSTRUCTION.

Where a statute fixes the liability of one who *maliciously* and *wantonly* injures the property of another, an instruction in an action under the statute, directing the jury that the only question for their determination is whether defendant "*willfully* and *maliciously*" did the injury complained of, is erroneous in using the word "*willfully*."

3. APPEAL—WEIGHT OF EVIDENCE—REVERSAL.

In an action for damages, for burning plaintiff's property, the evidence being of the most cogent character to show that defendant was guilty of the act charged, but the verdict being for defendant, *held*, that judgment on such verdict would be reversed by the supreme court upon appeal.

Appeal from circuit court, Montgomery county.

John M. Barker, for appellant. *E. M. Hughes* and *T. J. Powell*, for respondent.

SHERWOOD, J. There are two counts in the petition. The first charges that Joliah, willfully, maliciously, and wantonly intending to injure the plaintiff, set fire to and burned the plaintiff's property, a threshing-machine, belt, and separator, of the value, etc. The second count was of similar purport, double damages being asked under the provisions of section 3928, Rev. St.;

an affidavit and bond being filed with the petition, in conformity with that section, and the provisions of the attachment law. Joliah having died, his administrator was made party defendant, and on his plea in abatement a trial of the issue thus raised was had, resulting in a verdict for the plaintiff, which was followed by the statutory judgment sustaining the attachment. Thereupon the defendant administrator filed a general denial, and at the next term on the issue thus presented the verdict was for the defendant, and judgment accordingly.

1. There was no error in the trial court's refusing to permit the plaintiff to offer in evidence the record of the proceedings in the trial of the plea of abatement. The correctness of this ruling is apparent for several reasons: A judgment, in order to be a bar to further litigation, must not have been rendered on some mere preliminary ground; as, *ex. gri.* upon a plea in abatement or the like. The case must have gone to a full and complete termination, so that nothing is left unsettled as to the rights of the parties litigant, or the extent of those rights. In a word, the judgment must have been final, and rendered on all the merits of the cause. Bigelow, *Estop.* (3d Ed.) 29, 32, 33; *Freem. Judgm.* (3d Ed.) § 260. This, as will be seen from the authorities, is elementary law. Here, as will readily be noted, the judgment was not final,—not on the merits of the cause. That cause was not terminated. There had been no adjustment of the rights of the parties; nor the extent of those rights. This is conspicuous on the face of the record, and becomes more conspicuous when the statute law respecting attachment proceedings is examined.

Section 439 of the attachment act provides that, if the issue on the plea in abatement be found for the plaintiffs, "judgment shall be rendered against the defendant sustaining the attachment," * * * and the cause shall proceed; but, if such issue be found for the defendant, the court shall render judgment that the attachment be abated," etc. The section also makes provision for an appeal by the plaintiff in the latter contingency, and provides for the attachment remaining in full force until such appeal is determined. Further provision is made by the same action, that, in the event of the failure of the plaintiff to appeal, or after the dismissal or affirmance of the appeal, that "the defendant may plead to the merits, and the suit shall proceed to final judgment on the cause of action therein alleged as though commenced originally by summons alone." And the same section makes further provision that, where the issue on the plea in abatement goes against the plaintiff, "the defendant shall not be required to plead to the *merits of the action* until after the time fixed for taking an appeal has expired, or until the determination of such appeal.

These statutory provisions set forth in the clearest light that a judgment on a verdict in a plea in abatement does not become, and was not intended by the legislature to become, a bar to a trial on the merits of the cause. Besides, if such a judgment should be a bar, such a bar, like other estoppels, would of course have to possess the elements of mutuality; so that, if the issue on the plea in abatement should happen to go in favor of the *defendant*, the mere judgment that "the attachment be abated" would have the force and effect of a final judgment, could be pleaded by him as such, and the cause could not proceed to final judgment as though commenced by summons alone, nor could the defendant be required to plead to the merits of the action. I would not have noticed this point at such length but for the fact that plaintiff's counsel has called attention to the case of *Stewart v. Nelson*, 79 Mo. 522, as authority in support of the position that matters put in issue on the trial of a plea in abatement in an attachment suit become *res judicata* where the cause is afterwards tried on its merits. The case undoubtedly supports the claim of counsel, but I am persuaded that the conclusion therein reached is not a sound one; indeed, was unnecessary to a proper decision of the case, and so may be regarded as resulting from a momentary inadvertence.

2. The instruction given by the court of its own motion is open to criticism, because it told the jury that "the only question for their determination is whether or not Charles Joliah willfully and maliciously set fire to and burned the machine in question." This instruction is objectionable, because it employs a word not authorized by the section of the statute on which this action is bottomed, to-wit, "willfully." It is sufficient, under that section, to authorize a recovery that the act be done either "maliciously" or "wantonly." The legislature evidently had a purpose in employing those words, and attached to each one its own proper and usual signification. A similar line of remark was pursued in the case of *Burgert v. Borchert*, 59 Mo. 80.

3. In ordinary cases, where the action is one at law, this court does not interfere in regard to questions of the mere weight of evidence. In this case, however, the evidence is of the most cogent character that Charles Joliah burned the plaintiff's machine. This evidence is both direct and circumstantial; consisting of previous threats, and subsequent admission of the fact of his guilt; his wearing boots which made certain tracks, and those tracks being found the next morning leading directly from where the machine was burned to within a few yards of his house; his alarmed and excited manner when visited by a neighbor the next day; and finally his act in changing those boots for others at the suggestion of another neighbor. Looking at all these things, it is a matter of profound surprise that the jury, with all this evidence before them, could have found as they did. But, inasmuch as they have done so, our duty, under the rule announced in the cases of *Whitsett v. Ransom*, 79 Mo. 258, and *Spohn v. Railroad Co.*, 87 Mo. 74, is clear; and so the judgment is reversed, and the cause remanded.

(All concur.)

SMILEY and others v. SMILEY'S EX'RS.

(Supreme Court of Missouri. May 16, 1887.)

EXECUTORS—FINAL SETTLEMENT—ACTION—FRAUD.

An executor cannot properly make a final settlement of his accounts with the probate court while litigation is still pending against the estate; and, where he makes such a settlement for the purpose of thwarting the recovery of a judgment against the estate in a suit then pending, the settlement is in fraud of the court, and the pending suit may proceed and judgment be rendered against him notwithstanding the settlement.

Appeal from circuit court, Pettis county.

Geo. P. B. Jackson, for respondent. W. W. S. Snoddy, for appellant.

SHERWOOD, J. This case was here on a former occasion. 80 Mo. 44. It was an equitable proceeding to set aside for fraud the final settlement of George W. Smiley as administrator of H. W. Smiley, and for an accounting. George W. Smiley having died after service of summons, the proceeding was revived against his executors, the present defendants, Green S. Cockrell and William M. Henderson. The suit was instituted in 1877, service being had on George W. Smiley and one of the securities on his bond as administrator, James W. Beaman, in April of that year. The other surety, Hunter, was not served. In the opinion of the court when this case was formerly here, it is stated: "The other security Beaman, was one of the judges of the county court which approved the settlement of Smiley, and discharged him and his securities." The final settlement sought to be set aside was made May 3, 1869. The executors, Cockrell and Henderson, and the defendant Beaman appeared to the action, and filed an answer at the January term, 1878, and subsequently thereto filed an amended answer, which as to Beaman was finally withdrawn, and judgment by default entered. The cause was first tried at the May term, 1880, where judgment was rendered against the plain-

tiffs, from which they appealed, and at the October term, 1883, this court reversed the judgment, remanded the cause, with directions to the circuit court to set aside the final settlement, and ascertain, on a full accounting, the amount received by him, (the administrator,) with all interest due to the plaintiffs, and render a decree therefor.

The cause was again heard by the circuit court at the October term, 1884, when that court, acting in obedience to our mandate, entered a decree setting aside the final settlement of George W. Smiley, administrator, on the ground of fraud, and thereupon took an account, resulting in a judgment in favor of plaintiffs in the sum of \$5,463.75 against Beaman personally, and against the other defendants in their representative capacity. From this judgment said executors have appealed. The pleadings were the same, and the evidence the same, except as hereinafter noted, as when the cause was here before.

Objection was taken by the executors, who were the only appearing defendants, to the cause being proceeded with against them. Here is the record they made on that point: "When said cause was called for trial, the former executors of the estate of G. W. Smiley, deceased, the original defendant herein, stated that in 1881 they had made final settlement of said estate, and were discharged from their trust as such; that there was now no executor or administrator of said estate, and there was no one to represent the estate in said cause in this court; that they appeared only for that purpose. Said executors objected to the court proceeding against them as executors on said grounds. The court overruled said objections, and held that said former executors represented the interests of said estate as adversary parties to the plaintiff, and proceeded with said trial against said former executors, to which action of the court the said Green S. Cockrell and Wm. M. Henderson, said former executors, excepted then and there, at the time, duly and legally. The court then proceeded with the trial of said cause, against the objections and exceptions of the former executors, defendants herein, when they stated that they no longer appeared in said cause, still claiming they were not parties in their individual right, and that they were not executors, and declined to defend as such, but the court held that they had been proper parties in their representative capacity, and that this court was not bound by the action of the lower court while this suit was pending in the supreme and circuit courts, and, under the ruling of the court, they defended said action, but then and there excepted to the said ruling of the court."

The objection thus made by the executors is without merit. Their act of making a final settlement of the estate in their hands was unusual and unwarranted. It is not customary for final settlements of a testator to be made pending litigation against it. And there is not a word or syllable in the record to show, as claimed by counsel for defendants, that said executor had been cited in 1880 to make a final settlement. On the contrary thereof, it seems, from the probate record introduced by them, to show a final settlement of the estate of George W. Smiley; that such settlement was altogether *voluntary* on their part, since the record of their discharge shows that they had "made publication as required by law of their intention to make a final settlement," etc. Rev. St. 1879, § 238. Besides, if, as claimed, the executors made final settlement under the compulsory process of a citation to that effect given in 1880, how does it happen that such settlement was not made until *August 12, 1881*? Rev. St. 1879, § 225. Moreover, the plaintiffs were the creditors of George W. Smiley's estate, their demand having been legally exhibited against the same at the time the suit was revived against the executors. Rev. St. § 186. This revival occurred at the January term, 1878, within one year from the death of the testator, and of course the demand of plaintiffs would fall within the fifth class of claims. Id. § 184. And, under the provisions of section 245, the probate court could not properly order the payment of legacies unless satisfied that there was sufficient money to satisfy all the demands

against the estate. Debts must be paid before legacies. Kelly, Prob. Guide, § 355.

Furthermore, it appears from said final settlement that the *wives* of the executors, the sole legatees of George W. Smiley's will, were paid nearly \$1,000 while the demand of plaintiffs was still unsatisfied and in litigation. Now, under the provisions of section 239, the probate court is not authorized to make final settlement unless the estate is "*fully administered*," but an estate cannot be said to be fully administered while the demands of creditors remain unadjusted and unsatisfied, and that which should have gone in satisfaction of their demands is diverted from its legitimate purpose to the satisfaction of claims which should always be subordinated to the demands of creditors. It was the duty of the executors to have made known the fact to the probate court of the existence of plaintiff's demand when asking for an order to pay the legacies aforesaid, if one was asked for. Indeed, section 190 requires that an administrator make a list of all demands exhibited, classing them, and make return thereof at each settlement. So that the executors were guilty of a fraud on the court in making a final settlement when, as they must have known, the estate which they represented was not fully administered; and such fraud was in some senses but a continuation of the original fraud of their testator. And, on looking over this record, I have been impressed with the idea that this so-called final settlement was a mere contrivance on the part of these executors to thwart the plaintiffs in this action. If this be true, it only furnishes an additional reason why the gripe of a court of equity has fastened on the original fraud should not be shaken off by further covinous methods. And, in this connection, it is not to be forgotten that these same executors appeared in this court in 1883, and took part in the appeal, although they *now* claim that they had made their final settlement and were discharged in 1881. Such subterfuges are not to be tolerated in a court of justice; and I do not believe that, in any event, the jurisdiction of the circuit court, having once attached, could be divested by any subsequent action of the probate court pending litigation in the former court. *Setbel v. Simeon*, 62 Mo. 255.

But waiving any further discussion of this point, these executors could not, as they attempted to do in the circuit court, disavow their executorship, and still claim and exercise their right to defend the suit in that capacity. They could not occupy the ambiguous attitude of appearing and not appearing at the same time; thus taking their chances to defeat the suit *as* suitors, or to defeat it on the ground that they were *not* suitors; and so this point has been ruled, more than once in this court. *Tower v. Moore*, 52 Mo. 118; *Pry v. Railroad Co.*, 73 Mo. 123; *Kronski v. Railroad Co.*, 77 Mo. 362; *Barnes v. McMullins*, 78 Mo. 260.

The proper course for them to have pursued, if desirous of testing the validity of the final settlement, and of their discharge as executors, when the court ruled that they were still parties to the suit, was to have tendered their bill of exceptions, and abandoned the case at that point. *Davis v. Davis*, 8 Mo. 56.

No reversible error occurred in admitting in evidence the record books containing the several deeds of trust. Those books, as is conceded, came from the proper repository. They were "*official registers*" required by law to be kept. 1 Greenl. Ev. §§ 483-485. It may be that under the strict terms of section 697, Rev. St., that affidavit, etc., should have been made, but we will not reverse a judgment on that ground alone.

There is nothing in the testimony offered by one of the executors, conceding its relevancy, which alters the *status* of this cause as formerly presented and established by the judgment of this court. By that judgment the final settlement of the estate of H. W. Smiley was ordered to be set aside for fraud and an account to be taken. This the circuit court has done, and this was the

only thing it could do, under the terms of our mandate. *Shroyer v. Nickell*, 67 Mo. 589; *State v. Cape Girardeau Court of Common Pleas*, 78 Mo. 560.

These views result in an affirmance of the judgment, and it is so ordered.
(All concur.)

CHIDSEY v. POWELL, Ex'r, etc.

(*Supreme Court of Missouri. May 16, 1887.*)

LIMITATION OF ACTIONS—REVIVAL OF DEBT.

A letter written by the debtor in which he speaks of "the debt I owe you," and regrets his inability to pay any part of it, is a sufficient acknowledgment to remove the bar of the statute.

W. S. Shackelford, for respondent. *Goode & Cravens*, for appellant.

BLACK, J. This suit was begun in the Greene county probate court, and is founded upon a promissory note, dated October 1, 1871, and signed by William Addis, whereby he promises to pay William Chidsey, the plaintiff, \$250 in one year after the date thereof. The executor, as a defense, interposed the statute of limitations. To avoid the bar of the statute, the plaintiff, on the trial anew in the circuit court, read in evidence the following letter, shown to have been written by the deceased:

"OXFORD, BUTLER Co., OHIO, March 30, 1876.

"*Dear Brother Chidsey:* Your letter came to hand, but I have mislaid it somehow, and cannot lay my hand on it any more. * * * And now, brother, I must say to you something about money matters. I am very sorry that I cannot comply with your request to let you have some part of the debt I owe you, but let me say to you, for the last three years I have had bad luck from the failure of fruit. Last year at this time the orchards had the appearances of a greater crop up to the night of the 18th, when the frost killed everything; put at least one thousand dollars out of my pocket. And now there is a fair prospect for a good crop of apples and some peaches, but all may be killed. Young bushes, corn, and oats, and wheat was badly injured by so much rain. I hope it will be better this year, and I do not know what we farmers will do. My kind love to your family, and believe me, as ever,

"Your friend and brother,

WM. ADDIS.

"**APRIL 4th.** Bob was here to-day, but I had to disappoint him. I am sorry, and cannot see now when I can pay any.

WM. A."

The defendant asked, and the court refused, the following instructions: (2) The letter of deceased read in evidence by plaintiff does not constitute a sufficient acknowledgment of the debt to take the case out of the statute. (3) The letter having been written prior to the statutory bar of the note, and while said note was of itself in full force, cannot be relied upon to take the case out of the statute.

1. As to the third instruction, it is sufficient to say that we recently held, in the case of *Martin v. Branham*, 86 Mo. 644, that an acknowledgment, to take the debt out of the statute, may be made before the debt is barred; that, when the acknowledgment is thus made before the debt is barred, the statute will begin to run from the time of the acknowledgment.

2. There is no question but the letter of Addis read in evidence related to the note in suit; so that the real question is, does that letter contain such an acknowledgment as will avoid the plea of the statute of limitations? In view of the many conflicting decisions upon this subject, it is well to keep in view our statute, which, in substance, is that no acknowledgment or promise shall be evidence of a new or continuing contract, whereby to take any case out of the operation of the statute, unless such acknowledgment or promise be made or contained by or in some writing subscribed by the party chargeable. It is to be observed, in the first place, it is not necessary to show an ex-

press promise; an acknowledgment will be sufficient. What, then, are the essential elements of the acknowledgment to make it effectual? In the case of *Elliott v. Leake*, 5 Mo. 209, it was said: "It is not necessary that the party should acknowledge a willingness to pay the debt. It is sufficient that he acknowledge that he owed the debt, and that it remains unpaid. That evidence which will create an obligation will revive that obligation, if connected with evidence that the obligation has not been discharged." To the same effect is the case of *Boyd v. Hurlbut*, 41 Mo. 264. But if the acknowledgment is accompanied with conditions, or circumstances which repel or rebut an intention to pay, then it will not be sufficient to defeat the bar of the statute. *Boyd v. Hurlbut*, *supra*; *Mastin v. Branham*, *supra*; *Chambers v. Rubey*, 47 Mo. 99. The transaction of a promise to pay, arising from the acknowledgment, is, from such circumstances, destroyed.

From these adjudications it is clear that an acknowledgment of a debt, and that it remains unpaid, though there is no expression of willingness to remain bound, will avoid the bar of the statute of limitations, unless accompanied with conditions or circumstances which rebut or repel an intention to pay.

In the present case, the deceased, by the letter, when speaking of the note in suit, says of it, "the debt I owe you." There is here an unequivocal admission and acknowledgment of an actual subsisting debt. This is clear beyond all doubt. He then expresses his inability to pay any part of the debt at that time, and proceeds to give his reason therefor. Instead of saying anything showing an intention not to pay the debt, he expresses a regret of his inability to then pay it, or any part thereof. We see nothing in the letter indicating a purpose not to pay, or that is inconsistent with the promise to pay, arising from the acknowledged debt. The only thing left uncertain by the letter is as to when he could pay the note, but that uncertainty does not destroy the effect of the unequivocal acknowledgment of an existing debt. *Warlick v. Petersen*, 58 Mo. 408.

3. The further claim of the appellant is that the affidavit filed with the claim is not in compliance with section 195, Rev. St., in this: that it does not state that the claimant "has given credit to the estate for all payments and offsets to which it is entitled." The affidavit does say: "Said claim is just, lawful, past due, and unpaid, and there is no set-off against the same whatever." It is enough to say of this point that no such question was made on the trial, and it cannot be made here for the first time, though more might be said.

The judgment is, with the concurrence of the other judges, affirmed.

PER CURIAM. Clerk will first make the entry agreed upon in stipulation filed May 9, 1887.

KETCHEM v. MULLINIX and others.

(Supreme Court of Missouri. May 16, 1887.)

TAXATION—DEED—TITLE.

The deed of a tax collector, conveying only the right and interest of the state in land which had never been forfeited to the state by the owner, does not vest the grantee with legal title.

Fred Hyde, C. W. Bell, and S. P. Huston, for defendant in error. *J. H. Conoland and A. W. Mullins*, for plaintiff in error.

NORTON, C. J. This is an action of ejectment to recover the possession of 80 acres of land in Putnam county, described in the petition. Both parties claim the legal title; the plaintiff under a deed from John Mullinix, and the defendant George Mullinix under a tax deed in which it is, among other things, recited that the land in question was assessed for taxes, in 1868, to John Mullinix,—so that said John Mullinix is the common source of title.

The trial court held, as a matter of law, that the tax deed under which defendant claimed, did not convey the legal title, and gave judgment for plaintiff, from which defendant has prosecuted a writ of error to this court, and by it challenges the correctness of the above ruling. We are of the opinion that the ruling was correct, inasmuch as the tax deed did not convey, nor purport to convey, the interest of John Mullinix in the land, but states as follows: "I, James Comstock, collector as aforesaid, do hereby transfer, convey, and assign to the said George Mullinix all the right, title, interest, and estate of the state of Missouri of, in, and to the above-described property."

The land in question had never been forfeited to the state, and the state had no title or interest therein to be conveyed. In the case of *Einstein v. Gay*, 45 Mo. 62, it is expressly held that such a tax deed passes no title to the purchaser.

Other objections are made to the validity of the deed, but it is unnecessary to notice them, as the one already noted is fatal to it. Judgment affirmed.

(All concur.)

DRIGGS & Co.'s BANK and others v. NORWOOD.

(Supreme Court of Arkansas. May 7, 1887.)

EXECUTION—SALE—INJUNCTION—EXEMPTION.

Equity will not entertain a bill to enjoin an execution sale at the suit of the judgment debtor who lived 18 miles from the county-seat, and who was not apprised of the levy until it was too late to give the five-days' notice of filing his schedule and claim of exemptions required by Mansf. Dig. Ark. § 3006. Such a claimant has ample remedy at law, under section 2988, by petition to the circuit judge setting forth the circumstances.

Appeal from circuit court Nevada county. In chancery.

Bill for injunction.

Atkinson & Tompkinson, for appellants. *Montgomery & Hamby*, for appellee.

SMITH, J. Driggs & Co.'s Bank recovered a judgment against Norwood in the circuit court, and caused an execution to be levied on a carriage and harness. The levy was made February 7, 1884, and the sale was advertised for the eighteenth of the same month. The property was seized at the county-seat; and Norwood, living at the distance of 18 miles, was not apprised of such seizure until it was too late to give the five-days' notice of filing his schedule and claim of exemption, contemplated by section 3006 of Mansfield's Digest. He thereupon rushed into equity to enjoin the sale. His bill set forth the circumstances which prevented his claim from being made earlier and in the regular way; and it alleged that the value of the property levied upon, together with that of all other personal property owned by him, was not equal to his constitutional exemption. A temporary injunction was awarded, and a restoration of the property was directed. A demurrer to the bill having been overruled, the defendants answered, and insisted on the lien acquired by their levy; but the injunction was made perpetual.

The pleadings and evidence show plainly enough that Norwood is entitled to claim this property as exempt from execution. But the statutory method for making the claim is exclusive of all others. In *Settles v. Bond*, ante, 286, we decided that replevin would not lie for the exempt property, not because it was *in custodia legis*, but because, until a schedule was filed, the execution defendant was not pursuing the remedy pointed out by the statute. Neither can a bill in equity be allowed to restrain the sale of chattels under execution unless it shows that the plaintiff in such bill has no other means of stopping the sale, and that by such sale irreparable damage will result to him. *Lowette v. Longmire*, 14 Ark. 399; *Murphy v. Harbison*, 29 Ark. 340; *Stillwell v. Olver*, 35 Ark. 184; *Jacks v. Bigham*, 36 Ark. 481.

In *Nichols v. Claiborne*, 39 Tex. 363, it was held that a sale of exempt property might be restrained by the judgment debtor. But this seems to be contrary to principle. And it is difficult, if not impossible, to conceive of any state of circumstances which would call for the interference of a court of equity, since adequate relief may generally be had, either by superseding the sale under statutory provisions, or by an action at law. 1 High, Inj. § 122; *Baxter v. Baxter*, 77 N. C. 118.

Granting that Norwood was prevented, by causes over which he had no control, from giving the required notice and filing his schedule before the day of sale, yet he had only to apply to the judge of the circuit court—the same judge who granted the preliminary injunction—by petition setting forth the circumstances; and, if his excuse was deemed sufficient, it would have been the duty of the circuit judge to order further proceedings under the execution to be stayed until the debtor's claim of exemption could be made and determined. Mansf. Dig. § 2988.

The decree is reversed, and the bill dismissed.

WILLIAMSON, Adm'r, etc., v. WHITTINGTON and others.

(Supreme Court of Arkansas. May 7, 1887.)

ADMINISTRATORS—LIABILITY—CLAIMS—ACCOUNTING.

Where it appears that the creditor of an estate had been dead for two years at the time the administrator alleged in his account that he paid his claim; that the claim had not been assigned; that the claimant had not been through bankruptcy; and that no letters had, prior to the alleged date of payment, been taken out on his estate,—the administrator, and the surety on his bond, are liable to the personal representatives of the claimant for the full amount, with interest, although the administrator had been allowed credit for the claim in the final settlement of the estate.

Appeal from circuit court, Drew county. In chancery.

Bill to surcharge and falsify.

Wells & Williamson, for appellant. *Harrison & Harrison*, for appellees.

SMITH, J. A creditor of Meyer Meyer, deceased, complained of certain fictitious credits allowed to the administrator in the final settlement of said estate. The administrator and his surety, who was joined with him as defendant, specifically denied the frauds that were charged; and there was no proof, at the hearing, leading to any satisfactory inferences whether the charges were well or ill founded. The bill was therefore dismissed, and, under the meager state of the proofs, the correctness of that decree depends on the pleadings.

The administrator in his account had claimed, and been allowed by the probate court, a credit of \$235, amount paid on Augustus Meyer's debt against the estate, the same being his dividend or *pro rata* share of the assets of the insolvent estate. The bill alleged that no such payment had ever been made, either to the creditor himself, or to any person for him; that Augustus Meyer had, in fact, been dead for two years before Whittington had administered upon the estate of Meyer Meyer, and there had been no administration upon Augustus Meyer's estate until the plaintiff had qualified, many years after the confirmation of said settlement by the probate court. The answer admitted that Augustus Meyer had died in 1867, and that administration had not been granted upon his estate until 1883, when the plaintiff's letters had been issued; also that administration *de bonis non* had been taken out by Whittington upon the estate of Meyer Meyer in 1869, and that his final account with that estate had been filed and approved in 1871. The answer also averred that Augustus Meyer's dividend had been paid, either to his assignee, or to some one legally authorized to receive it. But, according to the admitted facts, no one was in existence, during the time of Whittington's administra-

tion, who could have given a valid receipt for this dividend; and as there is neither allegation nor proof that the claim had passed into the hands of an assignee, either by the act of Augustus Meyer or by operation of law, as by his bankruptcy, the presumption is that the claim still belongs to his estate, and that it is wholly unsatisfied.

The decree is reversed, and judgment will be entered here against Whittington, and his surety, William H. Rankin, for \$235, and interest at the rate of 6 per cent. per annum from the nineteenth of July, 1871.

CITY OF ARKADELPHIA v. WINDHAM.

(*Supreme Court of Arkansas. May 7, 1887.*)

MUNICIPAL CORPORATIONS—DEFECTIVE STREETS—LIABILITY.

Although it is the duty of incorporated towns and cities in Arkansas to keep their streets in repair, yet no statute, expressly or by implication, makes them liable to a private action by an injured party for damages sustained by reason of a failure to discharge the duty. In the absence of such a statute, they are not liable.¹

Appeal from circuit court, Clark county.

Action by Windham, appellee, against the city of Arkadelphia, appellant, to recover \$110 as damages for injuries sustained by his horse and wagon by reason of a defective railway crossing within the corporate limits of the said city. There was a demurrer to the complaint, which was overruled. The case was tried to a jury, which returned a verdict for the plaintiff for \$116, on which there was a *remittitur* of \$6, and a judgment for the plaintiff for \$110. The city thereupon took this appeal.

Crawford & Crawford, for appellant.

BATTLE, J. It is the duty of incorporated towns and cities of this state to keep their streets in repair, but no statute, expressly or by implication, makes them liable to a private action by an injured party for damages sustained by reason of a failure to discharge the duty. In the absence of such a statute, are they liable to a civil action by an individual for such damages? Upon this question the authorities are not agreed, and differ as to where the weight of authority lies. But, while they differ in this respect, they are almost unanimous in holding that an action cannot be maintained against counties or parishes, unless authorized by statute, for damages sustained through their neglect to keep their bridges and highways in repair, although the duty of doing so is clearly enjoined upon them by law, and they have authority to collect taxes, or make adequate assessments for that purpose. It was so held by this court in *Granger v. Pulaski Co.*, 26 Ark. 37. The reason of this rule is they are a part of the machinery of the state government, and their functions are wholly of a public nature, and their creation a matter of public convenience and governmental necessity. The reason for the application being the same, it is difficult to understand why this rule does not apply and should not be enforced as to incorporated towns and cities in respect to streets; for, like counties, they are a part of the machinery of the state, and are its auxiliaries in the important business of municipal rule and internal administration, and their functions are almost wholly of a public nature. Like counties, their functions, rights, and privileges are under the control of the legislature, and may be changed, modified, or repealed, as a general rule, as the exigencies

¹As to the duty of municipal corporations to keep their streets and sidewalks in good repair and safe condition, and their liability in damages for injuries caused by the failure to perform such duties, see *Pomfrey v. Village of Saratoga Springs*, (N. Y.) 11 N. E. Rep. 43, and note; *Hubbell v. City of Yonkers*, (N. Y.) 10 N. E. Rep. 868; *Bishop v. Township of Schnylkill*, (Pa.) 8 Atl. Rep. 449; *City of Houston v. Isaacs*, (Tex.) 3 S. W. Rep. 698; *Triese v. City of St. Paul*, (Minn.) 32 N. W. Rep. 857; *Shippey v. Village of Au Sable*, (Mich.) Id. 741; *Armstrong v. Incorporated Town of Ackley*, (Iowa.) Id. 180.

of the public service or the public welfare may demand. Like counties, they can sustain no right or privilege, or their existence, upon anything like a contract between them and the state, because there is not and cannot be any reciprocity of stipulation, and their objects and duties are wholly incompatible with everything of the nature of a compact. The duty of keeping in repair the public highways in their respective limits is imposed on both for the benefit of the public, without any consideration or emolument received by either. Before the incorporation of the town or city, the county was charged with the duty of keeping its highways in repair. When the town or city becomes incorporated, that duty is transferred to the town or city,—from one governmental agency to another. The object, purpose, reason, and character of the duty are the same in both cases. This being true, there can be no reason why the town or city shall be any more liable to a private action for neglect to perform this duty than the county previously was, unless the statute transferring the duty clearly manifests an intention in the legislature to impose this liability.

As said by Mr. Justice McIVER in delivering the opinion of the court in *Young v. City Council of Charleston*, 20 S. C. 119: "We find it not only difficult, but absolutely impossible, to perceive any good reason why a person who sustains an injury by reason of a defect in a highway just beyond the corporate limits of a city or town, has no right of action against the public authorities charged with the duty of keeping such highway in repair, while such person would have a right of action if the injury he sustained had been received within the corporate limits of such city or town. The duty of establishing and keeping in repair the public highways, whether within or without the corporate limits of a city or town, is a public duty, and whether such duty is imposed upon one set of public officers or another cannot make any difference in this respect. The character of the duty imposed in both cases is the same, the result to the injured party of a failure to perform such duty is the same, and we are unable to see why the liability should not be the same. The public generally, as well as the individuals composing the public, have the same, and perhaps a greater, interest in having the public highways outside as well as those within the limits of incorporated cities or towns kept in good repair; for, if an injury should be sustained in a remote or unfrequented part of the public highway, the consequence might be much more serious than if the same injury was sustained within the corporate limits of a city or town where relief could be readily obtained."

We think the streets of a town or city, like all other roads, are public highways; that the duty of keeping them in repair is a duty to the public, not to private individuals; and that no civil action arises from an injury resulting from a neglect to keep them in repair. In the absence of a statute there is no difference between the liability of an incorporated town or city and a county in such cases. Such a distinction would be contrary to every principle of fairness, reason, and justice. We are sustained, in our view, by the following, among other, authorities: *Hill v. Boston*, 122 Mass. 357; *Detroit v. Blakeby*, 21 Mich. 106; *Young v. Charleston*, 20 S. C. 116; *Navasota v. Pearce*, 46 Tex. 525; *Pray v. Jersey City*, 32 N. J. Law, 394; *Winbigler v. Los Angeles*, 45 Cal. 36; *Oliver v. Worcester*, 102 Mass. 499; *Mower v. Leicester*, 9 Mass. 250; *Mitchell v. Rockland*, 52 Me. 123; *Hyde v. Jamaica*, 27 Vt. 443; *Detroit v. Putnam*, 45 Mich. 265, 7 N. W. Rep. 815; *French v. City of Boston*, 129 Mass. 592. In the first four cases named, the question is so fully and ably discussed, and the English and American authorities so fully and satisfactorily reviewed, that it would be a work of supererogation to attempt to add to what is there said.

The judgment of the court below must therefore be reversed, and the cause remanded, with directions to sustain appellant's demurrer to the complaint, and for further proceedings.

Ex parte BRANDON.

(Supreme Court of Arkansas. May 14, 1887.)

HABEAS CORPUS—WHEAT OPEN ON—JURY TRIAL.

Where the judgment exhibited with the petition for a writ of *habeas corpus* shows a conviction of an offense of which the mayor's court had unquestioned jurisdiction, the court will not consider the question whether the petitioner, who was charged with the violation of the ordinance of an Arkansas city of the second class, was entitled to a trial by jury. The application cannot be made to perform the function of an appeal or writ of error, in correcting errors and irregularities at the trial.

Appeal from circuit court, Phillips county. *Habeas corpus.*
Stephenson & Trieber, for appellant.

SMITH, J. Brandon was charged in the mayor's court of Helena with disorderly conduct; pleaded not guilty; demanded a jury trial, which was refused; and was then tried by the mayor, convicted, and fined. Failing to pay the fine, he was taken into custody by the city marshal; whereupon he applied by petition to the circuit court for the writ of *habeas corpus*; but his prayer was denied, and he has appealed.

The question that is sought to be presented is whether a person charged with the violation of a city ordinance is entitled to a trial by jury in the police court of a city of the second class. But an application for *habeas corpus* cannot be made to perform the function of an appeal or writ of error, in correcting errors and irregularities at the trial. To authorize the judge of the superior courts to interfere, and discharge a convicted prisoner in this summary fashion, the sentence must be a nullity, or the court which imposed it must have been without jurisdiction. *Ex parte Watkins*, 3 Pet. 193; *Ex parte Parks*, 98 U. S. 18; *Ex parte Mason*, 105 U. S. 696; *Ex parte Carll*, 106 U. S. 521, 1 Sup. Ct. Rep. 535; *Ex parte Yarbrough*, 110 U. S. 651, 4 Sup. Ct. Rep. 152; *Ex parte Fisk*, 113 U. S. 718, 5 Sup. Ct. Rep. 724; *Ex parte Wilson*, 114 U. S. 417, 5 Sup. Ct. Rep. 985; *State v. Glenn*, 54 Md. 572. Section 3570 of Mansfield's Digest enacts, among other things, that it shall be the duty of the judge forthwith to remand the prisoner, if it shall appear that he is held in custody by virtue of the final judgment of any competent court of civil or criminal jurisdiction. And our previous decisions have conformed to the principle embodied in this statute. *Ex parte Jones*, 27 Ark. 349; *Ex parte Stow*, Id. 354; *Ex parte Martin*, Id. 467; *Ex parte Jackson*, 45 Ark. 158.

The judgment exhibited with the petition shows a conviction of an offense of which the mayor's court had unquestioned jurisdiction. And if in the progress of the trial, or in the proceedings preliminary to the trial, errors were committed, to the prejudice of the substantial rights of the prisoner, these errors must be brought for review before an appellate court in the regular way. *Habeas corpus* is not a proper proceeding to test the validity of a conviction where the prisoner has been denied a jury. The remedy was by appeal to the circuit court. Affirmed.

CLARK CO. v. HUIE.

(Supreme Court of Arkansas. May 14, 1887.)

POOR AND POOR LAWS—LIABILITY OF COUNTY—FUNERAL EXPENSES

There is no distinction in regard to a county's liability for funeral expenses and its liability for services rendered to the indigent person in his life-time. In both cases a previous adjudication of poverty is necessary to fix that liability.

Appeal from circuit court, Clark county.
Crawford & Crawford, for Clark county, appellant. The appellee, *pro se.*

SMITH, J. Hule's claim for \$20 against the county for the burial of an alleged pauper was allowed by the county court. Upon appeal by a citizen and tax-payer, the cause was tried in the circuit court, without a jury, upon the following agreed statement of facts: "That the plaintiff, as an undertaker, furnished a coffin, and assisted at the burial of one Marion York, for which this account is rendered against the county. That before the coffin was furnished, and the services rendered, the judge of the county court, *in vacation*, told the plaintiff that, if the law would authorize him in doing so, he would allow the claim when the county court should meet. That Marion York was a poor man, who died in destitute circumstances, without means to defray the expenses of his burial. That said York was at the time of his death, which occurred in December, 1885, a resident of Clark county. That the records of the county court of Clark county show that the said York was never adjudged a pauper by the county court, and that his name is not now, and never was, on the list of paupers for the said county."

The defendant moved the following declarations of law: "In order to charge the county for the burial expenses of Marion York, a resident of Clark county, it must appear from the records of the county court that the said Marion York had been duly and legally declared a pauper by the county court." "The plaintiff cannot recover against the county for a coffin furnished, or services rendered, to a destitute person, where no contract has been entered into with a person or persons authorized to bind the county. The law will deem all such things furnished and services rendered as gratuitous." "The county judge has no authority to adjudge an indigent person a pauper, or to contract for his support, medical treatment, or burial expenses, except in term-time, or while he is holding a county court."

The first two of these declarations were rejected, and the last was modified by striking out the words "burial expenses;" and the claimant had judgment.

The defendant's propositions express accurately the law applicable to the case. *Lee Co. v. Lackie*, 30 Ark. 764; *Prewett v. Mississippi Co.*, 38 Ark. 218; *Cantrell v. Clark Co.*, 47 Ark. 239, 1 S. W. Rep. 200. There is no distinction in regard to the county's liability for funeral expenses and its liability for services rendered to indigent persons in their life-time. In both cases a previous adjudication of poverty is necessary to fix that liability.

Reversed, and a new trial ordered.

COMMONWEALTH v. GIBSON and others.

(Court of Appeals of Kentucky. May 23, 1887.)

LIMITATION OF ACTIONS—ADVERSE POSSESSION—PAROL GIFT OF LAND.

If one enters upon land by the owner's mere *permission*, expecting merely that he will give it to him, such permission, and entry under it, will not constitute a hostile holding; but where there is an *unconditional parol gift* of the land, accompanied by an actual possession of 15 years or more, with claim of ownership, the donor cannot recover the land, although the donee may have entered expecting that the donor would *in futuro* convey or devise the land to him.

Appeal from circuit court, Henderson county.

This action was brought by the commonwealth of Kentucky against James W. Gibson and Mrs. Martha Robinson, his daughter, to subject to the payment of a judgment rendered against said Gibson a certain tract of land consisting of 111 acres, on which the daughter, Mrs. Robinson, resided and claimed to own. Judgment for defendants. The commonwealth appeals.

John Young Brown, *Montgomery Merrill*, and *A. T. Dudley*, for appellant. *Ball & Dorsey* and *Yeaman & Lockett*, for appellee.

HOLT, J. The testimony in this case shows that James W. Gibson, Sr., gave by parol to his son, Wiley Gibson, the 111 acres of land in contest in

1862; and that he, in like manner, gave to his daughter, the appellee Martha, the Pritchett land; and when she married, in January, 1864, told her to take possession of it. The son took possession of his land when it was thus given to him, and lived upon it from that time until December, 1865, when, at the instance and by the request of the father, the son and daughter verbally exchanged farms, Martha thus acquiring the land now in contest; and from the time she thus obtained it until this suit was brought, in August, 1879, to subject it to the father's debt, and ever since has been, in the actual possession of it either in person or by tenant. During the time the brother was in possession, he claimed, used, and occupied it as his own, and paid the taxes on it; and this is true of the appellee Martha Robinson ever since she acquired it of him. During all this time the father exercised no control over it in any way. The daughter has improved it to a very considerable extent.

It is urged that the father only *expected* or *intended* to give these lands to these children; and that, as there is some testimony that the appellee Martha Robinson expected him to make a title to her to the land, therefore her possession was amicable to him, and the plea of limitation by her unavailable. It is manifest from the father's own testimony, who is a witness against her, that he made the gift; and this also clearly appears from her own and other evidence. It is equally certain that the possession, first of the brother, and then of the appellee Martha, has been actual and uninterrupted from 1862 up to the bringing of this action, in August, 1879, a period of more than 15 years. Unless, therefore, the law says that under the state of case named she cannot rely upon the possession as adverse, she is invested with a possessory title, which prevents the land from being subjected to the judgment against her father. It is true that the legal title to the land is yet vested in him, and that there is no written evidence of the gift; but whether a holding is adverse or amicable depends upon the character of it in point of fact.

In the celebrated case of *Taylor v. Horde*, 1 Burrows, 60, LORD MANSFIELD laid down the broad rule that disseizen is a fact to be found by the jury, and it has been followed in this country. Thus ordinarily the possession of one joint tenant is that of all; but if that one openly denies the right of his co-tenant, and is in possession of and claiming the entire property himself, it is so no longer, but adverse. A tenant or *quasi* tenant may by his act not only terminate the relation of landlord and tenant, but render his possession adverse. *Morton v. Lawson*, 1 B. Mon. 46. The moment he disclaims to hold as tenant a right of action accrues against him. So, too, an entry, although under a parol contract, may be of such a character as to operate as a disseizin, and the possession ripen into a title. If one holds land as a purchaser, although under a parol contract, yet it is as his own, and not as the land of the vendor. If the contract of purchase be executory, and the purchaser be holding as a *quasi* tenant, yet he may hold adversely *in fact*. *Moore v. Webb*, 2 B. Mon. 282. If one in fact enters under a purchase or a gift, although it may be verbal, and holds the land by actual open possession, claiming it as his own, such possession is adverse, and a right of action at once accrues to the vendor or donor. The moment such possession begins, the owner is disseized. It is immaterial whether the entry was by the owner's consent or not. If, after entry, the newcomer claiming the land as his own, and the owner has notice of it, either actual or constructive, then there is a disseizen. Whether it has occurred, is a question depending upon circumstances; but, if there is an exclusive occupancy by the newcomer with a use of the land as his own in hostility to the right or title of the owner, then there is an actual ouster and a consequent disseizen. *Medlock v. Suter*, 80 Ky. 101.

The cases of *Speers v. Sewell*, 4 Bush. 239; *Pragoff v. Flood*, 7 Ky. Law Rep. 636, and *Fite v. Orr's Assignee*, 1 S. W. Rep. 582, (opinion by this court, November, 1886,) relied upon by the counsel for the appellant, are not in con-

flict with this view. They merely decide that a vendee or a donee under a parol contract, although in possession, cannot use that contract and such possession as a defense to an action by the vendor or donor to recover the land. This is because the statute of frauds prevents him from so doing. There must be a written memorial of the contract, signed by the party to be charged, to enable the other contracting party to hold the land by virtue of the contract. But a different question is presented when a vendee or donee has taken possession of land under a verbal contract, saying to the vendor or donor and all the world: "This is *my* land, and not yours," and has so held it for 15 years or over. The moment the vendee or donee does this, the vendor or donor has a right to sue for the land, and hence the adverse holding then begins; and, if it continues for the statutory period, this possession ripens into a possessory title. The claimant recognizes no better title than his own, and it appears *quo animo* the possession is held.

The appellee Martha Robinson is not suing for the legal title, or seeking to enforce any parol contract, but is relying merely upon the adverse possession, which, as the testimony shows, has continued for so long a period as to bar a recovery by James W. Gibson, Sr., and hence his creditor cannot subject it. If one enters upon land by the owner's mere permission, *expecting* merely that he will give it to him, then such a possession is not a hostile holding; but where there is an unconditional parol gift of it, accompanied by an actual possession of 15 years or over with claim of ownership, the donor cannot recover it, although the donee may have entered expecting that the donor would *in futuro* convey or devise the land to him.

Wood on Limitation of Actions, p. 539, says: "An entry under a parol gift of certain lands, the extent of which is definitely fixed, is adverse to the donor, and ripens into a title after the lapse of the requisite statutory period. There are cases in which a contrary doctrine is held, but the weight of authority, as well as common sense and the principles applicable to adverse possession, seem to support the rule as stated, because a person entering under such circumstances enters as owner, and occupies under a claim of ownership, and every attribute requisite to acquire a title by adverse possession exists." The writer is supported by the cases of *Steel v. Johnson*, 4 Allen, 425, and *Outcalt v. Ludlow*, 32 N. J. Law, 239, and in fact the very question now presented was passed upon by this court in the case of *Chamberlain v. McKinney*, 6 Ky. Law Rep. 365, (decided November 1, 1884.)

Judgment affirmed.

COX v. HOUSTON & T. C. R. Co.

(Supreme Court of Texas. May 6, 1887.)

1. SURVEYS AND SURVEYORS—COUNTIES.

Texas act of 1866, which provides that Young and other counties shall be attached to Jack county for judicial and other purposes, and Hardeman and other counties shall be similarly attached to Montague county, did not have the effect to attach Hardeman county to Jack county, for surveying or other purposes, even though by Young county the legislature meant Young land-district, and Hardeman county was a part of that land-district.

2. SAME—CERTIFICATES—PRESUMPTION.

The Texas act of 1858 requires that the surveyor of a county not previously a separate land-district shall not receive any certificate before procuring a certified copy of all files, applications, and locations from the surveyor's office of the land-district to which said county belongs, and filing the same in his office. *Held*, that this act is intended to apply to an organized county newly formed into a land-district which had before formed part of a larger district, and not to a county transferred from one district to another. But, to whatever case the act is applicable, the presumption is that the surveyor had complied with the law, and procured the proper papers, and the burden is on the party objecting to the survey to show the contrary.

3. OFFICERS—DE FACTO—SURVEYORS.

If a county surveyor of one county makes surveys in another county without authority of law, he will not thereby become the *de facto* surveyor of the latter county, even if his acts receive the sanction of the general land-office.

Appeal from Travis county.

A. M. Carter and A. M. Jackson, Jr., for appellant. *H. D. Prendergast and D. H. Hewlett*, for appellee.

WILLIE, C. J. This is a controversy as to the title to 640 acres of land in Hardeman county. The appellant claims it under a location and survey made by the surveyor of Jack land-district, November 10, 1874. The appellee claims it under a location made by the same surveyor, September 28, 1872. There is no question as to the right of this surveyor to make surveys in Hardeman county at the time the appellant's certificate was located. The important question is as to his authority to do so when the survey was made for the appellee. The court below held that he did possess that authority, and gave judgment for the appellee, and this judgment is before us for review on appeal. The appellee claims also that the above officer was on September 28, 1872, the *de facto* surveyor of Hardeman county, as he had possession of its land records, and was in the habit of making surveys in that county, and these surveys were generally recognized as legal by the commissioner of the general land-office; and the legislature afterwards directed patents to issue saving the intervening rights of third parties. The land in controversy was never patented upon either survey. If the surveyor of Jack land-district had no authority to survey land in Hardeman county on September 28, 1872, then the appellee's survey was void, and the land open to location and survey when the appellant's certificate was laid upon it. The act of 1866, under which the court below held that Benson, the surveyor of Jack county, was the lawful surveyor of Young county land-district at the time the survey was made for the defendant, and was authorized to make that survey, was entitled "An act attaching certain counties therein named to the counties of Jack and Montague for judicial and other purposes." The first section provides that the counties of Young, Throckmorton, Haskell, Knox, Baylor, and Archer shall be attached to the county of Jack for judicial and other purposes. The second provides that the counties of Clay, Wichita, Wilbarger, Hardeman, and Greer shall be attached to the county of Montague for judicial and other purposes.

It is claimed by the appellee that the *other purposes* mentioned in the statute include the survey of lands lying in such attached counties by the surveyor of the county to which they are attached. We do not think it necessary for a proper disposition of the present case that this proposition should be either discussed or controverted. Admitting that the expression "other purposes" includes the purpose of making surveys, what officer, under this act, was entitled to survey the land in controversy? The land is admitted to lie in the county of Hardeman. The act attaches the county of Hardeman to Montague and not to Jack county for judicial and other purposes. It must follow, therefore, upon the appellee's own construction, that the surveyor of Montague was the officer who under this act was authorized to survey lands in the county of Hardeman. But it is said that Hardeman county was part of Young land-district, and as such was, with the balance of that district, attached by this act to the county of Jack. In support of this proposition we are referred to articles 3822 and 3854 of our Revised Statutes, which were not in force at the time the rights of the respective parties accrued; but they are, in some respects, re-enactments of the statutes of 1860 and 1858 upon the same subject. The first-named of these statutes provides that "any organized county which may fail or refuse to organize as a separate land-district," according to the provisions of an act recited in the caption, "shall continue to form a part of the land-district to which it was formerly attached until it

shall have complied with the provisions of the aforesaid act." The second required that the surveyor of a county not previously a separate land-district shall not receive or file any certificate before procuring a certified copy of all files, applications, and locations therein from the surveyor's office of the land-district to which said county belongs, and file the same in his office for the inspection of any one interested therein. We cannot see what either of these provisions has to do with the question under consideration. Neither Young nor Hardeman county is shown to have been so situated as to make these provisions applicable to either of them at any time down to the date when the act of 1866 took effect. But if they had lost their rights as separate land-districts, and continued to form parts of Jack district, the legislature had the right to sever either of them from that district, and attach it to another. At the time the act of 1866 was passed, the boundaries of Young and Hardeman counties had been defined by statute, and they were distinct from each other, each having 900 square miles of territory. This territory was distinctly described in the statute, and could be easily ascertained. It is therefore a fair interpretation of the act to hold that, when the legislature said Young county, it meant the county thus defined, and not the entire district. Besides, in passing the act, the legislature had judicial purposes more particularly in view, and it was more likely, in such case, to provide for counties than for entire land-districts. But admitting that by Young county the legislature meant not the county proper, but the entire land-district, still, under well-known rules of construction, the act attaches Hardeman to Montague and not to Jack county. Statutes must be construed, if possible, as to give effect to all their provisions. Had the act stopped with its first section, and Young county meant Young land-district, we might hold that the entire district was attached to Jack county. But, as the act afterwards proceeds to attach a well-defined portion of Young district to Montague, to give effect to both provisions we must treat the latter as an exception to the first, and give all of Young district to Jack county, except that part laid off by statute for the county of Hardeman, and attach that to Montague. We can conceive of no construction that can be given to the statute which will attach Hardeman county to Jack for surveying purposes. The appellee contends that its adversary should have shown that the surveyor of Montague county had complied with the law we have recited as to obtaining maps, etc., of the lands in Hardeman. The act of 1858, making this provision, seems intended for an organized county newly formed into a land-district, which had before formed part of a larger district, and not to a county transferred from one district to another. But, if applicable to a case like the present, the presumption would be that the surveyor had complied with the law, and procured the proper papers, and the burden was on the appellee to show to the contrary. We think that, at the time the appellee's certificate was located and surveyed, this duty could not have been performed by the surveyor of Jack county, and the location and survey were void.

It is claimed that this officer was at least the *de facto* surveyor of Hardeman county. But to make one a *de facto* officer, he must have some colorable right to the office,—some appearance of right which would lead the public, without inquiry, to suppose him to be the officer he assumes to be. *Franco-Texan Land Co. v. Laigle*, 59 Tex. 344; *State v. Carroll*, 38 Conn. 449. Thus, had the statute made the surveyor of Jack county the surveyor of Hardeman also, and the person claiming to exercise that office had been generally recognized and reputed to be the surveyor of Jack county, and his acts as such had been acquiesced in by the public upon that supposition, he would have been the *de facto* surveyor, though his election had been irregular, or he had failed to take the oath of office, or the law under which the election was held should afterwards be declared unconstitutional. But when there was upon the statute book a law declaring that this officer should not

make surveys in Hardeman county, or, what was equivalent thereto, that another officer was alone authorized so to do, no usurpation of that authority by the surveyor of Jack county in the teeth of the statute, which the public was bound to know, could, though generally acquiesced in, give him the character of a *de facto* surveyor of Hardeman county. Nor could the sanction of the general land-office validate his acts. The commissioner had no power prospectively to authorize his making the surveys, and it follows, of course, that he could not give effect to them by a subsequent ratification. The power to ratify implies the power to authorize. It is doing retrospectively what might have been done in advance of the performance of the act. *Morris v. State*, 62 Tex. 741. The legislature could validate the surveys, and issue the patents upon them, because it had power at that time to grant the land to the owners of the certificate, no matter how illegally the surveying might have been done. But it could not ratify so as to interfere with the rights of other parties to the land accruing previous to the passage of the act by which the ratification was effected. *Wright v. Hawkins*, 28 Tex. 452. It made no attempt to do this; but, on the contrary, expressly saved the rights of all such parties, of whom the appellant was one. The fact that such an act was passed is, however, significant. It was equivalent to a legislative declaration that the surveys were not made in accordance with law, and hence needed an act of the legislature to make them valid.

We think the court below erred in rendering judgment for the appellees, and for this error the judgment will be reversed, and here rendered for the appellant for a recovery of the land in controversy, and of the costs of this and the lower court.

STEPHENS and others v. SHAW and others.

(Supreme Court of Texas. May 10, 1887.)

1. HUSBAND AND WIFE—SEPARATE ESTATE—CONVEYANCE—COMMUNITY PROPERTY.

A married woman, being entitled to an interest, as separate estate, in the community real estate left by her mother, relinquished it to her brother by a writing which she signed, but did not acknowledge, and to which her husband was not a party. Held, that the interest inherited by a married woman from the community estate of her deceased father or mother is not an exception to the Texas statute that allows a married woman's separate estate to be conveyed only by the joint deed of husband and wife, accompanied by a certificate of the privy examination and acknowledgment of the wife. The relinquishment does not bar her claim to the interest inherited from her mother, but she must account for the money which she received as the consideration for executing the relinquishment.

2. SAME—FAMILY SETTLEMENT.

Nor can the relinquishment be upheld as a family settlement. It is a rule of equity that, in the absence of fraud, a family settlement will be upheld; but this implies that the settlement sought to be maintained in force must be one which the party executing it was capable of making in the mode in which it was actually executed. The rule cannot be applied where its effect would be to abrogate the statute which directs the manner in which a married woman can convey her title to real estate.

Appeal from Johnson county.

C. W. Jordan, for appellants. Brown, Ramsey & Crane, for appellees.

GAINES, J. The property in controversy in this suit belonged to the community estate of Joseph Shaw and Sallie Shaw, who were husband and wife. Sallie Shaw died in July, 1877, leaving her husband surviving, and the following-named children: Zephia Stephens, Nancy Dunn, James M. Shaw, and Hugh Shaw. She also left surviving her Joanna Walker, James Walker, and Sarah D. Anderson, her grandchildren, and the following named great-grandchildren: Augustus Reynolds, Allie Reynolds, and Emma Reynolds. All

the grandchildren and great-grandchildren above named were descendants of a daughter of Sallie Shaw, whose death preceded that of her mother.

This suit was instituted by Zelfhia Stephens and her husband, G. W. Stephens, Joanna Walker, James Walker, Sarah Anderson and her husband, A. D. Anderson, and by Augustus, Allie, and Emma Reynolds, as minors suing by next friends, against Nancy Dunn, James M. Shaw, and Hugh Shaw, to recover certain interests in the property described in the petition. Zelfhia Stephens claimed one-fifth of her mother's interest, or one-tenth of the whole, and the other plaintiffs who were grandchildren of Sallie Shaw claimed each one-fourth of one-fifth of the grandmother's interest, and the great-grandchildren each one-third of one-fourth of one-fifth of the same.

The suit was brought and was tried in the court below before the decision of this court in the case of *Burgess v. Hargrove*, 64 Tex. 110, which held that, upon the death of the husband or wife, the descendants of such decedent, other than the children, inherited no part of the community estate. Upon the trial the attorneys of all parties, and the court, proceeded upon the theory that the grandchildren and great-grandchildren were entitled to the share which would have descended to the deceased daughter if she had been living at the death of her mother. It is now clear that they have no interest in the property as heirs of Sallie Shaw, and can in no event recover. It is therefore unnecessary to consider whether any error has been committed as to any of the appellants except Mrs. Stephens. She is the only party complaining of the judgment who has any interest in the property sued for, and her case will alone be considered.

The plaintiffs set up no claim to any share of the father's interest in the estate. How defendants became entitled to his entire half of the property does not appear in the record. As against Mrs. Stephens, defendants alleged that in 1878 their father paid her about \$1,100 in full of her interest in her mother's estate; that this was the full value of that interest; and that, at the time of the settlement, she executed and delivered to him a receipt acknowledging the payment of the money in satisfaction of her claim, and "releasing and relinquishing all of her right, title, and interest in and to the said estate" to her father. This instrument was signed by the wife alone, and not acknowledged. If the husband had joined in it, and it had been acknowledged by the wife, as the statute requires for the conveyance of real estate belonging to married women, it would have been, to all intents and purposes, a conveyance of her interest to her father, and could only have been set aside by proof of fraud on the part of the grantee. But with every disposition to uphold an adjustment of this character as a family settlement, under well-established principles of law we can neither hold that this instrument operated as a conveyance, or that the payment of the money, under the circumstances, was an extinguishment of Mrs. Stephens' interest in the estate. Her claim was not a mere right to a sum of money equal to a certain part of the value of the property left by her mother, but it was a title in fee-simple, either legal or equitable, in an undivided interest in the property itself. The property in question is real estate, and her interest in it is her separate property, and there is nothing in our laws which makes an interest inherited by a married woman from the community estate of her deceased father or mother an exception to the rule of the statute that a married woman's separate estate can only be conveyed by the joint deed of the husband and wife, accompanied with a certificate of the privy examination and acknowledgment of the wife. The instrument in question, therefore, did not operate as a conveyance of Mrs. Stephens' interest in the property.

If the showing made by Joseph Shaw had disclosed a community estate consisting both of lands and of money, and if the daughter had accepted a part or the whole of the money as her portion, this might probably have been treated as a partition not required under our decisions to be in writing, and

as such might have been held a final adjustment of her rights. But such is not the case disclosed by the record, and we are not called upon to determine that question.

It is a rule of equity that in the absence of fraud, and of a failure to make a fair disclosure on the part of the party who has obtained an advantage in a family settlement, such a transaction will be upheld; but this implies that the party against whom the settlement is sought to be maintained in force must be one which such party was capable of making in the mode in which it was actually executed. The rule cannot be applied where its effect would be to abrogate the statute which directs the manner, and the only manner, by which a married woman can convey her title to real estate.

We are of opinion, therefore, that the appellant Zephia Stephens was not concluded as to her rights in the property in controversy by the payment made to her by her father. But we think, however, that Mrs. Stephens cannot recover her interest in the estate of her mother without accounting to those who have become entitled to the father's interest for the money which she received in the settlement with him, with the interest thereon. *Burleson v. Burleson*, 28 Tex. 383.

The charge of the court was not in accordance with the law as stated in this opinion, and is assigned as error. The judgment will accordingly be reversed. The other questions raised by the assignment of error will not likely arise upon another trial, and therefore will not be considered. Many of them relate to the claims of the appellants, who were grandchildren of Sallie Shaw, who, as we have seen, have no rights in the property in controversy.

For the errors pointed out the judgment will be reversed, and the cause remanded.

BOHRBROUGH and others v. LEOPOLD and others.

(Supreme Court of Texas. May 10, 1887.)

1. ATTACHMENT—BOND—SUFFICIENCY.

Plaintiff obtained a writ of sequestration against the property of defendant, and executed the bond required by the Texas statute, making it payable to certain named parties, but without describing them as defendants, though they were in fact such. The bond also recited that it was upon condition that plaintiffs should "pay to the defendants all such damages," etc., without stating who the defendants were. *Held*, that this was not a sufficient bond under the statute which requires that it shall be payable to the defendants in the action.

2. SALE—FRAUD—INNOCENT PURCHASER.

The owner who is induced by fraud to part with the possession, and not the title, of his goods, may recover them even from one who has paid value for them without notice of the owner's right; but if the owner be induced to sell the goods, parting with the title as well as possession, by the fraud of another, he cannot recover them from a *bona fide* purchaser for value, into whose hands they passed from the fraudulent vendee.

Appeal from Grayson county.

Bryant & Dillard and *Hare & Head*, for appellants. *W. W. Wilkins* and *Woods & Cunningham*, for appellees.

GAINES, J. We think the court erred in overruling the motion to quash the writ of sequestration on the ground of the insufficiency of the bond. In *Schrimpf v. McArdle*, 13 Tex. 368, an attachment bond very similar to the one before us was held defective because it did "not correctly describe the parties or the suit." It is said by a recent text writer that the plaintiff in an attachment bond "should insert what is necessary to identify the bond with the suit." Wap. Attachm. 118. The writ of sequestration takes the property from the party in possession, to be held, if not replevied, during the pendency of the action, as is the case with the writ of attachment. The remedies are equally stringent, and no reason is seen why the same strictness

should not apply to the procedure in the one case as in the other. In the bond under consideration the title of the suit is defectively stated in the margin. The name of the plaintiff's firm is given, but the place for the names of the defendants is left blank. The bond is made payable to J. E. Rohrbough and I. Franklin, without describing them as defendants; but is conditioned that plaintiffs "will pay to the defendants in said suit all such damages," etc., without stating who the defendants are. This gives rise to the conjecture that Rohrbough and Franklin are the defendants, but the fact does not clearly appear from the face of the bond. Tested by itself, the bond does not identify the suit, and fails to show that it complies with the statute in the essential requirement that it must be made payable to the defendants.

It is complained, also, that the court erred in admitting the testimony of defendant Franklin, as to an agreement made by him with Leon and H. Blum immediately after he executed the assignment, by which the latter promised to buy the goods if practicable, and, after getting their money out of them, to let him continue business with goods in their name, he receiving the profits. This occurred very shortly after the purchase from plaintiffs, and tended to show that such an arrangement may have been contemplated by Franklin at the time he purchased, and thereby tended to establish plaintiff's allegations of fraud and misrepresentation. For this purpose the testimony was admissible. *O'Neal v. Will's Point Bank*, 2 S. W. Rep. 754. The court gave a special instruction upon this evidence, so that the jury could not have misconstrued the purpose of its introduction.

The seventh and fourteenth assignments of error raise the question whether the plaintiffs could recover the goods of the assignee, Rohrbough, although they may have been obtained by misrepresentation. The rule is that an owner who is induced by fraud to part with the possession—and not the title—of his goods, may recover them even from one who has paid value for them without notice of his right. But, if he be so induced to sell his personal property to another, by proving the fraud, he may recover of his vendee, and of any one holding under him, save a *bona fide* purchaser for a valuable consideration. But in this case, Rohrbough merely held the goods under a deed of assignment made for the benefit of creditors, and occupies no better ground than his assignor. That such an assignee is not a *bona fide* purchaser is well established by the authority of adjudicated cases.

The eighth assignment of error is not sustained by the record, and is not well taken. The court, in the first paragraph of the charge, very fully and correctly instructed the jury as to what facts would entitle plaintiff to recover, and, among other things, told them, in effect, that Franklin must have known that the representations made by him were false; that they must have been such as would have induced a prudent man to make the sale, and must in fact have led to its consummation. The instruction relied upon to support this assignment was, in substance, that, if the sale was not effected through the false representations of Franklin, defendant Rohrbough was entitled to a verdict. If counsel, in view of the entire charge, had desired further instructions to the effect that, unless the representations were known to Franklin to be false, plaintiffs could not recover against Rohrbough, they should have asked them.

Tenth assignment of error is that "the court erred in his second charge to the jury, in telling them that there must be a delivery of the goods to Franklin, before the sale would be completed, without explaining to them what would constitute a delivery, and leaving them to draw their own inference in this behalf." The eleventh and twelfth assignments complain of the refusal of the following instructions asked by defendants: "(1) The court instructs you that if you believe from the evidence that if a part of the goods were sold by Salinger to Franklin prior to any representations, and that the goods were selected and set apart for Franklin, and merely held for shipment.

because Franklin ordered them to hold the goods until he could inspect them, then you are instructed that the sale, as to those goods, was complete, and that no subsequent representations of Franklin would enable Leopold to rescind the trade as to those goods; and, if you find that the sale was made in the manner above stated, you will find for J. E. Rohrbough as to those goods. (2) If you believe from the evidence that all the goods were set apart for Franklin, and the terms and prices agreed upon before said representations were made, then you are instructed that the sale was complete, and no subsequent representations of Franklin would entitle plaintiffs to rescind the contract."

These three assignments will be considered together. The evidence showed that Franklin at his place of business, in Denison, Texas, gave one Salinger, a traveling salesman of plaintiffs, who were merchants in Chicago, an order on them for about \$1,200 worth of goods some two weeks before the sale in controversy was effected. They sent Franklin an invoice of the goods, but did not ship them. Finding that some of the goods were not what he had ordered, he, as he testified, telegraphed plaintiffs not to ship. One of the plaintiffs testified that the goods were not sent because they knew nothing of Franklin's commercial standing. The fact that the goods had not been shipped when the invoice reached Denison tends strongly to show that this testimony was true. At all events, the sale was not consummated as to these goods until Franklin went to Chicago. He then agreed to take these goods, and selected others of the value of about \$400, when Henry Leopold, one of plaintiffs, took him into his counting-room, and asked him for a statement. He then made a statement which plaintiffs allege to be false, and upon the faith of this they shipped the goods. Henry Leopold further testified, in effect, that they never intended to deliver the goods until Franklin made a satisfactory showing of his financial condition. In this he is substantially corroborated by Solomon, the book-keeper and confidential clerk of the firm. This is not contradicted by Franklin. He testified that the goods were selected and set apart at prices agreed upon, including those previously invoiced; but admits that he was taken into the counting-room immediately, and asked for a statement, and that he finally gave one before the interview was ended. The sale could not have been consummated until both parties agreed that he should take the goods. The minds of both must have concurred in this final conclusion. That plaintiffs did not concur is evident from their testimony. Franklin testified to no fact showing that this was not true, however he may have understood the transaction itself. The fact that he was permitted to select the goods, that the price was agreed upon, and that they were set apart,—and his testimony does not go beyond this,—are not at all inconsistent with the testimony of Leopold and of Solomon that they did not intend to consummate the transaction until satisfied of his commercial standing. The evidence of plaintiffs upon this point is supported by the circumstances of the case. They had never dealt with Franklin before, he was unknown to them, and they had evidently withheld for a time a shipment upon his order for no other reason than that they were not satisfied as to his financial condition. Under this state of facts, we take it as incontrovertibly true that the sale was not complete when the representations were made, and that there was no evidence which would have warranted the jury in finding otherwise. Under this state of case, if there be error in the charge, it could not have operated to the prejudice of defendants, and is therefore not a ground for a reversal of the judgment. It will be seen from what we have just said that the selection and setting apart of the goods, and the agreement as to the price, did not consummate the sale, unless both parties so intended. Therefore the instructions to that effect asked by defendants were properly refused. No additional charges upon that point in the case were demanded by the evidence.

The thirteenth assignment is, in substance, that the court erred in refusing

a special instruction asked by defendants to the effect that the plaintiffs must have established their allegations of fraud by clear proof before the jury could find against defendant Rohrbough. It is sometimes said in the books that fraud must be clearly proved; but, in order to show that the proposition contained in the instruction is misleading as to the case made in the court below, we need only refer to the sole authority from our own state cited in support of the assignment. See *Sparks v. Dawson*, 47 Tex. 188.

The evidence was amply sufficient to sustain the verdict, and we find no error in the proceedings except in the overruling of the motion to quash the writ of sequestration, and in giving judgment against the sureties upon defendants' replevy bond. These sureties having appealed, they are entitled to have the judgment set aside as to them. This, however, does not work a reversal as to the original defendants. *Cheatham v. Riddle*, 8 Tex. 162.

The judgment will accordingly be affirmed as to the appellant Rohrbough, and reversed and dismissed as to appellants Schneider and Levy, appellees being adjudged to pay the costs of this appeal.

BOREN v. STATE.¹

(Court of Appeals of Texas. February 2, 1887.)

1. LARCENY—INDICTMENT—OWNERSHIP—TWO COUNTS.

Indictment for larceny contains two counts; the first alleging the ownership in some person unknown, and the second that the owner was one S. The evidence showing that the name of the owner was known, operates to defeat a conviction under the first count, wherefore the trial court should have confined the charge to the second count.

2. SAME—CONVICTION UNDER SECOND COUNT.

The first count being eliminated, the legality of a conviction under the second count will depend, first, upon the sufficiency of the indictment in the second count to charge the offense.

3. SAME—SUFFICIENCY OF COUNT.

It was not essential to the sufficiency of the second count, as an indictment, that it should show by conjunctive words the accused named in the two counts to be the same person, and the stolen property described in the two counts to be the same property. See the opinion on the question.

4. SAME—GENERAL VERDICT OF GUILTY.

Both counts in the indictment in this case being sufficient in themselves to charge the offense, that which is supported by the evidence will support a general verdict of guilty.

5. CRIMINAL PRACTICE—NEW TRIAL—DISQUALIFIED JUROR.

One of the qualifications for jury service is that the proposed juror is a freeholder in the state, and a householder in the county of the forum. In this case a juror qualified himself on his *voir dire*, but, after the trial and conviction, it was discovered that he was neither a freeholder in the state, nor a householder in the county, and this disqualification was set up as a ground for new trial. *Held* that, in refusing the new trial, the trial court erred.

6. SAME—CHARGE OF COURT—ACCOMPLICE TESTIMONY.

See the opinion *in extenso* for circumstances under which, upon a trial for larceny, the charge of the court should have instructed the jury upon the law governing accomplices' testimony.

7. LARCENY—EVIDENCE—BRANDS.

The brand of the party from whom the defendant claimed to have obtained the alleged stolen animal was proved to be a horizontal "11." The brand on the animal was proved to be a perpendicular "11." The defense offered evidence to the effect that mistakes in the manner of applying the brand were frequently made by stock-men. *Held*, that the exclusion of the proof was error.

Appeal from district court, Ellis county.

The opinion sufficiently discloses the case. The penalty assessed was a term of five years in the penitentiary.

¹ Reported by Messrs. Jackson & Jackson, official reporters of the Texas court of appeals.

A. A. Kemble and E. P. Anderson, for the appellant.

The first count in the indictment charges the animal to be an estray, and its owner unknown. The second count charges the ownership in *A. Staton*. If two counts in an indictment be repugnant, both are bad. 1 Bish. Crim. Proc. (3d Ed.) § 431.

Every count in an indictment must show directly or by reference that the same person is charged. The same rule applies, in larceny cases, to the property alleged to have been taken. 1 Bish. Crim. Proc. § 431.

The evidence tending to implicate the witness Gartin as an accomplice, and his evidence being unsupported by other testimony, the court should have charged the law with respect to the corroboration of an accomplice witness. Code Crim. Proc. art. 741; *Welsh v. State*, 3 Tex. App. 413; *Wells v. State*, 4 Tex. App. 20.

The service on the panel of a disqualified juror, if his disqualification was unknown to the accused, will vitiate a verdict of conviction. *Lester v. State*, 2 Tex. App. 432; *Sevell v. State*, 15 Tex. App. 57.

Asst. Atty. Gen. Burts, for the State.

HURT, J. This was a conviction for the theft of a steer under an indictment containing two counts. The first charges that the animal was an estray, and that the owner was unknown; the second, that it was the property of *A. Staton*. The first count is conceded to be good, but it is urged that no conviction can be had upon it, for the reason that the proof shows that the name of the owner *was* known to the grand jury, and hence there is a variance between the allegation and the proof under it. From this well-taken position the appellant proceeds to argue that a conviction must be had, if at all, upon the second count alone. This position we think is also correct. This being so, the trial judge should have confined his charge to the second count, treating the case in his *charge* as though it were the only count in the indictment, that count alleging the ownership to be in *A. Staton*. *Jorasco v. State*, 6 Tex. App. 238.

It is further contended that, since no legal conviction can be had under the first count, if the second count is in itself defective, the conviction is wrong, because wanting in proper allegations. This is correct reasoning; and the question for this court to consider is that arising upon the sufficiency of the second count.

One ground of objection is that the Eugene Boren named in the first count is not alleged in the second count to be the identical Eugene Boren named in the first, contending that the descriptive words "the said" should precede the name Eugene Boren in the second count. The same objection is urged to the description of the steer in the second count. In short, that it is not made to appear from the allegations in the second count that the accused, and the property alleged to have been stolen, in the first count, are identically the same as in the second count. Eugene Boren is the name of the accused in the first and second counts. A steer is the property alleged to have been stolen in both counts. By presumption they are the same. But let us refer to the principles governing counts.

"The word 'count' is used when, in one finding by the grand jury, the essential parts of two or more separate indictments, for crimes *apparently* distinct, are combined; the allegations for each being termed a 'count,' and the whole an 'indictment.' And an indictment in several counts, therefore, is a collection of several bills against the same defendant for offenses which on their face appear distinct, under one caption, and found and indorsed collectively as true by the grand jury. The object is what it appears to be; namely, in fact to charge the defendant with the distinct offenses, under the idea that the court may, as often as it will, allow them to be tried together, thus averting from both parties the burden of two or more trials; or, in an-

other class of cases, to vary what is meant to be the one accusation, so as, at the trial, to avoid an acquittal by any unforeseen lack of harmony between allegation and proofs, or a legal doubt as to what form of charge the court will approve." 1 Bish. Crim. Proc. 421, 422. And: "On the face of the indictment, therefore, every separate count should charge the defendant as if he had committed a distinct offense, because it is upon the principle of joinder of offenses that the joinder of counts is admitted." Id. 426.

If, therefore, each count is to be considered as charging a distinct offense, we must look to its allegations to determine its sufficiency, just as though it was the only count in the indictment; and, when thus tested and found sufficient, we need look no further; but, if not sufficient upon its face, we may then look to the preceding count or counts for auxiliary allegations to supply its defects.

It is objected to the second count that it does not, and should have, alleged that "the said Eugene Boren did," etc.; thus showing the accused in both counts to be the same person. This is unnecessary, because, upon its face, the second count is sufficient, as regards the accused and also the steer.

The illustration given by appellant in his brief is not in point: "The first count charged an assault on Esther Richards, an infant above the age of ten and under the age of twelve years; and the second count charged, in a different form, an attempt to have carnal knowledge of the said Esther Richards. This reference was held not to carry with it the allegation that she was 'an infant above the age of ten and under the age of twelve years.'" By reference to the case from which the illustration is drawn, it will be found that it was essential, to constitute the offense, that the female be alleged and found to be over the age of 10 and under the age of 12 years. *State v. Lyon*, 17 Wis. 245; *Reg. v. Martin*, 9 Car. & P. 213, 215, 38 E. C. L. 37; *State v. McAllister*, 26 Me. 374. In the case under our consideration the age and description of the accused, as well as the description of the steer, is wholly immaterial. We have not found, nor do we think a case can be found, in which it is held that it is required that the second count should state, except by using the same name, that the accused in both counts is the same person. If, however, the description of the person, such as age or condition, is material to the description of the offense, the second count must contain all the elements of the offense, and to repeat the name of the person merely will not be sufficient.

It is further objected to the indictment that "the counts contain repugnant matters, and that, therefore, the verdict of guilty should be taken only on such one or more as are not mutually repugnant." There being but two counts, if they contain repugnant matters, the verdict of guilty could be referred to neither, because the first is as repugnant to the second as the second to the first; hence the verdict would be founded on inconsistent allegations. "Repugnancy, in general, consists of two inconsistent allegations in one pleading; and since both cannot be true, and there is no means of ascertaining which is meant, the whole must be as though neither existed, leaving the whole pleading—the indictment, for instance—inadequate. This doctrine applies to counts only,—that is to say, no count should contain repugnant matters,—but it does not, in the very nature of things, apply to the repugnancy which of necessity must exist in different counts." Bish. Crim. Proc. 489, 490, 499.

We are cited to what Mr. Bishop says in section 492, viz.: "The doctrine of this chapter, as to the indictment, forbids any repugnancy in a count. Counts may be joined containing matter repugnant the one to the other. But even then, if they are for one offense, the verdict of guilty by the jury should be taken only on such one or more as are not mutually repugnant." In support of the doctrine laid down in this last clause, Mr. Bishop refers to *Com. v. Fitchburg Ry. Co.*, 120 Mass. 372. Consulting this case, it will be found that there were five counts in the indictment, charging the same offense as committed by different means or modes. The jury returned a verdict of guilty

upon three counts. It was held that, as but one offense was charged, the jury should have been instructed to return a general verdict of guilty, or not guilty, upon the whole indictment as for a single offense; or to return a verdict of guilty upon the count proved, if either was proved, and not guilty as to all the other counts. In this case a general verdict was returned upon the whole indictment, thus filling the measure required in the Massachusetts case. Now, both counts in this case being good, a general verdict is proper; and, one being good and the other bad, a general verdict is also proper, and would be assigned to the good count. However, as bearing upon the point in issue, it was not because of the repugnancy in the different counts in the Massachusetts case that the verdict of the jury was held wrong, but because the defendant was convicted, by the form of the verdict, of three offenses, when he could be legally convicted of but one.

We are of opinion that both counts of the indictment are sufficient; and that, the second count, established by proof, under the rules of law in such cases, the appellant may be convicted under this count, but not the first, for reasons given above, as the second presents the facts to us.

C. H. Horsford, one of the jury trying the case, being examined on his *voir dire* by the court, answered that he was a freeholder in Ellis county, when in fact he was neither a freeholder in the state, nor a householder in said county. This was discovered after the trial, and was made a ground for a new trial. We are of the opinion that the new trial should have been granted on this ground. Our statute provides that "all male persons over twenty-one years of age are competent jurors unless disqualified under some provision of this chapter." Rev. St. art. 3009. The second ground of disqualification is that the juror is not a freeholder in the state, or householder in the county. It appears from the record that the court tested the qualification of the juror under the law, and that the juror qualified himself by answering that he was a freeholder. Appellant and his counsel make oath that his disqualification was not known to them until after the trial. There is no evidence that they, or either of them, did, except that which might be supposed to arise from the fact that they had intimately known the juror, Horsford, for years previously. This is not such proof, if it be proof at all, as will prevail over the oaths of appellant and his counsel that the disqualification was not known to them until after the trial. *Hanks v. State*, 21 Tex. 526; *Henrie v. State*, 41 Tex. 573; *Armendarces v. State*, 10 Tex. App. 44.

When it was called to the attention of the appellant that the steer was claimed by Staton, he stated that he got it from one James Gartin, or that he had taken the animal up and penned it, with others, at Ennis, for the purpose of shipping, and that he had taken it believing it to belong to James Gartin. The state proved by Gartin that he had not let Boren have the steer, neither had he authorized him to pen and ship it. A number of witnesses testified that they heard Gartin give appellant authority to get up and ship the animal; and another witness swore that Gartin, in effect, admitted that he had given such authority. Now, there are two theories presented: (1) That appellant did not have authority from Gartin to take the animal; (2) that, if Gartin did give the authority, still he (defendant) knew that Gartin did not own the steer, and therefore that a taking with this knowledge would be theft. This last hypothesis included the further proposition that Gartin was an accomplice, and hence there was a powerful motive enticing him to deny the giving of the authority. Under this phase of the case thus presented, the court should have given the jury an instruction with regard to accomplice testimony. This omission was calculated to injuriously affect the appellant's rights; all the law demanded by the facts in evidence not being given in charge.

It appears from the record that Gartin's brand was a long "11" placed lengthwise on the animal. The brand on the animal in question was a per-

pendicular "11," and not so long as the brand used by Gartin. Appellant offered to prove by stockmen that they, by accident, sometimes misplaced their brands on their stock. To this evidence the state objected, and its objection was sustained by the court. We think this was erroneous. The state relied upon the manner and shape in which the brand was placed upon the animal as strong proof of guilty knowledge. Appellant may have known Gartin's brand as well as the manner in which it was usually placed on his stock, and yet he may have believed that in this particular case the brand was accidentally placed in an unusual manner.

We do not discuss the other questions raised, believing that the matters assigned will not arise on another trial.

For the errors indicated, the judgment is reversed, and the cause remanded.

CAPT and others v. STUBBS and others.

(Supreme Court of Texas. May 6, 1887.)

1. EXECUTORS AND ADMINISTRATORS—SALE OF LAND—RECORD.

An administrator's sale of land, in Texas, will not be held void on the ground that the order of confirmation does not show that proof was heard upon the question of the sufficiency of the price for which the land sold when the order was made, as the statute does not require that the minutes of the court shall show affirmatively that this was done, and it is to be presumed that the court did its duty in that respect.

2. SAME—VOID OR VOIDABLE—SETTING ASIDE.

Inadequacy of price will not render an administrator's sale in Texas void, but only voidable, and it will remain good as to all parties until set aside, at the instance of some one or more of the heirs or creditors, in a direct proceeding instituted for that purpose.¹

3. TRESPASS TO TRY TITLE—PLEADING—ANSWER.

In an action of trespass to try title, when plaintiff claims through an administrator's sale, an answer that alleges that the court had no power to order such sale, but states no fact showing the want of power or jurisdiction, is insufficient.

4. SAME—TAXES—REIMBURSEMENT FOR PAYMENT.

In an action of trespass to try title, in Texas, where defendant shows no equity in or title to the land, it is not error to strike out a part of his answer, alleging payment of taxes by him, and asking that he have judgment against plaintiff therefor, as he has no right to be reimbursed for such payment.

5. CONTINUANCE—RIGHT TO—TRESPASS TO TRY TITLE.

In an action to try title, when there is no written agreement by counsel in regard to notice of filing deeds, if plaintiff's counsel is misled by a verbal agreement, or what he understood to be such, the court may postpone the trial to allow further time for giving the notice; but this will not give defendant a right to demand a continuance when the case is called a second time.

6. TRESPASS TO TRY TITLE—DISCLAIMER—EVIDENCE.

In an action of trespass to try title, where a defendant has disclaimed any interest in the land, and set up that he is only a tenant, his replevin bond may be introduced to show that he replevied the land, and therefore claimed an interest therein.

7. COSTS—LIABILITY FOR—DISCLAIMER.

In an action to try title, a defendant who disclaims any interest in the land, and alleges that he is a tenant, and asks that his landlord be made a party, is relieved from costs incurred after his disclaimer, but not from those previously incurred, if he was in possession, or set up claim, when the suit was brought.

Appeal from Blanco county.

Mis, Storey & Storey, for appellants. No counsel for appellees.

GAINES, J. This was an action of trespass to try title, brought by appellees against appellants Robert B. Capt and John Augerstein to recover a tract of land patented to Jacob De Cordova, as assignee of Thomas J. Callahan.

¹ A judicial or quasi judicial sale will not be set aside for mere inadequacy of price. *Sigerson v. Sigerson*, (Iowa,) 32 N. W. Rep. 462, and note.

The original defendants above named set up that they were tenants of Felix W. Capt. who subsequently appeared and made himself a party defendant.

Appellees introduced in evidence the patent to Cordova to the land in controversy; an order of sale of the county court of Bosque county, directing L. B. Davis, as administrator of the estate of Jacob De Cordova, deceased, to sell this as well as other tracts of land belonging to said estate; a report of the sale by said administrator of this tract to J. C. Frazier; an order of said county court confirming said sale; and a deed from the administrator to the purchaser. Appellees also exhibited in evidence a consecutive chain of title from Frazier down to themselves. The transcripts of the proceedings of the county court of Bosque county showed that the lands were ordered to be sold at private sale, and that the tract in controversy was sold for \$7. From the order of confirmation it did not affirmatively appear that proof was made before the court that the amount offered was a fair price for the land.

Defendant F. W. Capt proved that the land at the time of the sale was worth from \$1,500 to \$2,000. He introduced in evidence a deed from Louis Capt to himself of the premises in controversy, but failed to show from what source, if any, his grantor derived his claim.

The seventh assignment of error raises the question of the validity of the administrator's sale, and, as we regard this the leading question in the case, we will dispose of it first. The defendant showed no title to the land himself. He could have defeated a recovery by plaintiffs by showing an outstanding legal title in a third party; but not by showing simply an outstanding equity, without connecting himself with it. *Shields v. Hunt*, 45 Tex. 424; *Johnson v. Timmons*, 50 Tex. 521; *Fitch v. Boyer*, 51 Tex. 336. If, therefore, the sale was absolutely void, the legal title remained in the heirs of Cordova, subject to administration, and defendant had the right to avail himself of this as a defense to the action. If, however, the sale was voidable only, then defendant could not be permitted to set up the defense without showing an interest in the estate. The principal grounds relied upon to show the invalidity of the judgment are fraud, as shown by the gross inadequacy of price, and the failure of the order of confirmation to show that proof was heard upon the question of the sufficiency of the price when that order was made. In reference to the latter ground, it is sufficient to say that it is to be presumed that the court did its duty, and that the evidence was heard; that statutes do not require that the minutes of the court shall show affirmatively that this was done. As to the ground of fraud, admitting that the circumstances relied upon were sufficient to prove this, the judgment would have been voidable and not void, and the sale would have remained good as to all parties until set aside at the instance of some one or more of the heirs or creditors, in a direct proceeding instituted for that purpose. *Fisher v. Wood*, 65 Tex. 199; *Murchison v. White*, 54 Tex. 78; *Mikeska v. Blum*, 63 Tex. 44; *Rutherford v. Skamper*, 60 Tex. 447. It follows, from what we have said, that the right of those who were interested in Cordova's estate to set aside the sale for fraud, if fraud existed, was not available to defendant as a defense to this action.

The court did not err in sustaining exceptions to defendant's answer. The answer alleged that the court had no power to order the sale of the land, but stated no fact showing the want of power or jurisdiction in the premises. Besides, appellants had the privilege of making any valid objections to the proceedings of the county court upon the introduction of the evidence, and this privilege appears to have been freely exercised; hence he was not prejudiced even if the ruling upon the exceptions to the answer had been erroneous. Being, so far as the record discloses, without any equity in or title to the land, his payment of taxes upon it gave him no right of reimbursement from the owners; hence the court did not err in striking out so much of the answer as alleged a payment of the taxes by defendant, and asked judgment against plaintiffs therefor.

The postponement of the trial, after the case had been regularly reached, until a later day in the term, like the granting of a continuance, was a matter within the discretion of the court, and cannot be made a ground for reversal upon appeal.

Although there was no written agreement by counsel in regard to the notice of the filing of deeds which the court could enforce, yet if plaintiffs' counsel had been misled by a verbal agreement, or what he understood to be such, it was proper for the court not to permit plaintiffs to be prejudiced thereby, but to allow further time for giving the notice. *Williams v. Huling*, 48 Tex. 118. This did not operate to the injury of defendant, and gave him no right to demand a continuance when the case was called a second time.

The court did not err in permitting plaintiff to introduce in evidence the replevy bond given by defendants. The original defendants, R. B. Capt and Augerstein, disclaimed title by an amended answer. It was proper, therefore, for plaintiff, in order to recover his costs, to show that, at the time of bringing the suit, they were setting up a claim to its possession. We think their replevy bond was competent for this purpose.

What we have just said is sufficient, also, to dispose of the tenth assignment of error, which complains that the court erred in adjudging costs against defendants R. B. Capt and Augerstein. In their answer they alleged that they were in possession as lessees and tenants of F. W. Capt, and asked that he be made a party; at the same time that they disclaimed. A disclaimer may relieve a party of all costs subsequently incurred, but it does not relieve him of costs previously incurred, if he be in possession or set up claim when the suit is brought. The court would probably have adjudged against them only the costs which had been incurred before the disclaimer if this had been called to its attention by motion. But, this not having been done in the lower court, the judgment in that particular will be here reformed and affirmed, at appellants' costs.

BAKER v. MALONEY and others.

(Supreme Court of Texas. May 10, 1887.)

1. EVIDENCE—HEARSAY—CORROBORATION.

In a contest involving the identity of the grantees in a land certificate, issued by a board of land commissioners, where one of the claimants testifies that the certificate remained in his possession until the year 1867, when he sent it to a land agent in Austin, Texas, *held*, that a letter from the land agent acknowledging the receipt of the certificate is admissible as corroborative of such testimony.

2. PUBLIC LANDS—CERTIFICATE—CONCLUSIVENESS OF.

The statements of land commissioners, as contained in a land certificate issued by them, are conclusive of the right of the person named to the quantity of land to which he is certified to be entitled, but are not conclusive proof that he is not entitled to greater rights.

Appeal from Shackelford county.

A. A. Clarke, for appellant. S. W. Campbell and Fleming & Moor, for appellee.

STAYTON, J. The real question in this case was as to the identity of the John Wilson to whom the certificate issued under which the land in controversy was granted. The conditional certificate issued from the board of land commissioners for Harris county on March 7, 1839, and was of the third class, and numbered 7. On this conditional certificate an unconditional certificate, No. 1,140, issued, and by virtue of this the land was granted. Another conditional certificate, No. 679, was issued by the same board on December 9, 1839, to a John Wilson, which was also of the third class, and, as did the other, called for 320 acres of land, and the unconditional certificate which issued on this was numbered 582. The appellant claims to have purchased the certificate on which the land was granted at an administrator's sale, made in the

course of an administration on the estate of John Wilson, had in Harris county in 1852. The appellee Maloney claims under a conveyance made by John Wilson and his children, made January 12, 1884.

On the trial the John Wilson who made that deed testified fully to the fact that he was the person to whom the conditional certificate No. 7 was issued; and, after stating that he came to Texas in the latter part of 1836 or first of 1837, he gave a full statement of his residence, from time to time, and of the persons with whom he was acquainted in Harris county at the time the conditional certificate No. 7 issued. He further stated that the conditional certificate remained in his possession until the year 1867, when he sent it to C. R. Johns & Co., land agents, at Austin, Texas. His residence at that time was in the state of Missouri, where he seems to have resided for a long time.

Members of the firm of C. R. Johns & Co. testified to having received the conditional certificate No. 7 from him as stated by him, and identified a letter as of their writing, on the receipt of the certificate. This letter, which was as follows:

"AUSTIN, TEXAS, December 28, 1867.

"*John Wilson, Esq., Howard's Mills, St. Clair Co., Mo.*—SIR: We are in receipt of your favor of the fourth inst., with the original conditional certificate issued to you by the board of land commissioners of Harris county, March 7, 1839. This certificate was only a conditional grant, giving you the right to 320 acres of land after a residence in the county of three years.

"Yours truly,

C. R. JOHNS & CO.,"

—Was offered in evidence, the appellant objecting on the ground that it was an unsworn declaration made by C. R. Johns & Co. It is now urged that its admission was error. Proof that the letter was written by C. R. Johns & Co. was made by members of that firm, and, considering the facts stated in it, we are of the opinion that it was admissible as corroborative of the evidence of Wilson that he sent, and of the firm of C. R. Johns & Co. that they received from, *this* John Wilson the conditional certificate. The appellant objected to evidence to show that the John Wilson under whom the appellee holds was the person to whom the certificate issued on which the land was granted; and this, upon the ground that as the certificate was of the third class, and for only 320 acres of land, the adjudication of the land board was conclusive of the fact that the John Wilson to whom it was issued came to Texas after October 1, 1837.

This proposition cannot be maintained. It is true that the determination of the several boards of land commissioners appointed, from time to time, to issue land certificates, is conclusive of the right of a person to whom such a certificate was regularly issued to the quantity of land to which he was certified to be entitled; but such determination has never been held conclusive as to any fact not necessary to entitle the person to the quantity of land to which he was certified to be entitled.

It may be that the John Wilson to whom the certificate was issued came to Texas at a time which would have entitled him to a certificate for more than 320 acres of land, but that he was unable to make proof of that fact before the board, but was able to make the necessary proof to show that he was in Texas at a time which entitled him to the certificate which was issued to him, and that, therefore, he received a certificate for less land than he was really entitled to. The certificate was evidence that the applicant possessed the qualifications which entitled him to the rights evidenced by the certificate, but certainly could not prove conclusively that he may not have been entitled to greater right. In so far as the fact that he only received such a certificate as persons were entitled to who came to Texas after October 1, 1837, might bear on the question of identity, if it had any, the appellant had the benefit of that fact.

The fact that the John Wilson under whom appellee claims, paid taxes on the land for a number of years before he sold it, was a relevant fact, proper

to be proved, although there was no question of limitation involved in the case. It is insisted that the burden of proving that the John Wilson through whom the appellee claims, was the identical person to whom the certificate under which the land was granted, issued. The burden of proof was on the appellant to show that the John Wilson from the administrator of whose estate he bought, was the grantee of the certificate, and there was nothing in the case to relieve him. If the jury had believed that the person through whom the appellee claims, was not the person to whom the certificate issued, this would not have authorized a verdict for the plaintiff, unless they believed, from the evidence, that the person through whom he claimed was the person to whom it issued.

There is nothing in the case to give application to the doctrine of stale claim. We find no error in the judgment, and it will be affirmed.

ANDERSON and others v. SIMS.

(*Supreme Court of Texas. May 10, 1887.*)

PLEDGE—APPLICATION OF SECURITY—PROMISSORY NOTE.

Where A. indorses a note for the accommodation of B., A. cannot use as indemnity against his liability for such indorsement a security previously transferred to him by B. as indemnity against an entirely different liability; nor can A. confer on the holder of the accommodation note any right to apply such security on that note.

Appeal from Ellis county.

G. B. Anderson, for appellant. *W. E. Dunlap* and *G. C. Groce*, for appellee.

STAYTON, J. The petition alleges that George B. Anderson on October 6, 1883, executed his note to the appellee for \$1,378.58, and that to secure it Anderson indorsed to Sims a note for \$1,300, made payable to himself or order, and executed by the appellants Blassinghame and Farrar on August 18, 1883, and due six months after date. This last note was alleged to have been executed for the accommodation of Anderson, who, to secure Farrar from loss on this note, was alleged to have indorsed to Farrar a note for \$1,500 executed to Anderson by K. B. Jordan on November 26, 1881, and due 12 months after its date. All the persons who were alleged to have executed the notes above mentioned were made defendants, and a recovery sought against them all. All the defendants answered by a general demurrer and general denial, and the defendant Jordan, admitting the execution of the note to Anderson by himself, alleged that the note was not indorsed to Farrar for the purpose alleged in the petition, but that he and Anderson procured the signature of Farrar to a note payable to the order of Patrick, McMillan & Co. for the sum of \$1,200 due on or before June 1, 1882, and that, to secure Farrar against any risk on that note, the note which he had executed to Anderson was deposited with Farrar as a collateral security. He further alleged that the note to Patrick, McMillan & Co. was paid on October 6, 1883, and that afterwards he had satisfied the note which he had executed to Anderson, which he averred went into the hands of Sims long after it was due, and without any agreement whatever that it should be turned over to him. Demurrers to this answer were filed and sustained, and a judgment rendered against all the defendants. There are many questions raised on this appeal which, in view of the action on the demurrer, it will not be necessary to notice. To render Jordan liable in this action it must appear that Farrar, who was, in effect, a security for Anderson, held the note as a security to himself on account of having assumed that relation. If he held the note of Jordan as a protection to himself only on account of a liability which he had assumed to Patrick, McMillan & Co., in effect, as a security for Anderson or for him and Jordan, then Farrar could

not confer on Sims any right to enforce the payment of it on the indebtedness of Anderson to himself. There is no pretense that Sims became the holder of the note of Jordan in such manner and for such purpose as to enable him to enforce its payment as an independent matter between himself and Jordan. It was necessary for Sims to show that he was entitled to enforce the payment of the note due from Anderson to himself through the note of Jordan. Otherwise there would have been a misjoinder of actions, had he shown himself to be the legal holder of the note executed by Jordan. The answer of Jordan set up a complete defense to the enforcement of the claim against him which Sims asserted, and for the error of the court in sustaining the demurrer the judgment will have to be reversed.

It is suggested in the brief of counsel for appellee that, if the action on the demurrer was erroneous, this furnishes no reason for a reversal of the judgment as to the other defendants, and a willingness to dismiss, as to Jordan, in this court is suggested. The judgment is an entirety, and we think this not a proper case in which to affirm a judgment as to some of the appellants, and to reverse as to one. The adjustment of the matters presented by the pleadings may become a matter of importance as between some of the appellants.

The judgment of the district court will be reversed, and the cause remanded. It is so ordered.

MISSOURI PAC. RY. Co. and another v. DUNHAM.

(*Supreme Court of Texas. May 6, 1887.*)

1. RAILROADS—KILLING STOCK—FENCES—BURDEN OF PROOF.

The Texas statute imposing a liability on railroad companies for injuries done to animals, unless the railroad track is fenced, does not apply to such places as public necessity or convenience require should be left unfenced, such as the streets of a city or town, the depot or contiguous grounds. When, however, an injury occurs within the limits of a town or city, the burden of proof rests with the railway company to show that the place at which the animal entered was one which, under the law, it was not permitted to fence.¹

2. SAME—EVIDENCE.

In an action against a railroad to recover for killing plaintiff's stock while trespassing on the railroad track in a town, evidence is admissible to show that stock was not permitted, under the law, to run at large in the town where the killing occurred. Where there is such a law, the railroad company is liable only for gross negligence in killing stock.

3. SAME—LEASE.

Where the railroad on which the killing occurred was owned by one company, and leased to another, without special authority from the state, both companies are liable to the owner of the stock, the one because of its actual operation of the road, and the other because it could not, without permission of the legislature, transfer its franchise even temporarily so as to release itself from liability for the acts and defaults of its lessee.

Appeal from La Salle county.

Elias Edmonds, for appellants. No counsel for appellee.

¹ Railroad companies are not required to fence their depot grounds or their tracks at stations and sidings, *McGrath v. Detroit, M. & M. R. Co.*, (Mich.) 24 N. W. Rep. 854; *Bremmer v. Green Bay, S. P. & N. R. Co.*, (Wis.) 20 N. W. Rep. 687; *Smith v. Chicago, M. & St. P. R. Co.*, (Iowa,) 15 N. W. Rep. 303; *Chicago & G. T. R. Co. v. Campbell*, (Mich.) 11 N. W. Rep. 152; *Prickett v. Atchison, T. & S. F. R. Co.*, (Kan.) 7 Pac. Rep. 611, and 9 Pac. Rep. 464; and they are not liable for death of animals straying on their tracks there. *Indiana, B. & W. R. Co. v. Quick*, (Ind.) 9 N. E. Rep. 788; *Indiana, B. & W. R. Co. v. Sawyer*, (Ind.) 10 N. E. Rep. 105. But they should fence within 140 feet of their sidings, though within town, *Payton v. Chicago, R. I. & P. R. Co.*, (Iowa,) 30 N. W. Rep. 877; though not a block in a small town where cord-wood is hauled by farmers for shipment, and stored by the railroad, and where there is an elevator for the receipt and shipment of grain, *Hooper v. Chicago, St. P., M. & O. R. Co.*, (Minn.) 33 N. W. Rep. —.

WILLIE, C. J. The appellee was the owner of a valuable sow and brood of pigs which he allowed to run at large in the town of Cotulla, La Salle county. While trespassing upon the track of appellants in their depot at Cotulla, they were struck by the engine of a train, and the sow killed and the pigs injured. This suit was brought to recover damages for the injury; and the district court, to which the cause had been removed by appeal from a justice's court, rendered judgment in favor of the appellee for \$42.50, and from that judgment this appeal is taken. The plaintiff proved facts tending to show that the injury was caused by the engine and cars of the defendant, and that the railroad was not fenced at the place where it happened; gave evidence of the amount of damages he incurred thereby; and rested his case. The defendant proved that the accident occurred at its depot grounds within the town of Cotulla; that the town was there built up on both sides of the track; and, if the railroad was fenced, then it would create a great inconvenience to the public, as they could not then pass without difficulty from one part of the town to the other. No proof of negligence of any character was proved against the appellants, the plaintiff relying solely upon their failure to fence their track as conclusive upon that point. During the trial the defendants offered in evidence certain proceedings of the county court of La Salle county showing that stock were by law prohibited from running at large in precinct No. 1 of that county, which embraced the town of Cotulla. Upon objection of plaintiff these proceedings were excluded from the jury, and to this action the defendants reserved a bill of exceptions.

At the time this suit was tried below, the case of *International & G. N. R. Co. v. Cocks*, 64 Tex. 151, had not been published in our Reports, and doubtless had not come to the knowledge of the learned district judge who presided at the trial, or he would have followed the principles then declared by this court. We there held that "the general terms of our statute imposing a liability on railway companies for injuries done to animals, unless their railways are fenced, do not apply to such places as public necessity or convenience require should be left unfenced, such as the streets of a city or town, depot and contiguous grounds, the crossings of highways, and other like places." These principles are supported by the numerous decisions cited in the opinion, made upon statutes similar to our own, and constitute the settled law of our state upon the subject. It was, however, said in that case that, when an injury "occurs within the limits of a town or city, it rests with the railway company to show that the place at which the animal entered was one which, under the law, it was not permitted to fence." The corporation of a town or city often embraces territory which is not used by the public differently or to a greater extent than the same character of land in the country. To fence the road at such places would not interfere with the public convenience, and, as to these places, there is no reason why the railroad company should not comply with the statutory requirement. The burden of showing that the company is relieved from its statutory duty is thrown upon it; and, when this is established, it is then liable only in the event that the injury has resulted from the want of ordinary care. In this case the injury occurred at the depot of the appellants, and within the settled portion of the town, where the companies could not have fenced their track, as public necessity required that it should be kept open; and, no proof having been made that the injury occurred from want of ordinary care on the part of the appellants, judgment should have gone in their favor. The court should have charged the jury in accordance with the principles herein announced, and because this was not done, and the judgment is against the law and the evidence, it must be reversed.

We think, too, that the court should, upon another trial, if requested, admit evidence showing that stock was not, under the law in existence when the injury for which this suit was brought occurred, allowed to run at large in the town of Cotulla. Railroad companies are entitled to presume that

every person will comply with the law which forbids the owner to allow his animals to run at large. Hence they are excused from the exercise of such care as is exacted of them when animals are permitted to run at large. When there is no such law, they are liable for the want of ordinary care; when there is such a law, they are liable only for gross negligence. The evidence is therefore important in determining the degree of negligence for which the appellants may be responsible. *Railway Co. v. Cocke, supra.*

The evidence does not inform us as to why this action was brought against the two railroad companies appellant. There was no point made below as to the ownership of the road, and it might be presumed that the road and the rolling stock that caused the injury belonged jointly to the two companies. If, however, it should appear that it was owned by one company, and leased to the other without special authority from the state, both companies would be liable; the one because of its actual operation of the road, and the other because it could not, without permission of the legislature, transfer its franchise, even temporarily, so as to release itself from liability for the acts and defaults of its lessee. *Central & M. Ry. Co. v. Morris*, 3 S. W. Rep. 457; *Gulf, C. & S. F. Ry. Co. v. Morris, ante*, 156, (Galveston term, 1887.)

The judgment is reversed, and the cause remanded.

GRIGSBY v. PEAK.

(*Supreme Court of Texas. May 10, 1887.*)

1. PARTITION—COMMUNITY PROPERTY—REPARTITION.

Where a man dies leaving community property in which his surviving wife owns one-half interest, but the entire property is partitioned *equally* among his nine children, including seven by a former wife and two by the surviving wife, *held*, that the two children of the surviving wife may afterwards have a repartition, by which the one-half belonging to their father is divided equally between the nine children, but the one-half belonging to their mother, the surviving wife, is divided between them to the exclusion of the other seven children. The rule that upon partition each parcener impliedly warrants the title of his coparceners does not apply in such a case.

2. SAME—PURCHASER.

If any one of the parceners shall have in the mean time sold the land allotted to him upon the original partition, the same land may be allotted to the purchaser upon the repartition, if this can be done without detriment to the other parties in interest.

Appeal from Dallas county.

Rich. Morgan, Jr., and Jeff Word, Jr., for appellant. Stemmons & Field and Leake & Henry, for appellees.

STAYTON, J. The leading facts included in this case are stated in the cases of *Caruth v. Grigsby* and *Grigsby v. Caruth*, reported in 57 Tex. 259-273. Every question but one raised in this case was decided adversely to the appellee in the cases above referred to. The question not decided in the cases mentioned arises on the following facts: (1) The land, of which that in controversy is a part, was community property owned by John Grigsby and his wife, Louisa. (2) John Grigsby died in 1841, leaving nine children, of whom seven were by a former wife, and two, D. B. and Emeline Grigsby, were the children of himself and his wife, Louisa. (3) The entire land in controversy in this action, belonging to John and Louisa Grigsby, was partitioned in the probate court having the administration of his estate among his nine children, each one taking an equal share. (4) There was no partition between the estates of John Grigsby and his wife, Louisa, and that made purported to be only a partition of the estate of John Grigsby. (5) Louisa Grigsby, having married after his death, had one child by her last husband, who is Maria Louisa Swindle, and a party to this action, to whom, however, nothing was given in the partition to which we have referred, she not being an heir of John

Grigsby. (6) After the partition was made, Emeline Grigsby sold the part of the tract set apart to her to the appellee and others, and D. B. Grigsby subsequently sold the part set apart to him to other persons.

From this statement it will be seen that each of the nine children of John Grigsby only inherited from him one-eighteenth of the tract of land of which that in controversy is a part, but in the partition made they each received two-eighteenths of the entire tract partitioned. It will be further seen that D. B. Grigsby and his sister Emeline, as well as the child of their mother by her second husband, each inherited from their mother three-eighteenths of the land in controversy in this action.

Through the partition of John Grigsby's estate, each of his children by his first wife received double the quantity of land they inherited from him, while D. B. and Emeline Grigsby in that partition only received one-half of the land to which they were entitled by inheritance from their father and mother, while the daughter of their mother by her second husband received nothing at all. This action was brought by D. B. Grigsby to recover two-eighteenths of the land described in the petition, same as that partitioned as the estate of his father, while Mrs. Swindle seeks to recover three-eighteenths of the same land. The appellee claims nothing except through the conveyance of Emeline Grigsby.

In the case of *Caruth v. Grigsby*, 57 Tex. 259, it was held that the appellant was not precluded by the decree of the probate court, which proposed only to partition the estate of John Grigsby, from asserting his right to recover on his claim based on inheritance from his mother, on the ground that a party is concluded by a judgment in the right only on which he sues or is sued. In the case of *Grigsby v. Caruth*, 57 Tex. 269, the court instructed the jury as follows: "You are charged that if you believe from the evidence that Daniel B. Grigsby accepted the portion of the land set aside to him by the probate court of Anderson county in the attempted partition of the league and labor survey originally granted to John Grigsby, and afterwards conveyed it by deed or deeds, referring to such partition as his source of title, he will be concluded as respects the property embraced in the petition, and you will find for the defendant, William Caruth, against the plaintiff, Daniel B. Grigsby." The facts in that case were such as to involve the same questions and principles as are involved in this, and it was held that the facts embraced in the charge given did not create an estoppel. The decisions in those cases, to which we have referred, are directly applicable to this, which is but a part of the case in which those decisions were made, severance having been made. Seeing no reason to doubt the correctness of the decisions made in the cases referred to, the questions again presented in this case will not be further discussed.

On the trial of this cause the court gave the following charge: "If the plaintiff, D. B. Grigsby, was a party to a proceeding in the probate court of Anderson county, in which the land in controversy in this suit was partitioned, and if the said Daniel B. Grigsby was allotted a portion of said land, and if he subsequently accepted a portion of the land so allotted to him, and after he became of age (twenty-one years) sold it, he is bound by the law of implied warranty; that is to say, the law annexes to such partition a warranty of title from one to the other of the parties or co-tenants in such partition; and the said D. B. Grigsby, not having been disturbed in the possession of or evicted from the portion assigned to him in such partition, cannot recover in this suit, and you will as to the said D. B. Grigsby, if you find such facts to exist, find a verdict for the defendant."

Under this instruction a verdict and judgment were entered against D. B. Grigsby. It is now insisted that this charge was incorrect, in view of the facts of the case. That a warranty is implied in cases of compulsory partition made between tenants in common is true. *Ross v. Armstrong*, 25 Tex. 355. This rule is now made statutory. Rev. St. art. 3483. But it unnecessary to

consider whether the warranty given by the statute is more comprehensive than was implied before the statute was passed, for, be that as it may, this case must be determined upon the principles applicable to the question before the adoption of the Revised Statutes. In determining the nature and extent of a warranty implied or compulsory partition, it becomes necessary to consider the reasons which gave rise to the implication, and the purposes of justice intended to be subserved by it. Every rule, the outgrowth of long experience and observation, has its reason, and is established for the preservation of rights, and the fair adjustment of conflicting claims and equities existing between man and man; and, when the reasons on which a rule is based do not call for its application in a given case, it would be a perversion of justice to apply it. The reasons which called for an implied warranty in compulsory partition between coparceners at common law apply here to such partitions as may be compulsorily made between any persons who, under the laws of this state, are entitled to have such partitions made; and are thus well stated in the case of *Ross v. Armstrong*: "But this implied warranty and condition were, by the common law, confined to a partition made between coparceners, and for the reason, it is supposed, that the right of compulsory partition was given by the common law only to coparceners, and not to joint tenants, or to tenants in common, to whom the right was first given by statute. The common law, having given the right in favor of coparceners, deemed it reasonable and just that they should not be placed in a worse condition by the partition—which could be compelled by writ of partition or a bill in chancery—than if they had continued to enjoy their respective interests without a partition; in which case, if suit had been commenced upon a paramount title, all must have been impeaded, and, in case of recovery, all must have sustained their due proportion of the loss. In order, therefore, that they should not be placed in a worse condition by a compulsory partition, the common law annexed to the partition the implied warranty as a condition for their protection."

Partition is based on the fact, real or supposed, that the persons between whom it is made own the thing partitioned; and if they do so only in part, and the part not so owned in common be set aside to one or more of the supposed owners, then those who receive in partition that part of the thing which was owned in common receive something in which the co-owners had an interest, for which, in return, those who receive a part not so owned receive nothing. It is to protect those who in partition take that which was not owned in common, that the rule invoked in this case has an existence, and it exists only so far as is necessary to give such protection. Through it protection is given to such persons through a repartition of that actually owned in common, or by requiring those who received that to compensate the others for the interest they owned before partition.

The word "warranty" is an inapt expression, when used to indicate the engagement resulting from partition, if it be understood to carry the same obligation and measure of liability which results from a general warranty of title made in a deed, by which one person sells and conveys land to another; for the obligations resting on the parties in the two cases are different in some respects. Whether the implied warranty, arising on partition, would pass an after-acquired title, may well be doubted, for the accession to the property partitioned would entitle the person through whose means, by an after purchase, it was acquired, to contribution. On failure of title to land conveyed by deed with general warranty, the vendee would be entitled to recover from his vendor the purchase money with interest, which is supposed to represent the value of the land; but, in case of failure of title to land set apart to one in partition, this would not be the rule; for the value of the interest in the land actually owned by such person at the time partition was made, with interest on it, would give to him full compensation, and would be its measure. If repartition be sought on failure of title to the part set apart to one, in such

case the co-owner whose share failed through defect in the common title could only have such part of the land actually owned by all at the time of partition as his interest sustained proportion to the entire land that ought to have been partitioned. As an illustration, should two persons, supposing they owned, as tenants in common in equal shares, 100 acres of land, cause partition of it to be made, and each have set apart to him 50 acres of the land which they supposed they owned, then, on failure of title to the land set apart to one, it would not be his right to have the value of the 50 acres set apart to him, but to have the value of one-half of the 50 acres which they did own, or to have repartition of that. Thus far the implied engagement of the co-tenants would be extended, and no further; while had the transaction been a sale by one to the other, through a deed with general warranty, the engagement would be more extensive. Partition is not a means for acquiring title; but through it every common owner may seek and acquire the right to the exclusive ownership and possession of a part of that which before the partition was owned by all, which before partition each co-owner had equal right to use and possess. If the implied warranty existing, on compulsory partition, be the equivalent of a general warranty made in a deed by which land is sold and conveyed, it would become indirectly a means of acquiring title to something to which none of the parties to an attempted partition had title, and it would extend in its operation further than is necessary to give full protection to the co-owner whose title to land received in partition falls.

In the case before us there has been no failure of title to any part of the land which belonged to the estate of John Grigsby that was set apart to any one of his children in the attempted partition. No one of his heirs is called upon to surrender any part of the land which such heir inherited from him, though they may be compelled to submit to a repartition of the land of which partition was attempted to be made. If the doctrine of implied warranty, as invoked in this case, has application, it applies as between all parties to the attempted partition,—between the children of John Grigsby by his first and second wives, as well as between the children of each wife. Is such a rule necessary for the preservation of every right any of the parties may have had before the partition was attempted? We think not. The right of each of the children of John Grigsby by his first wife to one-eighteenth of the land in controversy is as full and complete as it ever was, and it is not controverted. By virtue of what process, or on what consideration, can they claim to have the quantity of land which they inherited doubled? There is no efficacy in an implied warranty resulting from an attempted partition which can work such an effect. D. B. Grigsby, having received one-half the quantity of land that he inherited from his father and mother, now seeks to recover only the residue to which he is entitled by inheritance from his mother, and the defendant, now before us, claims through his sister, who had equal right with himself.

Under this state of facts the implied warranty given in partition cannot be made to operate any divestiture of right D. B. Grigsby may have through inheritance from his mother. To permit him to recover what he was entitled to at the time partition was attempted, deprives no persons of what they were entitled to, and it would be singular, indeed, when the decree through which the partition was attempted was not sufficient of itself to bar his right to recover what he owned at the time it was entered, if its indirect effect—an implied warranty—could have such operation. The charge complained of should not have been given.

It appears that the person through whom the appellee claims was a sister of D. B. Grigsby; entitled, if the attempted partition fairly represented the value of the several parts of the land set apart to the several children, to more land than she received and sold, and in disposing of the case we deem it proper to say that we see no good reason why the appellee, and all other persons

similarly situated, may not be fully protected by having the land which they bought from Emeline Apsly, *nee* Grigsby, set apart to them in the final partition which the plaintiffs ask shall be made of all the land which is described in the petition, if this can be done without detriment to other persons. If, without the attempted partition, the vendor of the appellee had sold the particular tract which she did sell, under the rules well settled in this state as elsewhere, the vendee would be entitled to have the particular land bought by him given to him in partition, if this can be done without prejudice to others interested in the entire land. Justice requires that this shall be done if possible. The appellee has severed from the other defendants, but this furnishes no sufficient reason why he should not have the relief suggested. The right of the parties may be determined in this proceeding in severance, and the ultimate adjustment of equities be made on final partition of the land described in the plaintiffs' pleading.

For the error noticed the judgment of the district court against D. B. Grigsby will be reversed, and the cause remanded. It is so ordered.

PEAK v. SWINDLE.

(Supreme Court of Texas. May 10, 1887.)

LIMITATION—OF ACTIONS—SUSPENSION OF STATUTE—CONSTITUTION OF TEXAS.

That clause of the new constitution of Texas which provides that the period from twenty-eighth January, 1861, when the ordinance of secession was passed, to the date of the acceptance of the new constitution by congress, shall not be included in reckoning time under the statute of limitations, took effect on December 3, 1860, when the constitution was ratified by the people, and its taking effect was not postponed to March 30, 1870, the date of its acceptance by congress. The clause, therefore, applies to all cases in which the bar had not become complete before December 3, 1860.

Appeal from Dallas county.

John Grigsby died in 1841, leaving nine children, of whom seven were by a deceased wife, and two by the wife who survived him. The land in controversy in this action was owned by himself and his surviving wife as community property, but the whole of it was partitioned out among the nine children, each one receiving an equal share. The surviving wife afterwards married again, and had one child, the appellee, Maria Louisa Swindle, who now brings this suit to obtain a new partition of the land, so that the one-half owned by John Grigsby shall be divided among the nine children, and the other one-half, which belonged to her mother, shall be divided between herself and the two children of her mother by Grigsby. For additional facts, see *Grigsby v. Peak*, *ante*, 474.

Stemmons & Field and *Leake & Henry*, for appellant. *Richd. Morgan, Jr.*, and *Jeff Word, Jr.*, for appellee.

STAYTON, J. A history of this case may be found in the cases of *Caruth v. Grigsby* and *Grigsby v. Caruth*, 57 Tex. 259-273. In the case last mentioned it was held that the title of the appellee was superior to that asserted by the appellant, and that she was entitled to recover, unless her right was defeated by limitation. The brief of counsel for appellant presents some questions which were definitely settled on the former appeal, upon facts the same as are presented by the record before us; but as to those we see no reason to doubt the correctness of the former decision, and a further consideration of them becomes unnecessary.

The appellee, being a minor, married on August 24, 1859, and on the trial the court instructed the jury as follows: "You are instructed that the statute of limitations did not begin to run against the plaintiff, Maria Louisa Swindle, until the date of her first marriage, on the twenty-fourth of August,

1859; and you are further instructed that the statute of limitations did not run from January 28, 1861, until the second day of September, 1866, when the statute of limitations commenced running again; and if you find the period of five years elapsed between the twenty-fourth of August, 1859, up to the twenty-eighth of January, 1861, and then from the second day of September, 1866, up to the date the constitution of 1869 went into effect, viz., December 3, 1869, you will find that the plaintiff's (Maria Louisa Swindle's) claim is barred by the statute of limitations. If, however, you find that five years had not elapsed between the times above specified and the adoption of the constitution of 1869, you are instructed then that the statute of limitations against Maria Louisa Swindle commenced running on the twenty-fourth of August, 1859, the date of her first marriage, and continued so to run until the twenty-eighth day of January, 1861, when it ceased to run until the thirtieth day of March, 1870, and then commenced to run again, and continued so to run until the eighteenth day of August, 1874, the date of the institution of this suit. You are therefore instructed, if the time which elapsed from the date of her marriage up to the twenty-eighth day of January, 1861, when added to the time which elapsed between the thirtieth day of March, 1870, and the eighteenth day of August, 1874, did not amount to seven years, then the said Maria Swindle is not barred by the statute of limitations."

The appellant asked the court to instruct the jury that the constitution of 1869 did not take effect as to the article in it declaring that "the statutes of limitation of civil suits were suspended by the so-called act of secession of the twenty-eighth of January, 1861, and shall be considered as suspended within this state until the acceptance of this constitution by the United States congress," until March 30, 1870. This was refused. If the statutes ran from September 2, 1866, until March 30, 1870, the adverse possession shown by the appellant continued for a sufficient period of time to bar the right of the appellee; but, if the constitution of 1869 became operative at the time it was ratified by the people, then the period of adverse possession, while the statutes of limitation were operative, was not sufficient to bar her right. In the former disposition of this case this court assumed, without particularly considering when the constitution ratified by the people in 1869 took effect, that it did not take effect until March 30, 1870; and the majority of the court held, assuming this to be true, that the condition of the country was such between September 2, 1866, and March 30, 1870, as to give effect to the constitutional provision above quoted; even in a case in which the statutory bar would have been complete under the statutes prior to March 30, 1870, but for the disturbed condition of the country.

The inquiry as to when the constitution ratified by the people in 1869 became operative is now directly presented; and, if it be true that it so became when ratified by the people, it is clear that the instructions given were correct, and that the judgment as to the appellee must be affirmed. Under the acts of congress known as the "reconstruction laws," delegates were elected to convene and frame a constitution for this state. The delegates assembled in convention on June 1, 1868, and adjourned on August 31st following, but again met in convention on December 7, 1868, and finally adjourned on February 6, 1869, after having framed a constitution. Under the act of congress of date April 10, 1869, the president of the United States, by proclamation, directed an election to be held, beginning on November 30, 1869, at which the people were called upon to ratify or reject the constitution which had been framed by the convention. This election was held on November 30th, and the first three days of December, and resulted in the ratification of the constitution thus framed, by a large majority. The act of congress providing for the submission of the constitution to the vote of the people also provided for the election at the same time of members of congress, members of the state legislature, and all the state officers provided for by the constitution

to be submitted. The same act fixed a time at which the members of the legislature were to meet, if the constitution was ratified; and, in accordance with the requirement, the legislature met on February 8, 1870, and subsequently ratified the thirteenth, fourteenth, and fifteenth amendments to the constitution of the United States, and at the same time elected two senators to represent the state in the congress of the United States. By the act of March 30, 1870, this state was admitted to representation in congress; that act reciting the fact that "the people of Texas have framed and adopted a constitution of state government which is republican;" and, further, that "the legislature of Texas, elected under said constitution, has ratified the fourteenth and fifteenth amendments to the constitution of the United States; and whereas, the performance of these several acts in good faith is a condition precedent to the representation of the state in congress, therefore the said state of Texas is entitled to representation in the congress of the United States."

These acts, which led to the formation of the constitution, its adoption, and the admission of the state to representation in congress, not only evidence the opinion of congress that the constitution took effect before the state was admitted to representation, but also evidence the intention of the people, from whose will alone a constitution could have an existence, that it could be operative prior to the time the state was admitted to representation. If, however, we look to the instrument itself, the evidence of the intention of the people to make the constitution operative from the time of its ratification by the people is still more conclusive. The preamble declares that "the people of Texas * * * do hereby ordain and establish this constitution." When did the people "ordain and establish this constitution?" As their act, and not the will of congress, ordained and established it, this must have been accomplished when the will of the people was manifested at the election held on the last day of November and the first three days of December, 1869. At no other time was expression of the will of the people, as to whether or not the constitution framed by the convention should become the constitution of the state, ever given. The constitution fixed the terms of office for state officers, and declared that these should run from the day of general election; and the election declaration, passed by the convention, recognizing that fact, and intending to have no uncertainty as to the time when the terms of all state, district, and county officers should commence, declared that "the said election for state, district, and county officers shall be conducted under the same regulations as the election for the ratification or rejection of the constitution, and by the same persons. The returns of elections shall be made to the commanding general, who shall give certificates of elections to the persons chosen for the respective offices. The officers, as elected, shall commence the discharge of the duties of the office for which they have been chosen as soon as elected and qualified, in compliance with the provisions of the constitution herewith submitted, and shall hold their respective offices for the term of years prescribed by the constitution, beginning from the day of their election, and until their successors are elected and qualified." The same declaration also fixed a time at which the legislature, elected under the constitution, should meet, as did the constitution fix the congressional, senatorial, and representative districts, in which congressmen, senators, and representatives were required to be and actually were elected at the same election at which the constitution was adopted. All these officers were elected and held under the constitution; and the members of the legislature were, by its terms, required, as a legislature, to do acts which necessarily preceded the admission of the state to representation in congress. Act of congress, April 10, 1869, (Pasch. Dig. 1186;) Const. art. 8, § 36. The entire constitution bears evidence that it was the intention of the people it should become operative when adopted by them, and there is nothing in it to indicate an intention that any part of it should be inoperative until congress

admitted the state to representation. If such an intention was evidenced, it should be given effect; for it would be competent for the people of a state, the sole constitution making power, to determine that a constitution should not be operative until the happening of a future event dependent upon the action of some other body; but as no such intention is evidenced, and as a valid state constitution might exist without reference to the will of congress, and although the state by that body was denied representation, we are of the opinion that the constitution became operative in all its parts from the time it was ratified by the people. That congress deemed the condition of the country such, at the time the constitution was adopted, as to require a continuance for a period thereafter of a provisional government, and to deny to the state a representation in congress until it was satisfied that the constitution was in harmony with that of the United States, and that the time had come when the provisional government should be withdrawn, is a matter of no consequence in the consideration of the question before us.

Subject to the constitution of the United States, laws made in pursuance thereof, and treaties made under the authority of the general government, the constitution under consideration became the supreme law of this state, regulating, so far as it assumed to do, the rights of persons and property from the date of its adoption by the vote of the people.

In accordance with these views, it was held in *Campbell v. Fields*, 35 Tex. 752, that section 47, art. 12, of that constitution, gave a mechanic's lien for work done during the months of January, February, and March, 1870. In the course of the opinion it was said that "the approval of the constitution by congress was only a condition precedent to the representation of the state in the national legislature, and this condition of the reconstruction laws did not prevent the constitution from becoming the organic law of the state, on its ratification by the people, for all the purposes of state government."

In *State v. Williams*, 49 Miss. 661, the same ruling was made as to the time when the constitution of the state of Mississippi became operative. The constitution under consideration in that case was framed under the reconstruction laws operative in this and other southern states; and in that case, as in this, it was contended that the constitution did not go into effect until the passage of the act of congress admitting the state to representation in congress: The proposition was denied by the court, and it was held that the constitution went into operation, as the fundamental and organic law of the state, from the time of its ratification and adoption by the people.

In *Re Deckert*, 2 Hughes, C. C. 187, in which the opinion was delivered by Chief Justice WAITE, it became necessary, in order to determine the validity of an exemption claimed by a bankrupt, to ascertain when the constitution of the state of Virginia, adopted under the same reconstruction laws as was the constitution under consideration in this case, took effect. The same construction was made in that case as in this. After commenting on the laws which led to the adoption of the constitution of Virginia, illustrative of the intent of congress as well as of the people, the court said: "It is true that the government was not fully organized in all its departments under the constitution, and that the United States retained its supervisory powers under the reconstruction acts until the final action of congress. Complete organization of the government, however, was not necessary to give effect to the constitution, and no modification of the particular provision now under consideration was ever attempted by the United States. In our opinion, the constitution of Virginia took effect, so far as it related to the provision for exemptions, on the sixth of July, 1869, the day of its ratification by the people."

It is apparent from the uncontroverted facts that a less period than five years, excluding the period between March 2, 1861, and September 2, 1866, elapsed between the time of the marriage of the appellee and the third day of December, 1869, or between the date of her marriage and the date of the of-

can shield themselves behind the marriage disability of Mrs. Hensley. She received a part of the purchase money as such, and was morally, though not legally, bound to join in the deed. Her honest purposes are not to be frustrated or defeated by any fraudulent practices of the Fishers. There can be no doubt but the deed conveyed the legal title to the 10 acres to the Fishers, and the real question in the case is whether they, and through them Henry, acquired the title under such circumstances that he should be held to hold the title in trust for the estate of Starnes and plaintiff, a purchaser therefrom.

The evidence shows that R. B. Fisher bought the 10 acres at the sheriff's sale in 1860, to befriend Starnes, and to enable him to save his home for himself and family. There is some conflict in the evidence as to whether Starnes refunded to Fisher the purchase money, but the weight of the evidence is to the effect that he never did, and that Starnes eventually abandoned all claim to it in favor of Fisher. In 1861 or 1862 the house on the property was occupied by soldiers, and then destroyed by fire. Starnes left Butler, where the land is situated, and Fisher went to the southern army. There is some evidence that a deed of release from Starnes to him was found among his papers left with a lady at Butler when he went south, but the evidence is too indefinite to be of much value. However that may be, we conclude Starnes failed to pay Fisher the money he had bid and paid at the sheriff's sale, and yielded all claim to the property to Fisher. Thus the matter stood until 1867, when some of the Fisher heirs returned to Butler, and through the defendant Henry, who was their attorney, offered Hensley and his wife \$50.06 for a deed to the property. Hensley was then in destitute circumstances, and lived some 18 miles from the place where the deed had to be acknowledged. It is clear that he and his wife accepted the money, not as a new consideration for the land, but as a compensation for their trouble and expenses in going to Linn, where the deed was acknowledged. When there they were, for the first time, informed that the Fishers had acquired the title of Starnes, and it was on that representation that they executed the deed. Now, the heirs of Fisher had a right to demand and receive a deed from the late sheriff under the previous sale made by him to their father. That right entitled them to receive the deed from Hensley and wife in satisfaction of the title-bond to Starnes, and there was therefore no fraud or deception practiced in procuring that deed; and it follows that no trust does or can arise in favor of the estate of Starnes or the plaintiff. The deed from Hensley and wife was not only recorded when the plaintiff purchased at the administrator's sale, but he had actual notice of it.

The plaintiff contends that, in any event, he was entitled to a decree for the possession of the land during the life of Hensley, and for the entire title in the event he should outlive his wife. This claim is based upon the notion that the Fishers only acquired the interest of Mrs. Hensley. The remark made when this case was here before, that upon no theory of the case ought the decree to have embraced more than the legal interest of Hensley himself, cannot be regarded as giving any countenance to such a claim. The decree was then for the plaintiff, and the remark was made to show that it could not stand in any view of the case. We have before endeavored to show that the defendants by right acquired all the title of both Hensley and his wife. The fact that Henry knew of the existence of the title-bond, which is clearly enough shown by this record, cannot change the result before expressed.

The judgment of the circuit court, which was for the defendants, is affirmed.

(All concur.)

FAIRBANKS and others v. LONG and others.

(Supreme Court of Missouri. May 16, 1887.)

1. LIMITATION OF ACTIONS—EJECTMENT—INSTRUCTION.

Rev. St. Mo. § 3225, provides that any person claiming any real estate in the lawful possession of another, and which has not been in possession of such claimant, or any one under whom he claims, for 30 consecutive years, and on which he has paid no taxes, and the equitable title to which has emanated from the government more than 10 years, shall within one year bring his action to recover the same, or be forever barred. *Held*, that where this section was pleaded as a bar to an action of ejectment, although by its instructions the court erroneously made the bar of the statute complete against plaintiff upon proof of the two facts only,—that defendants were in possession of the premises at the time of the commencement of the action, and that neither plaintiff, nor those claiming under him, had been in possession of the premises for 30 years last past,—yet, as it appeared upon all the evidence that plaintiff could not recover, the erroneous instruction was not ground for reversal.

2. SAME—EQUITABLE TITLE.

Mansfield v. Pollock, 74 Mo. 186, and *Rollins v. McIntire*, 87 Mo. 497, holding that the statute applies to cases where the legal as well as the equitable title has emanated from the government, reconsidered and affirmed.

3. SAME—STATUTE—DISABILITY.

The statute is absolute, and makes no exceptions in favor of those laboring under disability. *Held* that, where such is the case, the court cannot introduce any exceptions into the statute on the ground of inherent equity, or because it may appear reasonable that the statute should not run against a party in a given case.

Appeal from circuit court, Chariton county.

Chas. Hammond and P. A. Reece, for plaintiffs in error. *H. Lander*, for defendants in error.

BRACE, J. This is an action of ejectment to recover the S. W. $\frac{1}{4}$ of section 22, township 56, range 21, in the county of Chariton. The petition in usual form was filed January 31, 1882. The answer of defendants David and Elizabeth Ballew was a general denial. Defendant Long filed a separate answer, and, in addition to a general denial, alleged that the land sued for was "military bounty land," and set up the two-years statute of limitations, and, for a further defense, alleged "that he, and those under whom he claims, have been in the actual possession of the premises in question for many years before the commencement of this suit, and that said premises have not been in the possession of the plaintiffs, or of any one under whom they claim, for more than 30 years next before the commencement of this suit, and that the plaintiffs, or any of them, or any one under whom they, or either of them, claim, have paid no taxes on said premises for more than thirty years next before the commencement of this suit, nor at any other time." The case was tried by the court without a jury. Finding and judgment for the defendant, and brought here by plaintiffs by writ of error. The errors assigned are the refusal of the court to give plaintiffs' declarations of law Nos. 8 and 5, and the giving of defendants' declarations Nos. 1, 2, 3, and 4.

It is conceded that the right of action of all the plaintiffs was not barred by the two-years statute, and the finding of the court was upon the theory that plaintiffs' recovery was barred by section 1 of the statute of February 27, 1874, (Laws 1874, p. 118; Rev. St. § 3225.) The point made, that no issue under that statute was raised by the pleadings owing to the insufficiency of Long's special plea, is not well taken; for, by the express terms of that act in a case coming within its provisions, the claimant's recovery is not only barred, but his right and title is *ipso facto* vested in the possessor; and, even if it were not so provided, it is well-settled law in this state that in ejectment it is not necessary to plead specially the statute of limitations. It operates upon the right, and vests title, and the facts to confer title may be given

in evidence under the general issue. *Nelson v. Brodhack*, 44 Mo. 597; *Fulkerson v. Mitchell*, 82 Mo. 14, and cases cited.

There was no evidence to support plaintiffs' declaration No. 5, and consequently no error in its refusal. Defendants' declaration No. 3 was upon the two-years statute of limitations, and Nos. 2 and 4 are unexceptionable, and the objections to them are not insisted upon; so that, for the determination of this cause, it will only be necessary to consider declaration No. 1, given for the defendants, and plaintiffs' declaration No. 3, refused.

The court by its action on these last two declarations in effect declared the law to be that if it appeared from the evidence that the defendants were in the actual possession of the premises in question before and *at the time of the commencement of the suit*, in good faith claiming title thereto, and that the plaintiffs, nor any of them, nor any one under whom they claim, were ever in possession of said premises, or ever paid taxes on said premises for the period of *thirty years last past*, then the defendants' possession was within the protecting provisions of section 1 of the act of February 27, 1874. That section reads as follows: "Any person claiming any real estate in the lawful possession of another, and which has not been in possession of such claimant, or any one under whom he claims, for thirty consecutive years, and on which neither he, nor those under whom he claims, has paid any taxes for all that period of time, and the equitable title to which has emanated from the government more than ten years, shall, within one year from the approval of this act, bring his action to recover the same, and in default thereof he shall be forever barred, and his right and title shall *ipso facto* vest in such possessor."

Under the construction placed upon this act in *Rollins v. McIntire*, 87 Mo. 496, the 30 years next preceding the date of the act is the period contemplated by the act, and "the claimant at the date of the act, and his predecessors in the chain of title under which he claims within said period of thirty years, as well as the person in actual possession at that date, are the parties contemplated by the act." With this construction, so far as it goes, no fault can be found.

The operation of the act depends upon these five concurring conditions: (1) The premises must not have been in the possession of the claimant, nor of any person under whom he claims, for 30 consecutive years next preceding the twenty-seventh of February, 1874, and no taxes must have been paid thereon for all that period of time, either by the claimant or those under whom he claims. (2) The claimant must have failed to bring his action within one year after that date. (3) The equitable title must have emanated from the government more than 10 years prior to that date. (4) The possessor must have been in lawful possession at that date. (5) His possession must have been continued during the whole of the year immediately succeeding that date.

In the light of this construction of the statute, the theory upon which this case was tried is erroneous, as, under the law as declared by the court, in order to defeat plaintiff's recovery, it was only necessary that defendants should have been in lawful possession of the premises *at the commencement of the suit*, and that the claimants, and those under whom they claim, should never have been in possession of the premises, nor paid any taxes thereon for the period of *thirty years last past*. Whether, for the errors contained in the declarations of law, this cause ought to be reversed, will depend upon a consideration of the undisputed and uncontradicted facts in the case; and here it may as well be premised that the same error in regard to the period within which the claimant must have failed to pay taxes contained in defendants' first declaration is also contained in plaintiffs' fourth declaration given by the court at their request, and they ought not to be heard to complain of an error which they invited and adopted. *Holmes v. Braidwood*, 82 Mo.

610; *Noble v. Blount*, 77 Mo. 235; *Smith v. Culligan*, 74 Mo. 387; *McGonigle v. Daugherty*, 71 Mo. 260; *Bettes v. Mayoon*, 85 Mo. 580.

The undisputed facts bearing upon the question under consideration may be briefly stated as follows: On the nineteenth of February, 1819, a patent issued from the government of the United States to James Blackburn for the land in controversy, whose title afterwards vested in his son John Patton Blackburn by descent. The latter dying intestate, the title descended to his son James R. Blackburn and five other children and one grandchild of the said John Patton. James R. Blackburn, by deed dated July 20, 1860, and recorded January 9, 1861, acquired all the interest of the other heirs of John Patton Blackburn except that of the grandchild. In 1862, James R. Blackburn died intestate, leaving surviving him one of the plaintiffs, his widow, and the others, his only children and heirs at law. The colorable title of the defendants was a deed from the patentee, James Blackburn, to John Evans, dated June 16, 1819; deed from Evans to John Reed, dated October 3, 1844; power of attorney from Reed to W. R. Love, dated February 11, 1864; and deed from Reed by his said attorney in fact to F. McLilley dated May 13, 1864. These deeds were all recorded August 8, 1865. McLilley, the grantee of Reed, took actual possession of the premises in 1866 or spring of 1867, and continued in possession, improving and using the premises as his own, until his death, in 1872, and his possession was continued in his heirs until April 22, 1876, when plaintiffs, or some of them, instituted suit for the premises against the tenants of said heirs, in which a nonsuit was taken, and afterwards, on the thirtieth of January, 1880, and within one year after taking said nonsuit, they commenced another suit against the heirs themselves, in which another nonsuit was taken, and within one year after taking same they instituted this action; the said heirs, and the defendants who claim under said McLilley, and who succeeded to all the right, title, and possession of said McLilley, continuing in the same actual, open, and adverse possession since McLilley's death to the commencement of the present action. Neither the claimants, nor any person under whom they claim, have ever been in possession of the premises, nor have they ever paid any taxes thereon.

The facts in this case fully meet all the requirements of the act of February 27, 1874. (1) The premises had not been in the possession of the plaintiffs, or of any person under whom they claim, for 30 consecutive years next preceding the twenty-seventh of February, 1874, nor had any taxes thereon been paid by them during all that time; (2) the plaintiffs failed to bring their action within one year after that date; (3) the title to the premises, legal and equitable, had emanated from this government more than 50 years prior to that date; (4) McLilley's heirs were in the lawful possession of the premises at that date; (5) their possession continued during the whole of the year immediately succeeding that date, and at the end of one year from that date, by virtue of the provisions of said act, plaintiffs' title was *ipso facto* vested in McLilley's heirs, and since has been acquired by the defendants, and, upon the uncontradicted evidence in the case, the court would have been warranted in declaring that the plaintiffs could not recover; from which it follows that the judgment of the circuit court ought not to be reversed for the errors in the declarations of law heretofore mentioned. Rev. St. 1879, § 3775.

In the cases of *Mansfield v. Pollock*, 74 Mo. 186, and *Rollins v. McIntire*, 87 Mo. 497, the only cases that have been before this court involving the construction of section 1 of the act of 1874, the law has been held to apply to cases where the legal as well as the equitable title has emanated from the government, and, after carefully considering the argument of counsel maintaining a contrary view, we see no good reason to depart from the ruling in those cases.

As to the remaining contention of counsel for appellants, that, at the time the act went into effect, all the plaintiffs except one were laboring under the disability of minority, it is sufficient to say that the statute makes no excep-

tions; and the settled rule is, in respect to the running of the statute of limitations, that the statute will run against all persons, "and no exception to the statute can be claimed unless it is expressly mentioned in the statute;" and, "where the statute makes no exception, the court can make none on the ground of any inherent equity, or because it may appear to be reasonable that the statute should not run against any party in a given case." Tyler, Ej. 928, 929, and cases cited; Ang. Lim. (6th Ed.) 203, and cases cited. The act of 1874 was evidently intended to be a statute of absolute repose to those who came within the protection of its provisions.

Judgment of the circuit court affirmed.

(All concur.)

STATE v. HATCH.

(Supreme Court of Missouri. May 16, 1887.)

1. CRIMINAL PRACTICE—VENUE—CONSTITUTIONAL LAW.

The constitution of Missouri conferring no power on the legislature to authorize the prosecution of a crime in a county other than that in which it was committed, *held*, that Rev. St. § 1698, which authorizes an indictment to be found in either of two or more counties, where it is matter of doubt in which the offense was committed, and gives the court of the county where the indictment was found jurisdiction of the offense, is unconstitutional.

2. SAME.

Where defendant commits an indictable offense in one county, and subsequently commits a similar offense in another county, *held*, that this does not change the venue of the offense first committed.

Appeal from St. Louis criminal court.

Atty. Gen. Boone, for respondent. *F. J. Bowman* and *R. G. Frost*, for appellant.

SHERWOOD, J. 1. The defendant was indicted for embezzlement alleged to have been committed in the city of St. Louis. On the trial he was convicted, and now appeals here. The evidence shows very clearly and conclusively that the offense was not committed in the city of St. Louis. This case, therefore, falls within the principle announced in *Ex parte Slater*, 72 Mo. 102, and in that of *State v. McGraw*, 87 Mo. 161; that principle being that, under the present constitution of this state, it does not lie in the power of the legislature to authorize the prosecution of a crime in a county other than that in which it is committed. In the case last cited it was ruled that so much of section 1691 as authorized the crime of burglary to be punished in any other county than the one in which the offense was committed, was constitutionally in valid. For like reasons it may now be ruled that section 1698, which authorizes an indictment to be found in either of two or more counties, where it is a matter of doubt, etc., in which one it was committed, and gives the court of the county where the indictment is found jurisdiction of the offense, is likewise obnoxious to constitutional objections. The case of larceny, and of the place of its perpetration, rests upon considerations peculiar to that crime, since every county into which the goods may be taken constitutes the *locus* of a distinct asportation, forming thereby a new theft. Such features as these, however, are obviously not possessed by the crime under discussion.

2. And the reception of money by defendant from his employes, after committing the crime of embezzlement elsewhere in the state, and his false assertions in respect to the state of his accounts with his employes, could not change the venue of the offense previously committed. The doctrine of *relation* does not apply in criminal cases. The act of the defendant in obtaining the money in St. Louis from his employes might certainly fall within the purview of the act in reference to *false pretenses*, but certainly could not amount to the crime of which he has been convicted. This being the case, we hold

that the criminal court had no jurisdiction of the offense charged; that its proceedings herein were *coram non judge*; and its judgment is hereby reversed, and the defendant discharged.

(All concur.)

MARTIN v. NIXON and others.

(*Supreme Court of Missouri.* October Term, 1886.)

1. TRUST DEED—DEFECTIVE EXECUTION—EFFECT.

A deed of trust regular in form, and acknowledged by the grantor before a proper officer as his act and deed, but lacking the grantor's signature, which was omitted by mistake, will be regarded in equity as a mortgage, and enforced against the lien of a judgment creditor of the mortgagor, subsequently acquired. RAY, J., dissenting.

2. JUDGMENT—LIEN—MORTGAGE—MISTAKE.

Where land intended to be included in a mortgage is omitted by mistake, and a judgment is subsequently rendered against the mortgagor, the lien of the judgment creditor is subject to the equity of the mortgage. RAY, J., dissenting.

3. MORTGAGE—CONSIDERATION—EXTENSION OF TIME.

Extension of time by a creditor for the payment of a debt due him by the debtor, as security, is a valid consideration, and is sufficient to support a deed of trust given by the debtor to secure a new note for the debt.

Error to circuit court, Johnson county.

W. W. Wood and W. H. Brinker, for Martin, defendant in error. S. P. Sparks, for Nixon and others, plaintiffs in error.

NORTON, C. J. This cause was tried on the following agreed statement of facts: "That on the fourteenth day of December, 1882, the plaintiff recovered a judgment in the circuit court of the county of Henry, in the state of Missouri, against one John Woodard and W. R. Muir for the sum of \$637.51; and that, on the eighteenth day of December, 1882, he caused a duly-certified transcript of said judgment to be filed in the office of the clerk of the circuit court within and for the county of Johnson, in the state of Missouri; and that afterwards he caused an execution to be issued upon said judgment, on the seventeenth day of August, 1883, directed to the sheriff of the said county of Johnson, which said execution was by the sheriff, on the eighteenth day of August, 1883, levied upon the following described real estate, situate in the county of Johnson, as the property of said John Woodard, to-wit: The north-east quarter of the south-east quarter of section 26, township 44, range 24; that on the nineteenth day of October, 1883, the said land was sold by said sheriff under said execution, at which sale plaintiff became the purchaser of all the right, title, and interest of the said John Woodard therein, and received a deed therefor; that on the twenty-first day of November, 1882, the said John Woodard was indebted to and owed defendants the sum of \$433, security on two certain promissory notes of one W. R. Muir, and payable to defendants, which were then past due; and in consideration of said debt, and the further agreement of defendants to extend, and the extension of the time of payment of the sum of money due by said notes for a period of six months, the said John Woodard promised and agreed to and with defendants to execute his negotiable promissory note, in lieu of the notes of himself and the said Muir, to the defendants, for the said sum of \$433, being dated November 21, 1882, due six months after date, with interest thereon at the rate of 10 per cent. per annum, and if the interest be not paid annually, to become as principal, and bear the same rate of interest; and to execute, acknowledge, and deliver to W. T. Shivil his deed of trust conveying to said Shivil the following described real estate: The north-east quarter of the south-east quarter of section 26, township 44, range 24, to secure the payment of said note, with power of sale in said trustee, if said note should not be paid according to its tenor and effect; that in pursuance of said agreement of said Woodard, the

defendants extended the time of payment of said sum of money, and said Woodard, in part performance of said agreement, executed and delivered to defendants his promissory note in the following words and figures, to-wit: "\$433.00.

WINDSOR, Mo., November 21, 1882.

"Six months after date, I promise to pay to order of Catherine Nixon and Emma Nixon four hundred and thirty-three dollars for value received, negotiable and payable without defalcation or discount, and with interest from date at the rate of 10 per cent. per annum, and if the interest be not paid annually to become as principal, and bear the same rate of interest.

"JOHN WOODARD."

— "And did at the same time cause to be drafted a deed of trust purporting to convey to W. T. Shivil, trustee, the premises aforesaid, for the use and benefit of defendants, to secure the payment of said notes, and did on said day appear before one N. K. Chapman, a notary public within and for the county of Henry, state of Missouri, and acknowledged the same to be his act and deed, for the purposes expressed in said deed, and did deliver the said deed to defendants; that on the following day, November 22, 1882, defendants caused said instrument to be filed in the office of the recorder of deeds within and for Johnson county, Missouri, for record; that the said John Woodard, by an oversight and mistake, omitted to subscribe his name to said deed of trust, although fully intending to do so; that on the twenty-third day of November, 1882, the recorder of Johnson county discovered that said deed of trust had not been subscribed by said Woodard, and on same day transmitted same to H. B. McCleverty, who had sent same to him, who, overlooking the fact that said deed of trust had not been so subscribed, retained possession of the same until the twentieth of December, on which day said John Woodard subscribed the same, and it was returned to said recorder on the twenty-first day of December, 1882; that thereupon they caused said deed to be recorded in the office of the recorder of deeds in and for Johnson county, Missouri, as the same will fully appear by reference to Deed of Trust Record S, at pages 445, 446, and 447; that in drafting said deed of trust, by a mistake of the scrivener, the said premises therein conveyed were described as situate in the county of Henry, state of Missouri, when in truth and in fact they are situate in the county of Johnson, state of Missouri; and, for the purpose of correcting said mistake, the said John Woodard, on the thirteenth day of August, 1883, executed, acknowledged, and delivered to W. L. Shivil, trustee for the defendants, his deed of correction, properly describing the said lands as situate in the county aforesaid, which said deed was duly filed in the office of the recorder of deeds within and for said county, and recorded at page 16 in Deed of Trust Book U, on file in said office, which said deed contains the same recitals and covenants as the first deed of trust herein described, except that it fully described said lands as situated in Johnson county, instead of Henry county, Missouri, and contained the further recital: 'This deed of trust is given and executed to the said parties hereto, to correct an error and mistake in the name of the county stated in a former deed of trust, executed by the said John Woodard to W. T. Shivil, trustee, Catherine and Emma Nixon being the beneficiaries in said former deed, of which this deed is a correction; is dated on the twenty-first day of November, 1882, and recorded in the recorder's office of Johnson county, Missouri, in Book S, at page 445. In said former deed, the land therein described is stated to be situated in Henry county, Missouri, when it should have been Johnson county;' that afterwards, default having been made in the payment of said note according to its tenor and effect, the said trustee herein named, W. T. Shivil, refused to act, and in pursuance of such refusal and authority conferred by said deed of trust, H. H. Russell, the then sheriff of said Johnson county, at the request of the said defendants, and by virtue of the power conferred on him, did, in place and stead of said Shivil, after having given the notice required by said deed, on the twenty-fourth day

of March, 1884, at the court-house door, in the city of Warrensburg, county of Johnson, state of Missouri, offer said premises for sale by public auction to the highest bidder for cash in hand, to satisfy and pay off said debt so secured, and, defendants being the highest bidders, having bid therefor the sum of \$250, the same was stricken off and sold to the said defendants, and in pursuance of said sale and purchase the said H. H. Russell, trustee as aforesaid, executed, acknowledged, and delivered his deed as such trustee, conveying to them said premises.

"It is further admitted that the defendants entered into said premises at the time alleged, and that, if the court finds that the plaintiff is entitled to recover, the damages may be assessed at one cent, and the monthly rents at no dollars per month. It is agreed that, upon the facts admitted, the court may make such separate finding and judgment upon each count of the petition as the law may warrant."

On the above facts, the court declared, by its finding, that under the law plaintiff was entitled to recover, and rendered judgment accordingly, from which defendants have appealed.

The principles of law applicable to the facts agreed upon may be summarized as follows: The doctrine seems to be well established that an agreement in writing to give a mortgage, or a mortgage defectively executed, or an imperfect attempt to create a mortgage, or to appropriate specific property to the discharge of a particular debt, will create a mortgage in equity, or a specific lien on the property so intended to be mortgaged. *McQuie v. Peay*, 58 Mo. 56, 1 Amer. Lead. Cas. Eq. 510; *Re Howe*, 1 Paige, 125; *Racouillat v. Sansevain*, 32 Cal. 376. When land intended to be included in a mortgage is, by mistake, omitted, and a judgment is subsequently rendered against the mortgagor, the lien of the judgment creditor is subject to the equity of the mortgage. The lien of a judgment does not exceed the actual interest which the judgment debtor had in the land at the time of its rendition. *Freem. Judgm.* §§ 357, 359; *Williams*, Eq. Jur. 75; *Galway v. Malchow*, 7 Neb. 286. Extension of time by defendants for the payment of a debt due them was a valid consideration, and sufficient to support the deed of trust to defendants as purchasers for such valuable consideration. *Cass Co. v. Oldham*, 75 Mo. 50; 1 Jones, *Mortg.* § 459. In all cases of mistakes in deeds, courts of equity will interfere as between the original parties, or those claiming under them in privity; such as personal representatives, heirs, devisees, legatees, assignees, voluntary grantees, or judgment creditors, or purchasers from them with notice of the facts. As against *bona fide* purchasers for a valuable consideration, without notice, courts of equity will grant no relief, because they have at least an equal equity to the protection of the courts. 1 Story, Eq. § 165; *Young v. Coleman*, 43 Mo. 179.

In carrying out the principles above announced in the case of *Martin v. Halley*, 61 Mo. 196, where there was a defective execution of a deed, in that it lacked a seal, it was held that the doctrine that "courts of equity will interfere for the relief of a vendee who has taken a defective conveyance, and will compel the vendor and his heirs, and all other persons claiming under him by the act of the law, although without notice, and even purchasers claiming as purchasers for a valuable consideration, if with notice, to make good the conveyance, is well established;" and the language of Chancellor KENT, in disposing of the question of the lack of a seal to a deed, is adopted, to the effect "that as the instrument was in form a deed, with the single exception that it lacked a seal, and as it concluded with the words, 'In witness whereof I have hereunto set my hand and seal,' the intention to affix the seal was apparent, and the omission to do so a mere mistake, concerning which redress could be afforded;" and it was decreed in that case that a subsequent purchaser with notice should convey the legal title to the first purchaser.

So, in the case of *McQuie v. Peay*, 58 Mo. 56, where the deed of trust omit-

ted to name a trustee, while it was held that the deed was at law inoperative, it was nevertheless held that it should be regarded as an equitable mortgage, and sufficient to create a lien for the benefit of the creditor which could be enforced in equity.

So in the case of *Young v. Cason*, 48 Mo. 259, it is held: "When a deed of trust, by mistake, omitted to describe certain lands, but the mistake was corrected by the grantor through a new deed, and the land was sold under the latter as well as under the former, the sale may be affirmed, and a court of equity will set aside the lien of a judgment on the land obtained by a creditor, with notice, after the first, but before the second, deed."

Sealing as well as signing a deed is essential to make it operative at law as a deed, and ordinarily it is as essential that there should be a grantee as a grantor; and if, as is held in the cases above cited, a deed of trust in which no trustee is named, or which is lacking in having a seal,—one of the essentials of a deed,—will be enforced as an equitable mortgage, no reason is perceived why the deed of trust thus made on the twenty-first of November, 1882, regular in form, and acknowledged before a proper officer as his act and deed, but lacking the signature of the grantor, which was omitted to be done by mistake, may not also be regarded as an equitable mortgage, and enforced accordingly against the lien of the judgment creditor, subsequently acquired. And inasmuch as the imperfect execution of the deed of November 21, 1882, could have been corrected in a court of equity, it follows that the grantor himself could remedy the defect, as was done in this case by the deed of correction made on the thirteenth of August, 1883, which recites as follows: "This deed of trust is given and executed to the said parties hereto, to correct an error and mistake in the name of the county stated in a former deed of trust, executed by the said John Woodard to W. T. Shivil, trustee, Catherine and Emma Nixon being the beneficiaries of said former deed, of which this deed is a correction; is dated on the twenty-first day of November, 1882, and recorded in the recorder's office of Johnson county, Missouri, in Book S, at page 445. In said former deed the land herein described is stated to be situate in Henry county, Missouri, when it should have been Johnson county." This deed of correction was filed for record before plaintiff's execution was levied on the land, and before he purchased at the sale made under the execution.

For the reasons given the judgment of the circuit court is reversed, and the cause remanded, with directions to enter up judgment for defendants, and dismiss the plaintiff's bill.

(All concur, except RAY, J., who dissents.)

RAY, J., (*dissenting*.) Not being able to concur with my brethren in their opinion in this case, I beg leave to state briefly some of the reasons therefor:

Prior to the case of *Davis v. Owenby*, 14 Mo. 171, it was uniformly held by this court that the lien of a judgment would hold over an unrecorded deed or mortgage; but in the later case *supra*, at page 176, it was ruled that "a bona fide purchaser of property, who has failed to record his deed until after a judgment has been recovered against his vendor, but who records it prior to any sale under the judgment, can hold it against the person purchasing under the judgment." In this case (*Davis v. Owenby*) it was also held that a "purchaser who has paid his money for land, and received his deed, is the owner of the land, and the property is no longer the property of the vendor, nor has he any seizin in it, either at law or in equity, whether the deed be recorded or not." It was also further held that "a creditor, by obtaining a judgment, acquires a lien that binds the estate of the defendant against any subsequent act of his, but he acquires no interest or estate in the property."

In the case at bar, there is no pretense, in the agreed statement of facts, that the plaintiff, Martin, at the time of his purchase at executor's sale under his judgment, had any actual notice of any of the defendant's equities therein,

or of the fact upon which they were predicated. It is conceded that unless the plaintiff, by virtue of statute concerning conveyances of real estate and registration of deeds, had had constructive notice of defendant's equities, he was entitled to recover the lands in suit, under the facts in the agreed statement. If that be so, it only remains to inquire which, if either, of the instruments of writing, or deed of trust, mentioned in said agreed statement, was competent, under Rev. St. 1879, c. 20, concerning conveyances of land, and the recording of same, to impart constructive notice to plaintiff of defendant's legal or equitable right, if any, to the land in question. Section 668 of said chapter 20, Rev. St. 1879, provides that "conveyances of lands, or of any estate or interest therein, may be made by deed executed by any person having authority to convey the same, or by his agent or attorney, and acknowledged and recorded as herein directed, without any other act or ceremony whatever." Section 674 provides that "all deeds or other conveyances of lands, or of any estate or interest therein, shall be subscribed and sealed by the party granting the same, or by his lawful agent, and shall be acknowledged or proved and certified in the manner herein prescribed." Section 692 provides that "every such instrument in writing, certified and recorded in the manner hereinbefore prescribed, shall, from the time of filing the same with the recorder for record, impart notice to all persons of the contents thereof; and all subsequent purchasers and mortgagees shall be deemed, in law and equity, to purchase with notice." We think it clear that the instrument of writing bearing date November 21, 1882, and filed for record on November 22, 1882, purporting to convey said land in trust, etc., was, under the statute, inoperative to pass title for want of the signature of the grantor; and, if inoperative to pass title, it was equally inoperative to impart notice. We think it equally clear that when, afterwards, on the twentieth of December, 1882, said instrument was signed by the grantor, but not reacknowledged, and then recorded, that it then was competent, and did pass the title, but that it was still inoperative to impart notice, for the reason that it was not reacknowledged after affixing the signature. If that be so, it seems equally clear that the subsequent deed of trust, made to correct a supposed defect in the first deed of trust, was inoperative either to pass title or impart notice, for the reason that the first deed, when signed, being valid and operative to pass title, left none in the grantor to pass by the deed of correction, subsequently made to correct a fancied defect, which had no existence, in point of fact. The land in question, being correctly described in the first deed by its congressional numbers of section, township, and range, passed by that description; and the further statement that it was situated in Henry county being false, in fact and in law, was mere surplusage, and harmless to impeach or invalidate the deed.

If the deed of correction, for the reason stated, passed no title, it was for the same reason equally inoperative to impart any notice to subsequent purchasers. As nothing passed, there was nothing to notice. But, besides this, as both the signing of the first deed of trust and the execution of the second were acts of the judgment debtor, subsequent to the rendition of the judgment or filing of the transcript in question, under which plaintiff bought at execution sale thereunder, they were invalid, as against the lien of said judgment or transcript. If this be so, it must follow that the judgment debtor cannot defeat the lien of a judgment creditor by inserting, in subsequent formal paper or deed, recitals of fact or equities that do not otherwise appear of record in some valid and formal deed or instrument of writing, executed prior to the date of such judgment or transcript, and recorded prior to the date of executor's sale under said judgment. That is, such subsequent deeds, with such recitals, do not, under the registration act, of themselves impart notice to the purchaser under execution, upon such prior judgment. It may be admitted, for the sake of the argument, that actual notice of such facts,

brought home to such execution purchaser before the sale, would defeat the purchase, but this is not the case. It is here insisted, and ruled by the opinion of the court, that the subsequent recording of a subsequent deed,—with such recitals,—of itself, under the statute, imparts notice, notwithstanding the execution purchaser, in point of fact, had no such notice. Such, I respectfully submit, is not the law. Rev. St. 1879, § 2730, provides that “judgments and decrees, rendered by any court of record, shall be a lien on the real estate of the person against whom they are rendered, situate in the county for which the court is held.” *Davis v. Owenby*, 14 Mo. 170; *Valentine v. Havener*, 20 Mo. 183; *Reed v. Owenby*, 44 Mo. 204. So of transcripts of judgments of courts of record, from other counties, from the date of filing same for record. Rev. St. 1879, § 2768.

While a *bona fide* deed, made prior to the date of the judgment, if recorded prior to an execution sale thereunder, takes precedence of the lien of the judgment, yet we apprehend that no well-considered case goes to the extent of holding (as this opinion does) that the judgment creditor's lien does not bind the estate of the judgment debtor against any subsequent act of his, by deed or otherwise, (*Davis v. Owenby*, *supra*;) or that the judgment debtor can evade the force of the judgment by a formal deed or paper, subsequently made, by inserting therein recitals of alleged prior acts and facts, and thus give the registration law a retroactive force and operation that only belongs, under the most liberal rulings, to *bona fide* deeds made before the date of the judgment, if recorded before the execution sale. Such subsequent deeds do not take precedence of the lien of the prior judgment, nor do they, in my opinion, impart such constructive notice, under the statute, as to invalidate the purchase thereunder, as is ruled by the opinion of the court in this case.

GRIFFITH v. HANKS.

(*Supreme Court of Missouri. February 28, 1887.*)

1. PROMISSORY NOTE—FORGERY—QUESTION OF FACT.

Where the question in an action on a promissory note is whether the signature of the maker is genuine or a forgery, and the instructions as given by the court present that question fairly to the jury, the verdict will not be disturbed where there is evidence tending to support it.

2. TRIAL—ADMISSION OF EVIDENCE—CURING ERROR.

In a civil case, error in admitting testimony in behalf of the defendant is cured where an instruction is subsequently given at the plaintiff's request withdrawing in express terms the testimony so admitted from the consideration of the jury.

3. APPEAL—ADMISSION OF EVIDENCE—EXCEPTION.

Where the record fails to show that the plaintiff in error excepted at the time to the ruling of the trial court in admitting evidence over his objection, the correctness of the ruling is not before the appellate court for review.

4. SAME—MOTION FOR NEW TRIAL—ASSIGNMENT OF ERROR.

Error in the refusal of an instruction cannot be reviewed on appeal, where it does not appear from the record that the plaintiff in error in his motion for a new trial assigned such refusal as one of the grounds upon which his motion was based.

Error to circuit court, Scotland county.

Smith & Krauthoff, J. G. Blair, and E. Scofield, for Griffith, plaintiff in error. *McKee & Smoot*, for Hanks, defendant in error.

RAY, J. This was a suit upon a negotiable promissory note. The note bore date December 21, 1880, was for the sum of \$210, payable to the order of Eagle Machine-Works, at Citizens' Bank, Memphis, Missouri, six months after date, and purported to have been executed and signed by and in the

name of John C. Hanks, the defendant, and also purported to have been assigned to plaintiff for value before maturity. The answer was the plea of *non est factum*, supported by affidavit. The reply, the general issue. At the trial before a jury, the evidence was substantially as follows:

It was admitted by defendant that the payee in said note was a corporation duly organized, and that the note was assigned to plaintiff by its authorized manager, J. C. Farr. The plaintiff, to further sustain the issue on his side, introduced as a witness H. G. Pitkin, who testified that he was acquainted with the defendant, John C. Hanks, and somewhat acquainted with his handwriting; has had some notes on him; has been in the banking and brokerage business for several years, and made the examination of signatures a study. The witness, being handed the note in suit, was asked if he could state in whose handwrite the name of John C. Hanks thereto was, and he said it was in defendant's handwrite. He was then handed plaintiff's admitted assessment lists, and asked to compare the signatures to the same with that to the note, and state if he could say from said comparison in whose handwrite the signature to the note was, and he answered that, in his opinion, it was in defendant's handwrite. On cross-examination, he stated that the signature to the note might not be that of defendant, but that it looked very much like his signature. H. Wine, the county assessor, being sworn for plaintiff, stated that he took the assessment lists of defendant for 1879 and also 1880, and knows that defendant signed the lists himself for one year, and thinks he signed for the other. J. W. Barnes, being sworn for plaintiff, stated that he was a broker, and cashier of Scotland County National bank; that he had made it a part of his business to examine signatures to notes. The witness being handed the note in suit, and defendant's said assessment lists, was asked to compare the signatures to the same, and state his opinion as to said signatures, and he said that, in his opinion, the person who wrote the name to the note also wrote the names to the assessment lists. On cross-examination he said the signature of Hanks was one that would not be hard to counterfeit; that the signature to the note was written in ink, with a pen. Plaintiff then offered in evidence the note in suit, together with the assignment of same to plaintiff, by the authorized manager of said corporation, as well as defendant's said assessment lists, all of which were submitted to the jury, and the plaintiff here rested.

The defendant, being sworn on his behalf, and being handed the note in suit, testified that he never signed said note; that the signature, "JOHN C. HANKS," was not his. He further stated that on December 21, 1880, a man claiming to be the agent of the Eagle Machine-Works of Cleveland, Ohio, came to his home, in company with Smith, from Memphis, Missouri, and said that he had my contract for three corn-crushers at \$70 each, and wanted me to pay or give my note for same. "I had never given any contract to buy corn-crushers." Plaintiff here objected to this evidence, tending to show the consideration of said note as being inadmissible in this suit by indorsee for value before maturity. The objection was overruled, and plaintiff excepts to the ruling. The witness then stated that some time in 1880 a man claiming to be the agent of the Eagle Machine-Works called to see him, and wanted him to become local agent for the sale of corn-crushers, and that he signed an agreement to become such, but never signed an agreement to purchase corn-crushers. Plaintiff, as before, objected to this evidence as inadmissible in this suit; and, as before, the court overruled the objection, and plaintiff excepted to the ruling, as before. Defendant then testified that, when the second agent came around, he did sign a note to the Eagle Machine-Works for \$210, due in six months, and payable at Citizens' Bank, with 10 per cent. from date; that the note he signed had the words "order of" and "negotiable" scratched out; that he would not sign a negotiable note, and had the above words scratched out. To this, also, plaintiff objected, because the note in suit showed

on its face that it had not been defaced, and that the only question was, did the defendant sign it? But the record fails to show that plaintiff excepted to this ruling of the court. On cross-examination, defendant being asked how many papers he signed that day, said: "I believe there was two. I signed two papers, and gave to agent, and he signed one, and gave to me. I read over all these papers before signing, and knew what I was signing." Being asked if he did not write to the E. M. Works concerning this note, the witness replied: "I got my attorney to write about the note I had signed." Witness was here handed the assessment lists, and he admitted that he signed one, and might have signed the other. The note in suit was then shown witness, and he was asked if the signature to it was his, and he said no, but that it resembled his signature. "I signed with a pencil the agent had. I see that my name, 'J. C. Hanks,' to this note, is written with ink and pen." William Hanks, son of defendant, testified: "I was present at the time of the transaction between father and agent, and I heard the note read over that my father signed, and I also read it myself. The words 'or order' and the word 'negotiable' were erased. My father signed it with a pencil, and handed it to the agent. This is not the note my father signed, and this is not my father's signature. It read payable to Eagle Machine-Works, and the words 'negotiable,' 'or order,' were scratched out. The amount was \$210." To this evidence the plaintiff objected as inadmissible in this suit. But the record fails to show either that the court overruled the objection, or that plaintiff excepted to the court's action in this behalf. On cross-examination, witness reaffirmed what he before stated about the erasures in the note his father signed, and further said it was a printed note, and partly blank in places. Being here shown note in suit, witness said he never saw it before, but that the note Turner (the agent) read over to his father was about the same size as the note in suit, and looked like it. This was all the evidence offered.

The court, at the instance of the plaintiff, gave the following instructions: "(1) That the evidence in this case proves that the plaintiff is a purchaser of the note in suit for value and in good faith before maturity of same, and the jury must believe from the evidence that the defendant never signed said note; (2) that, if they believe from the evidence that the note was signed by defendant, they will find for the plaintiff for the full amount of said note, with interest from date at the rate of ten per cent.; (3) that, if they believe from the evidence that defendant signed the note in suit, they must find for plaintiff, without they further find that he signed it, believing, at the time, that it was not a negotiable note, and believing that said note did not contain a proper statement; (4) that the contract between the Eagle Machine-Works, made prior to the time of the alleged execution of the note in question, is not a subject for the consideration of the jury, except the question as to whether or not defendant executed said note; (5) that the evidence in this case proves that the plaintiff is a purchaser of the note in suit for value and in good faith before maturity of the same, and the jury must find for the plaintiff, unless they believe from the evidence that the defendant never signed the said note."

The plaintiff also asked the following instruction, which the court refused, and plaintiff excepted to said ruling: "(6) The court instructs the jury that it is their right and privilege to examine the signature signed to said note, and to compare said signature with other admitted signatures of the defendant; and if, from said comparison, they believe the signature to the note is his, and that he signed the same, they will find for plaintiff."

At the instance of defendant, the court gave the following instructions: "(1) That the burden of proof in the execution of the note sued on is with the plaintiff; and unless they believe from the preponderance of the evidence that defendant signed the note sued on, or authorized some one for him to sign same, they will find for defendant." To the giving of which plaintiff objected and excepted.

The jury found a verdict for the defendant, and there was judgment accordingly, from which the plaintiff, after unsuccessful motions for new trial and in arrest, appealed to this court.

It is here insisted, in behalf of plaintiff, that the court erred in admitting in evidence that portion of defendant's testimony (father and son included) touching his execution, to said corporation, of a note like the one in suit, except that it was non-negotiable; that the words "order of" and "negotiable" were erased or scratched out before he signed it; that it was signed in pencil, etc. It is further insisted that the court also erred in admitting in evidence what the defendant said in reference to the prior alleged contract between defendant and agent of said corporation touching the purchase of corn-crushers, and becoming agent of said corporation for the sale of same, etc. It is also claimed for plaintiff that the court erred in refusing instruction No. 6 asked by plaintiff. The defendant has furnished us no brief on his behalf.

As to first alleged error, it is sufficient to say that the record fails to show that the plaintiff, at the time, excepted to the ruling of the trial court in that behalf, and, under repeated decisions of this court, that question is not now before us for review. *Hoyt v. Williams*, 41 Mo. 270; *Harrison v. Bartlett*, 51 Mo. 170; *Pogue v. State*, 13 Mo. 444; *Waldo v. Russell*, 5 Mo. 387; *Hannibal & St. J. R. Co. v. Moore*, 37 Mo. 338.

As to the second alleged error, it is also sufficient to say that that error was cured by the fourth instruction given at plaintiff's request, by which that testimony was in express terms withdrawn from the consideration of the jury. *Fitzgerald v. State*, 14 Mo. 413. We are aware that the ruling of this court on that question of practice—especially in criminal cases—has not been altogether uniform, but the great weight of authority is in favor of the rule above stated.

As to the refusal of plaintiff's sixth instruction, it is also sufficient to say that, if that was error, it is not now before us for review, as the record shows that plaintiff in his motion for new trial failed to assign that as one of the grounds for a new trial. The question in this case, as has been seen, was whether the signature to the note in suit was the genuine signature of the defendant or a forgery. The instructions given by the court presented that question fairly to the jury, (or at least contain no error of which the plaintiff can complain,) and, as there was evidence tending to support the verdict, the uniform practice of this court, under such circumstances, is not to disturb the verdict.

There may be some question as to the propriety of plaintiff's first and third instructions; but, if there is, plaintiff cannot complain of it.

This leads to an affirmance of the judgment of the trial court; and it is so ordered.

(All concur.)

BOBB and others v. BOBB and others.

(Supreme Court of Missouri. June 7, 1887.)

1. TRUSTS—ACCOUNTING—CREDITS.

Where a husband and father establishes a trust in favor of the separate use of his wife and of their children, by conveyance to a friend, and a reconveyance to himself as trustee, he is not entitled to a credit in his account as trustee for the consideration expressed in the reconveyance when, as a matter of fact, both transfers were voluntary, and no consideration passed.

2. SAME—COMPOUND INTEREST.

Upon a suit for accounting against a trustee, it appeared that he kept no account of the trust funds for a large portion of the time, and that he used the balances, from time to time, for his own profit, by loaning the same at a high rate of interest, and by otherwise employing the same for his individual benefit, without ac-

. counting for the profits so realized. *Held*, that he should be charged, in lieu of the profits, with interest at 6 per cent. on balances in his hands, compounded annually.

3. SAME—SELF-IMPOSED TRUST.

A father who creates a trust in his own property in favor of his children and undertakes to administer the trust himself is liable to account at the suit of the beneficiaries when the proper time arrives.

4. SAME—CREATION OF TRUST—ESTOPPEL.

Although, as a matter of fact, no consideration passed under either deed, both of which expressed one, it does not lie in the mouth of a father who conveyed his property to a friend, and took a conveyance back to himself, in which he joined in trust for the sole use and benefit of his wife and their children, to say that the first deed was without consideration, and therefore left the estate in himself divested of all trust.

5. EVIDENCE—PAROL—RECITAL IN DEED.

A want of consideration cannot be shown, against the recital in a deed, for the purpose of defeating the operative words of the deed, as for the purpose of showing a resulting trust in the grantor.

6. EQUITY—REFORMING DEED—FAMILY TRUST.

Equity will not reform a deed establishing a family trust, so as to let in after-born children, where the testimony, as to the intention of the creator of the trust is conflicting, and about equally balanced, and where the settlor, who was also the trustee, has administered the trust for 24 years according to its express terms, and with no intimation of a mistake.

7. APPEAL—CLAIM NOT MADE BELOW—TRUSTS.

A claim by a trustee to a credit on an accounting, made for the first time on appeal, will not be considered.

8. SAME—WAIVER—AMENDMENT.

Where pleadings are amended, the prior pleadings are to be regarded as abandoned, and error in the rulings of the trial court upon the original pleadings is not available.

Cross-appeals from St. Louis court of appeals.

Bill for removal of trustee, and account. The following statement is part of the opinion of LEWIS, P. J., reported in 7 Mo. App. 501: In April, 1843, defendant Charles Bobb, who is the father of all the other parties beneficially interested in this cause, conveyed to Miss Hannah Letcher, now Mrs. John D. Stevenson, for the expressed consideration of \$10,000, a considerable quantity of real estate situate in the city of St. Louis. It does not satisfactorily appear that any consideration was really paid. Miss Letcher was a relative, and an inmate of Charles Bobb's household, enjoying his entire confidence. It appears to have been his wish to place this property in her hands, in order to secure it against possible vicissitude in his own affairs, and so that it might be ultimately enjoyed by his wife and children. At that time his children were three,—Charles L., John H., and William H., all infants of tender years. Afterwards, and prior to January, 1845, William H. died, and a daughter, Lucy G., now the defendant Lucy G. Taylor, was born.

In January, 1845, Miss Letcher, being about to marry, executed and delivered a deed conveying all of the property remaining in her hands to Charles Bobb, as trustee, for the sole use and benefit of Mary H. Bobb, his wife, and John H., Charles L., and Lucy G. Bobb, his children, with power to sell or dispose of the same as the beneficiaries might direct. Miss Letcher had previously sold some parcels of the real estate, and held notes of the purchasers, secured by deeds of trust. These notes went into the possession of Charles Bobb, who collected the proceeds. There were certain other notes, known as the Kelly and Sellick notes, which, with the deed of trust securing their payment, were in December, 1843, conveyed, in a deed which was duly acknowledged and recorded, by Charles Bobb and the trustee in the deed of trust, to Charles L. Bobb, John H. Bobb, and William H. Bobb.

The present suit was commenced in 1859. Its general objects are to restrain the defendant Charles Bobb from further acting as trustee, or in any manner disposing of or interfering with the property; to compel an account-

ing for his receipts and disbursements as trustee; and to divest the entire legal title out of the trustee, and cause it to be vested in the *cestuis que trust*. After a lengthy trial upon preliminary issues, and two successive references, the whole occupying a period of more than eight years, the circuit court decreed substantially according to the prayer of the second amended petition.

The first question to be here considered arises upon the prayer of defendants, Charles Bobb, George L. Bobb, and his sister, Cora L. Taylor, for a reformation of the deed of January, 1845, from Hannah Letcher to Charles Bobb, trustee. It is claimed that the real intention of the parties was to establish a trust for the benefit of Mary H. Bobb, wife of Charles Bobb, and of all their children then in being or thereafter to be born, but that the scrivener, by mistake and without authority, inserted the names of the then living children only. As the deed now stands, John H. Bobb, Lucy G. Taylor, and the representatives of Charles L. Bobb, who have died since the institution of the suit, are each entitled to six-twentieths of the estate; while George and Cora, who were born after the execution of the deed, can only claim one-twentieth part each, as heirs of their mother, Mary H. Bobb, who died in 1853. A reformation of the deed as proposed would give to the defendants George and Cora shares equal with those of the other beneficiaries.

Jeff. Chandler and M. Kenealy, for appellants. *Hitchcock, Madill & Finkelnburg*, for respondents.

BLACK, J. On April 18, 1843, the defendant, Charles Bobb, conveyed to Miss Hannah Letcher nine parcels of land in the city of St. Louis. This deed is in the usual form, and expresses no trust. On the twenty-third of January, 1845, Hannah Letcher conveyed the same property, except three parcels which had been sold to Charles Bobb, in trust for the sole use and benefit of Mary H. Bobb, wife of said Charles and their children, Charles L., John H., and Lucy G. Mary H. Bobb died in 1853. There had been born to her and Charles Bobb, since the execution of the deed of trust, two children, Cora and George. In 1854, Charles Bobb, as trustee and father and guardian, instituted suit against Hannah Letcher, the object of which was to procure a reformation of the deed of trust so as to allow him to sell the property, or any of it, without the consent of the children. The deed was reformed as prayed. From 1845 to the institution of this suit, the trustee sold portions of the property, collected rents from the houses on the property when the deed was executed, built others and collected rents therefrom. The object of this suit is to compel an accounting. An interlocutory decree to that effect was made and a reference had. Objections to some of the items of account in the report of the referee were sustained, and as to those, and the matter of compensation of the trustee, the cause was again referred. From the final decree entered upon these reports Charles Bobb and some of the other defendants have appealed.

1. Of the many reasons assigned to set aside the final and interlocutory decrees, some of them relate to rulings on the pleadings previous to the second amended petition. Those prior pleadings are to be regarded as abandoned. None of these complaints go to this amended petition or the defendant's pleadings filed subsequently thereto, and hence the rulings complained of need not be considered.

2. The trustee now claims that he should have had a credit of \$10,000 because that amount is recited as the consideration in the deed from him to Hannah Letcher. The conceded fact is that no consideration was ever agreed to be paid. Besides this, he does not appear to have made any such a claim in the trial court, and it cannot be made here for the first time, even if it had any show of right.

3. Two other objections are to the effect that the deed of 1843 to Hannah Letcher was without consideration, and therefore left the estate in defendant

divested of all trust, and she had nothing to convey by the deed of 1845. There was, in reality, no consideration paid by Hannah Letcher or any one else for the deed of 1843, though it recites a consideration of \$10,000. There was a show of passing a bag of silver back and forth, but it was for the purpose, merely, of giving color to the transaction. Still this can make no difference; no trust resulted to Charles Bobb because of that fact. The consideration expressed in a deed is open to parol explanation for most purposes. But a want of consideration cannot be shown against the recitation in the deed for the purpose of defeating the operative words of the deed, as for the purpose of showing a resulting trust in the grantor. *Henderson v. Henderson*, 13 Mo. 151; *Hollocher v. Hollacher*, 62 Mo. 273; *McConnell v. Brayner*, 63 Mo. 463; *McCrea v. Purmort*, 16 Wend. 475; *Farrington v. Barr*, 36 N. H. 86; *Kimball v. Walker*, 30 Ill. 511.

Besides this, Charles Bobb joined in the deed of 1845. He does not deny the express trust created by that deed; on the contrary, by his answer he asserts, and in the most solemn form affirms, the trust. Indeed, he asks that the trust deed may be reformed so as to place the two after-born children upon a footing equal with those named therein; whereas now they only inherit shares in their mother's interest.

But the trustee does contend that the plaintiff's case made by the bill is made to stand on the deed of 1843, while the decree, he insists, is made to rest on the trust deed. As to the deed of 1843, the petition does allege that, while it was made without any trust being expressed, yet it was fully understood between Miss Letcher and Mr. and Mrs. Bobb that she was to hold the legal title for Mrs. Bobb and her children then living. But the petition goes on and sets out the deed of trust, the decree correcting the same, and the interests of the parties thereunder, the sale of property, and collection of rents thereafter. There can be no doubt but the deed of trust is also made the foundation of the relief asked. Indeed, the interlocutory decree as to the first count appears to be based solely upon the deed of trust of 1845.

4. Miss Hannah Letcher, now Mrs. Stevenson, was an intimate and trusted friend of Mr. and Mrs. Bobb, staying sometimes at their house, and it was for this reason she was requested to and did take the deed. She executed the deed of trust before her marriage. She says that Charles Bobb requested her to take the deed of 1843, for the benefit of his wife and children, Charles L., John H., and William H.; that Mrs. Bobb was opposed to making the deed, saying that she thought the property was safer with her husband, and they might have more family, when Charles said he would attend to that. Mrs. Stevenson says, when the deed of trust was made, William was dead, and Lucy had been born, and she understood Lucy was to take the place of William. The whole tenor of her testimony is opposed to the theory of any mistake. Charles Bobb testified that he made the deed of 1843 to satisfy the fears of his wife; that he had been compelled to take an interest in a boat, and was about to go on the river, and she was afraid he would become embarrassed; that, when Hannah Letcher was about to get married, he talked the matter over with his wife, and they concluded to take the property back, and that the understanding was, she would convey it to him, in trust for his wife and their children, born and to be born. This effort to correct the deed of trust is made for the first time some 24 years after it was made. Besides this, the petition of Charles Bobb to have the deed corrected in the matter before mentioned, and which was sworn to by him, sets out the interests of the parties, including those of George and Cora, precisely as if there had been no mistake in the respect under consideration. During all this time he had administered the trust on the theory that there was no mistake. Under these circumstances, and on his evidence, thus contradicted by his own acts, no court would be justified in decreeing a reformation of the deed. The deed may have been an unwise act, and not made with sufficient forethought, but the evidence is too

uncertain to show that it was not prepared in accord with the then intention of the parties thereto.

5. The further objection to the decree is that the trustee was charged with 6 per cent. interest on balances in his hands, compounded annually. Whether a trustee should be charged with any interest upon moneys in his hands, and, if he is, then at what rate, must depend much upon the particular facts of each case. As to surviving partners and administrators, where there has been no delay in collecting and paying out the funds, they are not to be charged with any interest. *Gregory v. Menefee*, 83 Mo. 418. But in this state it has been held, where the administrator has used the moneys, not for the interest of the estate, but for his own purposes, he might be charged with the highest rate of interest. *In re Davis*, 62 Mo. 454. And on moneys in his hands, and not reported, but used by himself, he should be charged with 10 per cent. interest, compounded annually. *Williams v. Pettibrew*, 62 Mo. 472. Again, where there was unreasonable delay in making settlements, 10 per cent., with three rests in fifteen years, was approved. *Scott v. Crews*, 72 Mo. 268. The doctrine that compound interest may be exacted by way of a punishment for breach of trust has recently been repudiated by this court. *Cruce v. Cruce*, 81 Mo. 684.

In Perry on Trusts, section 471, it is said: "If he [the trustee] has so mingled the money and the profits with his own money and profits that he cannot separate and account for the profits that belonged to the *cestui que trust*, the *cestui que trust* may have legal interest, computed with annual rests, in order to compound it." Again, "the burden is on the trustee to show that he made no profits, or received no benefit, from the money; and if he refuses to account, or to show the amount of profits received, the court will give compound interest, in order that it may be certain the *cestui que trust* gets the profits of the trade or business in which the trustee has employed the money."

On the one hand, it appears from the report of Mr. B. Gratz Brown, to whom the question of compensation of the trustee was referred, that defendant gave to this property close and careful attention. He built many houses upon it, kept them in repair, and collected the rents. In short, he made a valuable property out of his own donation to these children, and is not chargeable with any neglect in that behalf which could distinguish the trust-estate from his individual interests.

On the other hand, the same referee reports that the attention given by the trustee to this property did not seriously interfere with his other business; that he carried on his private business in connection with the trust, and the accounts of the trust were largely commingled with his own. He was engaged in trade, in warehousing, in lending money, in improving other property, and for a time in mining. It would seem no accounts of the trust funds were kept for a large portion of the time, and no accurate accounts were produced. It is true that the interlocutory decree did direct the referees to compound interest on balances annually at 10 and at 6 per cent. per annum, so that in reality they never passed upon the rate of interest to be charged, or when or how often compounded. The final decree, however, finds that these balances were used by the trustee from time to time for his own profit, by loaning the same at a high rate of interest, and by otherwise employing the same for his individual benefit, without accounting for the profits so realized; and it then proceeds to adjudge him accountable for interest on the balances at 6 per cent., compounded with annual rests.

The evidence reported by the referees, and that upon which this finding of the court was made, is not preserved in this record, and we must take the reports of the referees, in so far as they were confirmed, and the findings of the court, as correct. It is manifest, from these reports alone, that some method of charging interest, in lieu of profits, had to be adopted, and we cannot say

from this record, and the authorities cited, there was any error in this respect. We do not see that section 5560, Rev. St., has any application to this case. The defendant undertook to execute this trust; and the law everywhere is, when the proper time comes, the trustee must account to the beneficiaries.

The judgment of the court of appeals is affirmed.
(All concur.)

MCCARTHY and others v. CASS AVENUE & FAIR GROUNDS RY. CO.

(Supreme Court of Missouri. June 6, 1887.)

1. JURY—COMPETENCY OF JUROR—PREJUDICE.

In an action to recover damages under the statute of Missouri for causing the death of a person, the competency of a juror who testified that he had no prejudice against this particular case, but that he was opposed to personal damage cases generally, but that, if the evidence showed that the plaintiffs were entitled to damages, then he would be in favor of awarding them, is a question for the court to try, and the findings of the court upon it will not be disturbed.

2. NEGLIGENCE—CONTRIBUTORY—CHILD—INSTRUCTIONS.

In an action for damages based upon alleged negligence in violating an ordinance of St. Louis by which drivers and conductors of street cars are required to keep watch for children, either on the track or approaching the same, and to stop in the shortest time possible, where the evidence disclosed that a boy between eight and nine years old was knocked down by the horses of defendant's street car while attempting to jump on another car going in the opposite direction, and that the driver of the car did all in his power to stop it the instant he saw or could have seen the boy, *held*, that an instruction to the jury "that the law requires of a boy eight years and eight months old that he shall exercise such care and foresight, in avoiding danger and accident, as he is capable of exercising, and if he failed to exercise such degree of care, and thereby contributed directly to his death, that his parents could not recover," is not error, when the court otherwise instructed the jury that it was proper for them to consider the facts and circumstances of the case, his age, experience, and knowledge of the risk attending the act of running in the street to catch onto street cars, and the warnings which he may have received from his parents and others, and when the court also told the jury that all the instructions were to be taken and read together.¹

Appeal from St. Louis circuit court.

F. X. McCabe and *A. R. Taylor*, for appellant. *Leonard Wilcox*, for respondent.

BLACK, J. The plaintiffs are the parents of John McCarthy, an unmarried minor. Their cause of action is based upon alleged negligence in violating an ordinance of the city of St. Louis by which drivers and conductors of street cars are required to keep a vigilant watch for persons on foot, and especially children, either on the track or approaching the same, and, upon the first appearance of danger to such persons, to stop in the shortest time and space possible.

The first contention is that the court erred in overruling the plaintiffs' challenge to four jurors for cause. The examination of one of them will present the question as to the others, and, as reported in the bill of exceptions, is as follows: "Upon a special jury of eighteen being called and sworn, plaintiffs' counsel asked Juror Sawyer whether, in an action brought to recover damages under the statute of Missouri on account of killing a person, he would have any bias or prejudice one way or the other. The juror answered that he did have a bias against such a case; that he was prejudiced against all damage cases. Being asked if such bias existed at this time, he answered that it did. Asked if it would require evidence to remove said prejudice in this case, he said in answer: 'Well, I suppose there would have to be ev-

¹ Respecting negligence in regard to children, see *Mackey v. City of Vicksburg*, (Miss.) 2 South. Rep. 178, and notes; *Emerson v. Peteler*, (Minn.) 29 N. W. Rep. 313, and note; *Schmidt v. Kansas City D. Co.*, (Mo.) 1 S. W. Rep. 65, and note.

idence anyway;' that it would require strong evidence. Counsel for the plaintiffs then made his challenge for cause, and thereupon the court asked the juror if he could hear the evidence in the case, and render a verdict according to the law and the evidence. The juror answered that he believed he could. *By the Court.* 'Suppose a case in hand, one in which the evidence in other respects sustains plaintiffs' cause of action, could you, under the evidence and instructions of the court, give the plaintiff a verdict?' *Answer.* 'Yes, sir.' Plaintiffs' counsel then asked: 'My question still is, would the prejudice that exists in your mind now against all damage suits, including this, be such that it would require evidence to remove it before you could find a verdict for plaintiffs?' *Answer.* 'If you will allow me, I will answer it in this way: If the evidence went to show that the party was entitled to damages, then, as a matter of justice, I would be in favor of awarding damages; otherwise I could not.' *Q.* 'Would you start into the case with a prejudice against it which would require evidence to remove?' *A.* 'Not in this case. I have no prejudice against this case, because I don't know anything about it.'

It is not every opinion of a juror concerning the matter in litigation which will operate as a disqualification. To have that effect it must be such an opinion as will influence his judgment in the consideration of the cause. This is substantially the rule of the statute. Section 2796. Opinions formed, but not of a fixed character, and which readily yield to evidence, do not disqualify the juror. *State v. Walton*, 74 Mo. 270. If he have such a bias or prejudice against a class of cases that his judgment will be warped, then he should be set aside and not accepted as a juror; but it ought to appear that his bias is such as to influence his judgment.

Again, the competency of a juror is a mixed question of fact and law. It is for the court to try this question of fact, and the finding of the trial court as to the competency of the juror ought not to be disturbed unless it is clearly and manifestly against the evidence. This rule is to be deduced from what has been heretofore said by this court. *State v. Catham Nat. Bank*, 80 Mo. 626; *Montgomery v. Railroad Co.*, 2 S. W. Rep. 409.

Now, from the examination of the juror in this case, it clearly appears that he had no opinion as to this case. His evidence, as a whole, shows that he was opposed to unfounded personal damage suits; but, if the evidence showed that the plaintiffs were entitled to damages, then he would be in favor of awarding them. What more could be asked of any juror? But applying the rule before asserted, it becomes clear that we ought not to disturb the finding of the circuit court as to the competency of these jurors.

For the purpose of the only question of law urged it is sufficient to say of the evidence that the boy was between eight and nine years old. As one of the defendant's street cars was going east on Cass avenue, the boy and two older brothers saw the conductor was inside collecting fares, and they attempted to jump on for a ride. The older boy got on the car, but John was five or six feet behind, running after the car. At the same time another car on the north track was going west. The boy got on the space between the two tracks, and in his endeavor to avoid the west-bound car and a butcher wagon, which passed at the same moment, he ran against the horses drawing the car going west, was knocked down by them, and run over by the car. There is but little evidence showing any want of care on the part of the driver, and much that exonerates him from all blame, that he did all in his power to stop the horses and car the instant he saw or could have seen the boy.

The instructions given at the request of the plaintiffs, among other things, required the jury to find that the child was exercising ordinary care, according to his age and discretion, to prevent injury to himself.

For the defendant the court gave the following instructions: "No. 6. The court instructs the jury that the law requires, even of a boy eight years and eight months old, that he shall exercise such care and foresight in avoiding

danger and accident as he is capable of exercising; and if plaintiffs' deceased son failed to exercise such degree of care, and thereby contributed directly to his injury and death, then plaintiffs cannot recover. No. 7. In determining the capacity of plaintiff's son to foresee and avoid the danger to which he exposed himself, the court instructs you that it is proper for you to consider, among other facts and circumstances in the case, his age, his experience, and knowledge of the risk and danger attending the act of running in the street to catch onto street cars, and the warnings which he may have received from his parents or others."

Objection made to the sixth instruction is that it required a too high degree of care on the part of the boy; but the court, in express terms, told the jury that all of the instructions were to be taken and read together. When this is done, the boy was only required to exercise care and prudence equal to his capacity, age, knowledge, and experience considered. This he was required to do. *Boland v. Railroad Co.*, 36 Mo. 490; *Ostertag v. Railroad Co.*, 64 Mo. 424.

No question is made over the other instructions.

The judgment is affirmed.

(All concur.)

KARNES v. ALEXANDER.

(Supreme Court of Missouri. June 6, 1887.)

1. JUDGMENT—JUSTICE OF PEACE—COLLATERAL ATTACK—EXECUTION SALE.

In ejectment to recover the possession of certain real estate, defendant claimed title under a sheriff's deed, given at a sale under two special executions issued upon special judgments rendered by a justice of the peace upon special tax bills for the doing of certain grading in the city of Kansas. Section 4 of the Kansas City charter provides: "Where the amount due on any tax bill does not exceed three hundred dollars, suit may be brought thereon before the recorder of the city, or any justice of the peace of said city," etc. The executions only recite that the justice who rendered the judgments was a justice of the peace of Kaw township, and omits the words "in Kansas City." It was admitted that it appeared from the proceedings held before the justice that he was a justice of the peace in Kansas City. *Held*, that the judgments were not subject to collateral attack, and that an exception to the deed on this ground was not well taken.

2. EXECUTION—LEVY AND SALE—RETURN-DAY.

A sale under special executions issued upon special judgments rendered upon special tax bills as provided by section 4 of the Kansas City charter, although the executions came to the hands of the sheriff on the first day of April, and were returnable to the next April term, which began on the second Monday in April, and nothing was done under them till the twenty-eighth day of April, when the property was advertised for sale, *And* not void, when the property to be sold for the payment of the judgments has been seized, set apart, and designated by the judgment of the court.

Appeal from circuit court, Jackson county.

R. H. Field, for appellant. *C. O. Tichenor*, for respondent.

NORTON, C. J. This is a suit by ejectment to recover the possession of certain real estate in Kansas City. Defendant had judgment, from which plaintiff has appealed, and it is conceded that plaintiff was entitled to recover unless a certain sheriff's deed put in evidence by defendant was effectual in passing the title to the property in dispute.

The trial court held that the deed was effectual for that purpose, and it is this ruling of which the plaintiff complains, and the grounds of his complaint will sufficiently appear by the following facts disclosed by the bill of exceptions, viz.:

"That the following executions were delivered, on the first day of April, 1876, to the sheriff of Jackson county, which, together with the advertisements posted thereon, were read in evidence. There are two of these executions; but inasmuch as, except as to the amounts thereof, the recitals in each are the same, we copy herein but one, which is as follows:

"The State of Missouri to the Sheriff of Jackson County, Greeting: Whereas, Michael Hunt, on the twenty-second day of September, A. D. 1875, filed in the office of the clerk of the circuit court of Jackson county a transcript of a judgment by him obtained against Charles G. Hopkins, Sans W. Hopkins, and J. V. C. Karnes, before A. W. ALLEN, Esq., a justice of the peace within and for Kaw township, Jackson county, on the twenty-sixth day of June, A. D. 1875, for the sum of \$87.64, which to the said Michael Hunt was adjudged as aforesaid, and also for costs; and whereas, said judgment was rendered on a certain special tax bill against the following described real estate: Lot No. nine, (9,) in block No. seven, (7,) of Ranson and Hopkins' addition to the city of Kansas, county of Jackson, and state of Missouri, and that the defendants are the owners thereof. These, therefore, command you that of the above described real estate of the said Charles G. Hopkins, Sans W. Hopkins, and J. V. C. Karnes, you cause to be made the sum aforesaid adjudged against them, together with the costs, and that you have the same before the judge of our Jackson county circuit court at the next April term thereof, to satisfy the judgment and costs aforesaid; and that you certify how you execute this writ.

"Witness, Wallace Laws, clerk of our said circuit court of Jackson county, with the seal thereof hereunto affixed at office in Kansas City, this first day of April, A. D. 1876. [L.s.] WALLACE LAWS, Clerk."

"The following were the acts done by the sheriff under the executions, to-wit: On the twenty-ninth day of April, 1876, the sheriff caused an advertisement to be inserted (as provided by law for advertising sheriffs' sales under executions) of his intention to sell said real estate under the executions above set forth on the twenty-second day of May, 1876, and, notice of such intention having been published, said real estate was stricken off on May 22, 1876, and sold to William E. Sheffield at public sale, by the sheriff at the courthouse door. A deed in due form of law was made by the sheriff to William E. Sheffield, purporting to convey to him said real estate, and which vested in said Sheffield the title to said real estate if the above executions were sufficient on their face to authorize the sheriff to proceed thereon to make a sale, and were living writs on the twenty-second day of May, 1876. Said sheriff's deed is as follows: [Here follows a copy of the deed.] The two questions on the executions above set forth are all that is involved in the appeal to be taken herein. There was no levy of or upon either of the above executions unless the advertisements aforesaid be deemed a levy. Each and all the acts of the sheriff done on and under said executions are above set forth, and were on the dates set forth."

The special executions, it was admitted, were issued upon special judgments rendered upon special tax bills for the doing of certain grading in the city of Kansas, by a justice of the peace in said city. The transcripts of said judgments were filed in the office of the clerk of the circuit court of Jackson county, Missouri, at Kansas City, and there recorded and indexed as judgments of said court prior to the issuing of said special executions; that, at the time of the rendition of said judgments, the title was in the defendants therein.

It is provided in section 4 of the Kansas City charter (Laws 1875, p. 253) as follows: "When the amount due on any tax bill does not exceed three hundred dollars, suit may be brought thereon before the recorder of the city, or any justice of the peace in said city, as in other civil cases, and such recorder or justice of the peace may render a special judgment as aforesaid; but, to en-

force the same, a transcript of such judgment shall be filed in the office of the clerk of the circuit court of Jackson county in said city, * * * whereupon an execution may be issued," etc.

It is insisted by plaintiff that said section of the charter confers jurisdiction over the class of cases therein mentioned only on justices of the peace in Kansas City, and that, inasmuch as the execution only recites that the justice who rendered the judgment was a justice of the peace of Kaw township, Jackson county, and omits the words "in Kansas City," that the execution, for want of that recital, conferred no power on the sheriff to make sale of the real estate in question, conceding that the jurisdiction of courts of inferior and special jurisdiction to render a judgment must affirmatively appear, and that said section 4 only confers jurisdiction over the class of cases referred to in it on justices of the peace in Kansas City. It may be said that, if nothing further appeared than what appears on the face of the execution, the authorities cited by counsel tend strongly to establish his contention. But in view of what has been held by this and other courts that, although a jurisdictional fact may not appear, either in the recitals of a judgment or execution, unless such recital is required to be made, if such jurisdictional fact does appear from any of the proceedings had before the justice of such inferior court, it is sufficient. In view of this, and the admission made on the trial that ALLEN, the justice of the peace who rendered the judgments on which the executions issued, was a justice of the peace in Kansas City, which we take to be an admission that such fact appeared from the proceedings had before him, we hold that the judgment is not subject to collateral attack, having been rendered by a court having jurisdiction both of the persons and subject-matter of the suit. *Gray v. Bowles*, 74 Mo. 419; *Stoddard v. Johnson*, 75 Ind. 30; *Iba v. Hannibal & St. J. R. Co.*, 45 Mo. 469; *Haggard v. Atlantic & P. R. Co.*, 63 Mo. 302; *Baker v. Baker*, 70 Mo. 136; *Jolley v. Foltz*, 34 Cal. 321; *Van Duesen v. Sweet*, 51 N. Y. 381; *Carpenter v. King*, 42 Mo. 219.

In the case last cited it is held that a sheriff's deed which recites the date of the rendition of the judgment, the amount for which it was rendered, the name of the parties to the record, the time of fixing the transcript, and the time when execution issued, is sufficiently definite to render it *prima facie* evidence, and shift the burden of proof upon the adverse party if he denies its validity, even although it does not recite the name of the justice of the peace before whom it was rendered.

It is next insisted that, inasmuch as the special executions came to the hands of the sheriff on the first day of April, 1875, returnable to the next April term, which began on the second Monday in April, inasmuch as nothing was done by the sheriff under them till the twenty-eighth day of April, 1876, when the property was advertised for sale, that the sale made under them, though made at said April term, was a void sale; in other words, it is contended that, by reason of the fact that nothing was done under the writs until after the first day of the April term, they became dead. While counsel contend—and it may be conceded to be so—that the first day of the term to which a writ of execution is made returnable is the return-day, it is at the same time admitted by him, and has been so ruled by this court, that where a general execution has been levied by the sheriff on the property of the defendant anterior to the return-day, that the property so levied upon may be sold at any time after the return-day, provided it is sold during the term. If the levy of a general execution, which is but a seizure or designation by the sheriff of so much of the property of the defendant in the execution as is intended to be applied by a sale to the liquidation of the judgment debt, has the effect of imparting vitality to the execution for the purposes of advertisement and sale of the property so seized at any time during the term, the like result would logically follow in the case of a special execution when the property to be sold for the payment of the judgment has been seized, set apart, and design-

nated by the judgment of the court, and we so hold. In both cases the property is in the grasp of the law for the purposes of a sale, in one case by the levy of the sheriff, in the other by the judgment of the court. Judgment affirmed.

(All concur.)

GILLIAM and others v. McCORMACK and others.

(Supreme Court of Tennessee. March 10, 1887.)

1. MARSHALING SECURITIES—MORTGAGE CREDITORS.

A third mortgagee asked to have the first mortgagee forced to subject a lot of land to his debt, on which the third mortgagee had no lien, but which would be to the prejudice of the fifth mortgagee, whose mortgage covered the lot in question. *Held*, that the rule that where one creditor has a mortgage lien on two funds, and another has a mortgage lien on one of those funds only, the former must exhaust the fund on which the latter has no lien, before he can attach the other fund, will not be applied where there are a large number of mortgage creditors, none of whom have exclusive liens on any particular fund, and the application of the rule as to marshaling securities must necessarily work injustice to some one of the creditors. In such a case the several mortgage debts should be paid *pro rata*, in the order of priority, out of the proceeds of the funds covered by each.

2. SAME.

The inchoate right to have a marshaling of securities is a mere equity, and not a lien, and depends upon the situation of things at the time the equitable action of the court is invoked. It may be disturbed or defeated by subsequent alienation by the common debtor or mortgagee.

Appeal from chancery court, Davidson county.

R. McP. Smith, for Gilliam. Vertrees & Vertrees and C. D. Berry, for McCormack.

LURTON, J. The report of the commission of referees contains a full statement of the facts. The reasoning as well as the conclusion of Judge CALDWELL, who prepared that report, being altogether satisfactory, is adopted and made a part of this opinion. It is as follows:

"REPORT.

"These bills were brought to compel an application of the equitable doctrine of *marshaling securities*. The defendant M. McCormack owned three lots of ground, A, B, and C, in the city of Nashville, which he mortgaged to various creditors, as follows: (1) A, B, and C to McFarland, May 31, 1877, to secure \$1,000; (2) A and B to McFarland, June 26, 1877, to secure \$6,996.55; (3) B to James McCormack, June 8, 1878, to secure \$4,075; (4) A and B to Jane Gilliam, July 31, 1878, to secure \$1,500; (5) C to Merritt & Randalson, November 20, 1878, to secure \$1,671.66; (6) A and B to Annie Lawrence, January 28, 1879, to secure \$1,160. There were other mortgages, which need not be mentioned.

"All the necessary parties were brought before the court, and the three lots were sold under decree, and reports of sale confirmed. The amount realized for A was \$8,660; for B, \$6,500; and for C, \$3,125. The total being less than the aggregate of the secured debts, a loss must fall on some creditor; hence this contention. The chancellor decreed that the costs and taxes accrued be paid *pro rata* out of the funds realized from the three lots respectively; and, further, (1) that the whole debt of Merritt & Randalson be paid out of the net proceeds of lot C; (2) that the balance of such proceeds be applied in satisfaction of McFarland's debt secured by mortgage on A, B, and C; (3) that the residue of the latter debt, and the other debt of McFarland, be paid *pro rata* out of the net proceeds of A and B; (4) that the balance of the net proceeds of B shall be applied to the debt of James McCormack; (5) that the balance of the net proceeds of A be used, first, in payment of Jane Gilliam's debt, and then in payment of that of Annie Lawrence. This division

of the funds paid all the debts mentioned in full, except those of Annie Lawrence and James McCormack. The latter only has appealed, and by his counsel insists upon a different distribution.

"It has been seen that McFarland and James McCormack have the three oldest mortgages; and, when the case is considered with reference to them alone, there is no difficulty. McFarland has a lien on these funds for another debt, while McCormack has a lien on only one of the funds for his debt. The three funds are ample to pay the three debts. Then, as between these creditors, it is but a plain case for the application of the familiar doctrine of marshaling securities. McFarland must first exhaust the two funds upon which he alone has a lien, and leave the third fund, on which they both have liens, for McCormack. Story, Eq. Jur. § 633; Jones, Mortg. §§ 728, 875, 1628, 1629. The same may be said in favor of any other creditor, as between him or her and McFarland; but the case is not so simple as that. The lien rights and equities of each and all must be considered at the same time. McFarland must be preferred over all the others, because he has prior liens. The real contention is between the other creditors; mainly between McCormack on the one hand, and *Merritt & Ranaldson* on the other. How does the case stand as to them? McCormack's mortgage is on lot B alone; that of *Merritt & Ranaldson* is on lot C. alone; so that each has a lien on a single fund, and on that fund the other has no lien. The two funds are distinct. Neither of the two creditors has a lien on two funds; neither of them has two securities. For these reasons it is manifest that the doctrine under consideration has no possible application, as between McCormack and *Merritt & Ranaldson*, unless McFarland's lien on the two funds give it application. McCormack, from the date of his mortgage, had a right to compel McFarland to exhaust both A and C before subjecting B; that is, he had an equity against McFarland, but no interest in or lien upon A and C. While this equity existed, and before any steps were taken to enforce it, *Merritt & Ranaldson* acquired a lien by mortgage, which is superior to the equity against McFarland, and as a consequence the right of *Merritt & Ranaldson* to satisfaction of the debt out of the proceeds of C is necessarily stronger than the right of McCormack to force McFarland to take the fund as a payment on the latter's debt. The lien of a mortgage of land is superior to the equity of the mortgagor's vendor for purchase money. For the greater reason is the lien of a mortgagee superior to the mere equity of a third person to compel another to take the mortgaged land by way of marshaling securities. Therefore the contention of McCormack that McFarland should first take the proceeds of C cannot be maintained. This case cannot be properly decided alone on the doctrine invoked.

"Our solution of the case is this: The three funds should severally pay their proportionate part of McFarland's debt secured by mortgage on A, B, and C. Then the remaining proceeds of A and B should proportionately pay the other debt of McFarland secured by mortgage on A and B. From the residue of the three funds payment should be made as follows: McCormack should receive the residue of the proceeds of B, on which he had a mortgage. *Merritt & Ranaldson* should be paid out of the residue of the proceeds of C., on which they had a mortgage. Jane Gilliam should receive payment out of the residue of the proceeds of A; and the balance of that fund should be paid to Annie Lawrence; the two ladies having successive mortgages on A. They likewise had mortgages on B at the same time, but B's proceeds are previously exhausted by McCormack, a prior mortgagor. Such an order of distribution will give every mortgage creditor the benefit of his or her security according to priority in time, which is eminently just and equitable to all.

"The result of the chancellor's decree is substantially the same as we have indicated. The first debt of McFarland being small, that part of it chargeable upon the proceeds of C, by the rule of proportion we have stated, would leave more than enough of that particular fund to pay *Merritt & Ranaldson*.

It being evident, then, that they should receive full payment, the chancellor directed, in the first instance, that their debt be paid. That being done, the whole residue of the proceeds of C. (and not simply its proportionate part) was first applied to McFarland's first debt,—that secured by A, B, and C. To this extent the securities were marshaled in favor of the subsequent incumbrances of A and B, and McCormack got the benefit of it.

"Our view as to the rule that should govern such a case is sustained by *Green v. Ramage*, 18 Ohio, 428. The case of *Conrad v. Harrison*, 3 Leigh, 546, seems to be an authority in conflict. Nevertheless we have not a doubt as to the correctness of our conclusions.

"The decree of the chancellor should be affirmed, at the cost of appellant.

"EAKIN and TINNON, RR., concur."

In support of the conclusion contained in the report in favor of the *pro rata* payment of the several mortgages in the order of priority out of the proceeds of the parcels covered by each mortgage, we add certain suggestions which occur as additional reasons for declining to marshal these securities to the prejudice of the second mortgage on lot C, and of the third and fourth mortgages on lot A. The equitable doctrine of marshaling securities is a pure equity, and in nowise depends upon contract. The whole principle, as stated by Prof. Pomeroy, is this: "That a person having two funds to satisfy his demands shall not, by his election, disappoint a party having but one fund. The general rule is that if one creditor, by virtue of a lien or interest, can resort to two funds, and another to one of them only,—as, for example, where a mortgagee holds a prior mortgage on two parcels of land, and a subsequent mortgage on but one of the parcels is given to another,—the former must seek satisfaction out of that fund which the latter cannot touch." Pom. Eq. Jur. § 1414.

Now, if in this case there were but two mortgages,—one on the three lots, and the other on only one,—the equity of marshaling would be applied, and the dominant creditor, having a mortgage on all three of the lots, would be required to first exhaust the two lots, upon which the second mortgagee could not proceed. So, if there were but three mortgages, the first being on lots A, B, and C, the second, as is the case here, on lots A and B alone, and the third, as is likewise the fact, upon lot B alone, the securities would be so marshaled as to require the senior mortgagee to first exhaust lot C, upon which he alone could go, and thus leave lots A and B to be subjected by the two second mortgagees. Indeed, there would be no trouble in going further, and, in behalf of the third mortgage, which rests upon lot B only, the two prior mortgagees might well be required to first subject lot A, upon which they alone could go. But this is not the situation of these securities at the time that the equity of marshaling is invoked. Before the third mortgagee had successfully invoked the marshaling in his favor, which we have shown could have been granted without prejudice to the rights or equities of any one, a *fourth* mortgage is executed, which is placed upon lots A and B, and a *fifth* is placed upon lot C. Now, when the *third* mortgagee asks to have the *first* mortgagee forced to subject lot C to his debt, the demand is resisted by the fifth mortgagee, who says: "This is to my prejudice. There was upon lot C, upon which alone I have a mortgage, but one mortgage senior to mine, and that ought to be satisfied *pro rata* out of the three lots upon which it rests, that my security may bear only its proportionate part of the prior burden. The situation has therefore changed from what it was when the third mortgage was executed upon lot B alone."

The contention of the learned counsel representing this third mortgage is that the common debtor could not, by the execution of another mortgage upon lot C, cut off or deprive the third mortgagee of the right he had, or, rather, might have had, if the doctrine of marshaling had been invoked at the time the third mortgage was made, or at any time before another mortgage was

placed on lot C. The proposition contended for would amount to this: that if, at any time, the situation of several subsequent mortgagees is such that, as between themselves, such a marshaling of securities could have been invoked by proper application to a court of equity as would result in the satisfaction of the senior mortgages out of a fund which the junior mortgagee could not reach, whereby the fund upon which he could only go should be left for his satisfaction, that this inchoate equity cannot be disturbed, displaced, or defeated by any subsequent alienation or mortgage by the common debtor or mortgagor. This rule, if admitted, would result in elevating an inchoate equity to marshal assets or securities to the high plane of a lien. Yet it would be an incumbrance or lien of which a subsequent mortgagee would have no notice by record or otherwise. It would clearly be in antagonism to our registry laws. This equity to have securities marshaled, if it can be called an equity until actually invoked, cannot be of a higher order than the equity of the vendor. Yet the latter is defeated, according to our decisions, by alienation of the lands to a purchaser, to a mortgagee, and even to a trustee under an assignment to pay debts, before the actual filing of a bill to enforce the equity. A marked distinction exists between the cases holding lands sold subject to the lien of a vendor, or that of a mortgage or judgment liable for the discharge of such lien in the inverse order of alienation. In all such cases the parcels were all actually bound by a *lien* or *incumbrance* of which the alienees had notice, either actual of constructive, and not by a mere equity, such as that to have a marshaling of assets.

It follows, therefore, from this view of the question, that *the equity to marshal assets is not one which fastens itself upon the situation at the time the successive securities are taken, but, on the contrary, is one to be determined at the time the marshaling is invoked. The equity can only become a fixed right by taking proper steps to have it enforced, and, until this is done, it is subject to displacement and defeat by subsequently acquired liens upon the funds.* The qualification upon the doctrine of marshaling, that *marshaling will not be permitted to the prejudice of third persons*, whether wholly or only partially dependent upon this principle, is one well settled, and operates to defeat the contention of appellant. Upon these two grounds the case of *Green v. Ramage*, 18 Ohio, 423, rests. That case was this: W. had a lien on lots 14 and 39, and G. on 14, and H. on 39, in this order of date; G. contending (just as does the third mortgagee in this case) that, as he had the right, before H. took his second mortgage on 39, as between himself and W., to throw W. on 39 first, therefore this right fastened itself into the situation so as to turn H.'s second mortgage on 39, when taken, into virtually a *third* mortgage. The court, after conceding that if there was nobody to be considered but W. with two funds, and G. with only one of them, W. would have to exhaust his exclusive fund before touching the common fund, added: "In this case, however, there are three parties interested. If G. compel W. to exhaust lot 39 before he comes on lot 14, then G. will have the benefit of the fund arising from lot 39, although he took no security on it. But H., by this arrangement, will be deprived entirely of this security on 39, although he took a mortgage on it. We think the rule cannot be applied in a case of this kind. The principle is one established for the purpose of securing to parties the rights to which, upon the principles of natural equity, they are entitled. To deprive H. in this manner of his security would be manifestly unjust."

So, in the case of *Leib v. Stribling*, 51 Md. 285, S. mortgaged to V. five lots. Afterwards four of these lots became incumbered with a mechanic's lien, and the fifth lot by a second mortgage to C. The contention was that S. should first exhaust the fifth lot, upon which C. had his mortgage, so as to disincumber the four lots upon which the mechanic's lien was an incumbrance second to that of S. This was refused, upon the ground that the assets

would not be marshaled to the prejudice of C., who had notice of the equity of the complainant.

In the case of *Marr v. Lewis*, 31 Ark. 203, the facts were that A. held a mortgage upon two tracts of land. B. also held a mortgage on one of them. In a proceeding to foreclose, B. sought to compel him to exhaust the tract not embraced in his mortgage first. The widow of the mortgagor, who was also a party, claimed a homestead in the latter tract. Held that, by reason of the widow's equity, the securities should not be marshaled. The rule, as laid down by the court in that case, was this: "When one creditor has a security upon two funds, another having a security on one of them may, if necessary to the protection of his security, compel the other to resort to the fund not embraced in it, if it can be done *without prejudice to the other creditor, or injustice to the common debtor or third persons having interest in the fund.*"

In the case of *McArthur v. Martin*, 23 Minn. 75, the court said: "Where A. holds a security upon two tracts of lands, one of which is a homestead, and B. holds a security only upon one not a homestead, A. will not be compelled to exhaust the homestead tract first in order to leave the other tract for B."

The English editors of White & Tudor's Leading Cases in Equity, (4th Amer. Ed.) vol. 2, pt. 1, 252, say: "Marshaling is not enforced to the prejudice of third persons. Thus, in *Averall v. Wade*, Lloyd & G. t. Sugden, 252, where a person being seized of several estates, and indebted by judgments, settled one of the estates for a valuable consideration, with covenant against incumbrances, and subsequently acknowledged other judgments, it was contended by the subsequent judgment creditors that, as they only affected the unsettled estates, on the principle in *Aldrich v. Cooper*, 8 Ves. 382, as they had only one fund, they had a right to compel the prior judgment creditors, who had two funds,—the settled and unsettled estates,—to resort to the settled estates; or, at any rate, that the settled estates ought to contribute to the payment of the prior judgments. Lord Chancellor SUGDEN, however, held that the subsequent judgment creditors had no equity to compel the prior judgment creditors to resort to the settled estates. On the contrary, that the prior judgment should be thrown altogether on the unsettled estates, and that the subsequent judgment creditors had no right to make the settled estate contribute; observing, after a close examination of *Aldrich v. Cooper*, that, upon the whole of the case, you will find Lord ELDON, in the application of the principle, '*carefully avoids dealing with the rights of third persons.*' So in *Barnes v. Racster*, 1 Younge & C. Ch. 401, (a case almost identical with the one under consideration,) Racster being seized of Foxhall coppice, and a piece of land marked in a plan of the estate as No. 32, mortgaged, in 1792, Foxhall to Barnes; in 1795, Foxhall to Hartwright; in 1800, Foxhall and No. 32 to Barnes; and, in 1804, Foxhall and No. 32 to Williams. The subsequent incumbrancers took with notice. It was held by Sir Knight BRUCE, V. C., that the court *ought not, as against Williams*, to marshal the securities. His honor said that, circumstanced as the case was, Hartwright and Williams stood, with regard to the matter in dispute, on an equal footing; that Barnes ought to be paid out of the respective proceeds of No. 32 and Foxhall, *part passu* and rateably, according to their amounts; that the residue of the proceeds of Foxhall ought to be applied towards paying Hartwright; and that the residue of the proceeds of No. 32 ought to be applied towards paying Williams,—a conclusion, as he considered, entirely in accordance with the principles on which *Lanoy v. Duchess of Athol*, [2 Atk. 446;] *Aldrich v. Cooper*, and *Averall v. Wade* were decided."

These cases, and the sound equity upon which they are manifestly founded, sustain the proposition that *marshaling is a pure equity, and does not at all rest upon contract, and will not be enforced to the prejudice of either the dominant creditor, or third persons, or even so as to do an injustice to the debtor.* We are not disposed to extend the doctrine so as to affect the equities

or legal rights of third persons. The case in 3 Leigh, 546, so far as we have been able to discover, stands alone. It is not supported by authority, and we are not content with its reasoning. The other cases relied upon by counsel for appellant all seem to be cases of sale of lands actually incumbered by an express lien, and are not in conflict with the views expressed to us.

PEARCE v. PETTIT and another.

(*Supreme Court of Tennessee. May 5, 1887.*)

1. EQUITY—TRIAL PRACTICE—WITNESS.

Where complainant, in an equity cause, took the depositions of the defendants, and issues were afterwards framed and tried before a jury, *held*, that it was not error for the court to refuse to allow complainant, after closing his evidence, and upon the cross-examination of defendants, who testified in their own behalf, to read their depositions "as evidence," or for any purpose other than for the purpose of contradicting them.

2. SAME—EVIDENCE.

If a bill in equity is one that, under the rules of chancery pleading, is not required to be sworn to, but does not waive defendants' oath, the sworn answer is admissible in evidence, but the bill not.

3. SAME—JURY—ISSUES.

In a suit in equity, where complainant tenders a long list of issues to be submitted to a jury, and the court allows only part of them to be submitted, it will not be held error, where complainant's exceptions fail to specify in what particular the court erred in its action, and its attention was not called thereto at the time.

4. SAME—MISTAKE—PRODUCTION OF BOOKS.

A. filed a bill to rescind a contract, whereby he sold his interest in a partnership to B., his co-partner, alleging that B. had fraudulently misrepresented the value of the assets, and that a mistake had been made in the estimates furnished him by the book-keeper.¹ On the trial of issues submitted to a jury, the court refused to compel B. to produce the books. The jury found that no fraud had been committed by B., and that at the time of the sale A. knew approximately the value of his interest. *Held* that, on these findings, the complainant would not have been entitled to relief, even if the books had been produced, and that the ruling of the court was not prejudicial error, justifying a reversal of the decree.

Appeal from chancery court, Sheeley county.

Poston & Poston and *Metcalf & Walker*, for complainant, Pearce. *Gantt & Patterson* and *U. W. Miller*, for defendants, Pettit and others.

McFARLAND, Special Judge. Prior to the eleventh March, 1884, complainant, Pearce, and defendants, Pettit and Suggs, were partners in the grocery and commission business in Memphis. One McElroy was the book-keeper of the firm. This firm had existed from first June, 1880. On the eleventh of March, 1884, Pearce sold his entire interest in the firm to Pettit for \$20,750, of which \$15,000 was cash, and balance, \$5,000, in 12 months, with interest. Pettit was also to pay Pearce half of a \$1,500 note due Hernando Insurance Company. This agreement was reduced to writing, and signed by the parties. On the fourteenth of April, 1884, Pearce filed this bill for a rescission of this contract. Alternative relief was also prayed as to some "uncollected assets of Pearce, Suggs & Co.," in case rescission was denied.

The material allegations of the bill, alleged as grounds for the rescission, were false representation on the part of Pettit as to the condition of the firm, specifying, among others, that he represented that there would be a considerable loss on shipment of 600 bales of cotton; that the indebtedness of the firm to third parties exceeded its promptly available assets; that, after paying its debts, the firm would have nothing to pay partnership balances, etc.,—all of

¹See *Guilmartin v. Urquhart*, (Ala.) 1 South. Rep. 897, and note; *Stiles v. Willis*, (Md.) 8 Atl. Rep. 353; *Hallam v. Collett*, (Iowa,) 32 N. W. Rep. 449, and note; *Griffith v. County of Sebastian*, (Ark.) 3 S. W. Rep. 896; *Fleetwood v. Brown*, (Ind.) 11 N. E. Rep. 779; *Benson v. Markoe*, (Minn.) 33 N. W. Rep. 33.

which the bill says were untrue, and specifying in what particulars they were untrue; the allegations as to compress stock and brick-yard stock, and value of other assets, being specifications under the above charge of misrepresentation as to condition of the firm. The oath of the defendants is not waived. It is not a bill which, under the rules of chancery pleading, is required to be sworn to. The bill further charges that Pettit was the financial manager of the firm, and that he attended to the outdoor part of the business, and knew but little about the books. It also alleges that while negotiations were pending as to a contemplated sale, he (the complainant) directed the book-keeper, McElroy, to make up a statement showing how the complainant stood with the firm. In about half an hour this statement was handed to him, from which it appears that \$15,000 would be only about 50 per cent. of the amount to his credit with the firm, after deducting complainant's one-third of the estimated bad debts due the firm. The bill further charges that this statement did not come up to the date it was called for; that for this reason it did not show the true state of his account; that the profits of that year had not been divided, and for other reasons the statement was inaccurate. The complainant had this statement for a day before he made the trade with Pettit. There is no allegation of incompetency or want of skill upon the part of McElroy, nor of his participation in any way in perpetrating any fraud upon complainant. There is no allegation that either Pearce or Suggs instigated or influenced McElroy in making this statement, or had anything to do with it. And it must follow that whatever relief may be based upon the errors of this statement must be based upon "accident and mistake," and the relief incident to these, and the rules of equitable relief based upon these purely without the feature of fraud.

The defendants answer separately. Each answers under oath. Their answers each are responsive to the bill; and, as to facts alleged as to the fraud of Suggs & Pettit, and their misrepresentations to complainant of the condition of the firm, and upon which in part he bases his right to rescission, they are of their personal knowledge.

During the progress of the case the complainant took the depositions of both defendants. During the taking of the proof the complainant first called for the books of the firm. This being denied, he then, by formal motion, asked for a rule on defendants "to produce in court their books for inspection, and also for an order on them to furnish from the books a trial balance or detailed statement, showing the true condition of the firm of Pearce, Suggs & Pettit on the eleventh of March, 1884, together with a statement of the individual account of complainant with said firm to that date. The first part of this motion was denied, the second granted, and the defendants or McElroy ordered to furnish same. McElroy made these statements; and, upon exceptions thereto, he made other and very full statements upon every specific point asked by complainant; and the court below, while refusing complainant production or inspection of the books, seemed prompt and liberal in granting all orders for statements on specific matters.

The complainant called for a jury on the hearing, and the cause was tried with a jury. When the issues were presented by both complainants and defendants, those of complainant were, as he complains, materially changed, so that they did not present properly the issues to which he was entitled; but, under the direction of the court, some 22 issues, with 80 sub-issues, were preferred and submitted to the jury. On the trial of these issues complainant offered to read the depositions of Pettit and Suggs, previously taken by complainant, as a part of their cross-examination on witness stand as witnesses for themselves, "and as evidence." The court refused to permit complainant to do this, except for the purpose of contradicting witnesses on evidence given to jury, and saying this must be done by calling attention of witness to each part intended to be so used for contradiction. The court also permitted the answers of defendants to be read to the jury as evidence, saying, in the

hearing of the jury, that the bill was not evidence. The court also charged the jury as to the weight to be given to their answers. The verdict of the jury was in favor of defendants upon all the issues submitted except one, and upon that their return was that "they were unable to determine;" this issue being immaterial to the question now involved. The complainant moved for a new trial, which was overruled, and for a decree upon the whole evidence. Exceptions were taken to all the rulings now complained of.

The grounds upon which complainant now seeks a reversal in this court are suggested by the foregoing. They are, substantially: (1) Refusal of the court to permit complainant to read as evidence the depositions he had taken of the defendants, except for contradiction of witnesses; (2) because the court permitted defendants to read as evidence their answers in the case; and error in the charge of the judge as to weight of their answers; (3) changing of issues presented by the complainant; (4) refusal of the court to grant an inspection of the books of the firm.

As to the first of these. We do not think the court erred in refusing to allow complainant to read the depositions of defendants he had previously taken in the cause, except for the purpose of contradiction. The complainant had closed his examination in chief. He offered these depositions as a part of his cross-examinations. As original evidence, it was within the discretion of the chancellor to permit it to be there read or not. No reasons were given why they were not read in chief. We cannot find such error in matter of discretion as should now demand reversal. If read at all as original evidence, it was upon the ground of admissions of the defendants, and yet it does not appear that any admissions were pointed out to the court below or here as being material to go to the jury. Simply because it was a statement made by the defendant does not determine its admissibility, without first showing that it is an admission, and such from its materiality that it should go to the jury; and this is so whether such paper offered is an answer, deposition, or other statement. If offered merely for the purpose of contradicting witness then under examination, the ruling of the court was correct in refusing to allow them to be read as proposed.

2. As to the admissions of answers read to the jury, and the charge of the court thereon. Under the well-established rule as to sworn answers, they were evidence, and the bill not. The charge of the court as to their weight as evidence was simply a reannunciation of a well-recognized rule. *Bogart v. McClung*, 11 Heisk. 118; Meigs, Dig. § 591, and cases cited; *Beech v. Haynes*, 1 Tenn. Ch. 574, 575.

3. As to the changing of the issues as presented to the court by the complainants. "The issues shall be made up by the parties under the direction of the court, and set forth briefly and clearly the true questions of fact to be tried." Code, § 5218, and note. Complainant simply tendered a long list of issues, and the bill of exceptions only says: "The court allowed only such issues as appear in the decree showing the verdict of the jury; and plaintiff excepted to the ruling refusing or modifying the issues submitted in his behalf." No error is pointed out. The objection to the action of the court was general, and might have applied as well to the change of phraseology as the substance. Besides, had the attention of the court been called to the particular change objected to, he might have had them corrected. But the reading of the issues, as presented, satisfies us that every material issue, rung with many changes, was presented to the jury.

4. As to the fourth of these alleged errors. It may be conceded, for the purposes of this case, that the court erred in not permitting this inspection by complainant of the books of the firm; but on this point we express no opinion. The question would still remain, was this reversible error? Should this court now remand for this? This court will not reverse except for errors affecting the merits. Code, § 4516; Meigs, Dig. § 952, and cases.

It has been seen that the issues permitted by the pleadings, and submitted to the jury, were two, divisible as to the equitable principles involved,—one as to the transactions between Pearce, on the one hand, and Suggs & Pettit on the other, as between themselves; the other as to the mistake made by complainant, Pearce, and his reliance upon the statement made to him by McElroy of the condition of his interest at the time of the sale. Upon the first of these, many issues were presented to the jury, and they found all in favor of defendants. There is no suggestion that on this point the evidence was so preponderating as to demand the findings to be set aside by this court. The finding of the jury, therefore, on these points is conclusive. It remains, then, only to see if the jury have found such facts as would make this contract binding upon Pearce, independent of what mistakes he may have made, and independent of the actual condition of the firm, or the value of his interest when he sold. They have found that no false statements materially affecting his interest in the business were made by either Suggs, Pettit, or McElroy; that no fact, material for him to know in estimating the value of his interest of which he was ignorant, did Suggs & Pettit, knowing his ignorance, fail to communicate to him; that the sources of information were equally open and accessible to him as to defendants, as to the value of his interest; that when he made the sale he had acquired, or could have acquired, by the exercise of the prudence of a reasonable man, all the information accessible to either of the members of the firm; that he sold his interest voluntarily upon his own judgment, and without any material misrepresentations or concealment of material facts by either of the defendants; that he sold on his own judgment, based on his own knowledge of the business, and on the statement of its approximate value furnished by McElroy; that in preparing this statement McElroy acted in good faith, under his direction, without any collusion with, or suggestion or direction from, defendant; that the books of the firm were properly kept,—were open to him,—and would have afforded all the information necessary to have given him exact knowledge of the value of his interest; and that Pearce was himself a self-reliant business man, who kept himself informed as to condition of the business. The converse of many of these propositions was found also in favor of defendants on issues procured by complainant. The jury also found that, after the filing the bill in this cause, Pearce negotiated the \$5,000 note given by Pettit as part of purchase money, and that Pettit paid this note.

These findings establish, not only that there was no fraud perpetrated upon Pearce by Pettit & Suggs, but also that he knew when he sold approximately the value of his interest in the firm. It is evident he did not sell for its book value, nor did he think he was so doing. He says in his bill the book value, as appeared by the statement furnished him, was \$30,000, and he sells for \$20,750. This is not such a case as will be rescinded in chancery. *Prima facie* he knew how his account stood,—the value of his interest in the firm. *Piano Co. v. Bernard*, 2 Lea, 365.

Says Mr. Pomeroy: "There are two requisites essential to the exercise of equitable jurisdiction in giving any relief, defensive or affirmative. * * * The mistake itself must be so important that it determines the conduct of the mistaken party. * * * " And again: "Where the mistake is wholly caused by the want of that care and diligence in the transaction which should be used by every person of reasonable prudence, and the absence of which would be a violation of a legal duty, a court of equity will not interpose its relief. * * * In addition to the two foregoing requisites, it has been said that equity would never give any relief from a mistake; if the party could, by reasonable diligence, have ascertained the real facts, nor when the means of information are open to both parties." Pom. Eq. § 856, and cases cited; Story, Eq. Jur. 146-148. See Pomeroy's definition of "Mistake," § 839.

Says Mr. Story: "In all such cases the ground of relief is, not the mistake
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or ignorance of material facts alone, but the unconscientious advantage taken of the party by the concealment of them." Story, Eq. Jur. § 147; 2 Lindl. Partn. 930; *East India Co. v. Donald*, 9 Ves. 275; *In re Earl of Bothcan*, 3 Ch. Cas. 56; *Pickering v. Pickering*, 2 Beav. 31; *Clapham v. Shillito*, 7 Beav. 146; *Poland v. Brownell*, 131 Mass. 138; *Bridges v. Robinson*, 2 Tenn. Ch. 720. "If the law were otherwise, contracts, instead of being binding, would be as unstable as water." 2 Tenn. Ch. 724.

The findings of the jury, then, preclude further inquiry into the matters of mistake of Pearce, if any, made under such circumstances; and the decree of the court on these findings would have been for the defendant, even had complainant been permitted to inspect the books, and thereby possibly proven the allegations of the bill as to mistake, made by him in his estimate of value of interest. It follows from the foregoing that the court below did not err in its refusal of new trial, or decree to complainant, on the whole evidence.

The decree of the court below is affirmed, with costs.

DUFF and others v. MOORE.

(Supreme Court of Texas. May 13, 1887.)

BOUNDARIES—CONFLICTING SURVEYS—PRESUMPTION.

In an action to settle the boundary line between two adjoining patents, if there are conflicting calls indicating two distinct lines of survey, that actually run by the surveyor will always prevail, provided it can be proved. Upon the same principle the call for a marked line of an older survey will prevail over a call for distance. It is to be presumed that the surveyor identified the line called for by the marks upon the ground; and hence that the mistake occurred in the measurement or the calculation of the distance. But if there be no objects, natural or artificial, to show the line, the presumption does not obtain, and the rule no longer applies.

Appeal from Hill county.

A. P. McKinnon, for appellants. S. C. Upshaw, for appellee.

GAINES, J. Appellants, as the owners of a tract of land patented to J. D. Whitcomb, as assignee of Con's El Paso Irrig'n, Manufacturing Co., brought suit against appellee to recover the land in controversy, claiming it as a part of the above-named survey. Appellee was in possession of the disputed strip, setting up claim under a title to the J. A. Yeoman survey, of which he was admitted to be the owner. The issue presented is a question of boundary. The Yeoman is the older survey. The field-notes of the Whitcomb call for the south boundary line as coincident with the north boundary line of the Yeoman. This latter is not a marked line. There are neither natural nor artificial objects at its corners or along its course to fix its locality. It seems, however, that there is no difficulty about establishing the northern corners of the Whitcomb or the southern corners of the Yeoman surveys. Running the lines of both surveys from the known corners and lines according to course and distance, a space is left between the south boundary of the one and the north line of the other of some 280 varas wide; and it is this strip which is the subject-matter of this controversy. Appellants contend that, although the north line of the Yeoman is not a marked line, yet it can be readily established by running the calls from the surrounding surveys, and that, therefore, the call for this line in the field-notes of the Whitcomb survey should control the call for distance. Their witness testified, in substance, that the north line of the Yeoman could be readily established, but upon cross-examination stated that there was nothing upon the ground to indicate the line claimed by appellants as the true boundary. In case of conflicting calls indicating two distinct lines of a survey, that actually run by the surveyor will always control, provided it can be proved. Upon the same principle the call for a marked line of an older survey will prevail over a call for distance. It is to be presumed that the surveyor identified the line called for by the

marks upon the ground, and hence that the mistake occurred in the measurement or the calculation of the distance. But if there be no objects, natural or artificial, to show the line, the presumption does not obtain, and the rule no longer applies. Both surveys were made by the same officer, there being an interval of about three weeks between them. It is apparent that there is a mistake in the junior survey in calling for the line of the older, or there is a mistake in the length of the lines either of the one or the other. If the error be in the distance, it seems to us it can be imputed with as much reason to the lines of the Yeoman as to those of the Whitcomb survey. It is true that the Yeoman calls for the old Hamilton survey, which was abandoned, and which is now covered in the main by appellants' patent. But a comparison of the field-notes of the Hamilton and the Yeoman shows that they do not correspond with each other; the north-west corner of the Yeoman calling for an L corner of the Hamilton when the L corner of the Hamilton cannot be approximately reached without entirely disregarding both the course and distance called for. This would indicate that the surveyor allowed for an off-set in the south line of the Hamilton, not indicated by the field-notes adduced in evidence, and that he was mistaken as to the true position of the Hamilton line. On the other hand, the field-notes of the appellants' patent call for its south-west corner as the south-east corner of the A. Jacobs survey. According to the map introduced in evidence running its calls from the Jacobs corner, it does not embrace the land in controversy.

The burden was upon appellants to show that the patent under which they claimed embraced the land sued for. We think they failed to do this, and that, therefore, the court did not err in giving judgment against them. Neither did the court err in overruling the motion for a new trial. If the evidence for which the new trial was asked could be considered newly discovered, it is not seen that its materiality was such as to effect the result upon another hearing.

There is no error in the judgment, and it is affirmed.

ANTHONY and others v. TAYLOR.

(*Supreme Court of Texas. May 13, 1887.*)

JUDGMENT—LIEN—RECORDING.

Where a statute provides that, when any judgment has been recorded and indexed, it shall, from the date of such record and index, operate as a lien, *held*, that the record must show the names of the plaintiffs and defendants in the judgment. A judgment rendered against Joan and William Bankhead, and recorded and indexed as against Joan and William Burkhead, confers no lien.

Appeal from Milam county.

Antony & Wilcox, for appellants. *W. M. James*, for appellee.

STAYTON, J. On April 5, 1878, Joan and William Bankhead recovered a judgment in the district court for Milam county against W. T. and J. R. Roberts. On May 29, 1878, an execution issued under this judgment, which was returned June 5th without levy or satisfaction, and after this no execution issued until October 22, 1884, when one issued that was levied on the land in controversy on December 2 of same year. Under this levy the land was sold, and the appellants became the purchasers. Plaintiffs in the judgments before referred to took an abstract of that judgment, and on May 16, 1881, attempted to have it recorded, but it was recorded as a judgment in favor of Joan Burkhead and William Burkhead against W. T. and J. C. Roberts, instead of Joan Bankhead and William Bankhead. It was indexed in the same manner. On October 20, 1882, Darnell conveyed the land in controversy to Julia Roberts, wife of W. T. Roberts, one of the persons against whom the judgment before referred to was rendered, and this deed

on its face showed that it was made in consideration of \$600 paid by Mrs. Julia Roberts; but it contained no recital that the consideration was of her separate estate, or of any fact tending to show that it was intended to convey the land to her in her separate right. On December 8, 1883, W. T. Roberts and wife conveyed the land to the appellee by a deed which recited a consideration of \$450 cash, and a promissory note for \$273.63, due November 13, 1884, and there is no claim that the transaction evidenced by it was not *bona fide*. To entitle the appellants to recover, they must show a state of facts which gave them a lien on the land at the time appellee bought it. Although an execution issued within 12 months after the judgment was rendered, it is well settled that the subsequent failure to issue executions from year to year was such want of diligence as to deprive the judgment of its lien conferring power. *Barron v. Thompson*, 54 Tex. 235; *Bassett v. Proetzel*, 53 Tex. 579; *Ficklin v. McCarty*, 54 Tex. 371; *Williams v. Davis*, 56 Tex. 250. The capacity of the judgment to confer a lien was lost before the land was conveyed to Mrs. Roberts, unless it was continued or rather restored by the attempted record of an abstract of the judgment. In *Muller v. Boone*, 63 Tex. 94, it was held that this would not be the effect of recording an abstract of a judgment rendered before the adoption of the Revised Statutes, when, under the former law, the lien had been lost by failure to use proper diligence. If, however, this were not so, it would not better the case made by the appellants. The statute declares that "when any judgment *has been recorded and indexed*, as provided in the preceding articles, it shall, from the date of such record and index, operate as a lien," etc. The purpose of record is to give notice of the lien, and a recorded abstract which does not substantially describe the judgment on which the lien is founded, does not give such notice as the statute contemplates. The abstract recorded must show the names of the plaintiffs and of the defendants in such judgment. Rev. St. art. 3155. The record must show this truly. In the case before us the record showed a judgment in favor of Joan Burkhead and William Burkhead, while the judgment on which the lien was claimed showed a judgment in favor of Joan and William Bankhead. The names of the real plaintiffs and of the plaintiffs shown by the record are not *idem sonans*.

There is no error in the judgment, and it will be affirmed. It is so ordered.

LOVING PUB. CO. v. JOHNSON and others.

(*Supreme Court of Texas*. May 13, 1887.)

SALE—CONDITIONAL—FRAUD.

Where one sells a stock of goods to another, and puts the vendee in possession, but provides that title to the goods, as well as to any additions to the stock, shall remain in the vendor until the purchase money is paid in full, and that, upon failure to pay any installment of the purchase money, the vendor may retake possession of the goods, and no memorandum of the sale is put on record, *held*, that the sale is fraudulent so far as it reserves title to the vendor, and the creditors of the vendee may subject the goods to their debts.

Appeal from Parker county.

Reach & Richards, for appellant. No counsel for appellees.

WILLIE, C. J. The appellant sued out an attachment against the property of Surber & Taylor, and caused it to be levied upon a stock of goods to which the appellees made claim under a statute for the trial of the right of property. The goods, at the date of the levy, were in the possession of Surber & Taylor; so the burden of proof as to their ownership was upon the appellees. They sought to prove this by a written agreement entered into between the appellees and Surber & Taylor, January 11, 1883, wherein the firm, for the consideration of \$1,374.75 to be paid by the latter, promised to sell them a stock of

goods, describing its location, when Surber & Taylor should have paid them the above sum of money. Surber & Taylor were to receive the goods immediately with full right to manage and dispose of them in the course of trade. They were to keep them replenished, so that at no time they should be of less value than \$1,000. The \$1,874.75 was to be paid as follows: One hundred dollars cash, and three-fourths of the gross receipts of the sales of the stock at the end of each week until the whole sum was paid. The title to the said stock was to remain in appellees till the whole consideration was paid. Upon failure to turn over the three-fourths of gross receipts to appellees they might take possession of the goods, and retain the gross receipts already paid them. The title to such goods as were bought to replenish the stock was to remain in the appellees till the entire \$1,874.75 was paid. Surber & Taylor reserved the right to pay the consideration before it could be paid in installments as stated. This instrument was never recorded. Surber & Taylor took possession of the goods immediately, sold them in the usual course of trade, replenished the stock with other goods, and in short carried on the mercantile business with them as if they were in fact owners of the property. They made payments to the appellees to the amount of \$900 or over, down to the time the attachment was levied. At that time the stock consisted in part of the goods originally transferred to Surber & Taylor, and in part of goods they had purchased and placed in the stock; but how much of each was not shown. The appellees showed the contract to Loving just previous to the making of the levy. These are all the facts important to the decision of the cause. The court below gave judgment for the claimant, and the plaintiffs in attachment appealed to this court.

The decision of the district judge in this case is sought to be sustained upon the principles announced in *Bank v. Tufts*, 63 Tex. 113; but the two cases are unlike each other in many important particulars. There the contract was made in reference to a specific article, and no power of sale was given to the vendee. Here the agreement is made in reference to a stock of goods consisting of a multitude of different articles, and they are to be sold in the usual course of trade. Not only so, but these goods are allowed to be replaced by others to be purchased by the vendee; and these again to be sold, and others purchased, till there may not remain the smallest remnant of the original stock; and yet, through all these mutations, the stock is to be protected against the creditors of the vendee. This arrangement, too, is secret; no record made of it, and no knowledge of its existence brought to the world. A better device for the perpetration of fraud upon the creditors of the vendee could hardly be invented. They are placed in a position where they can enjoy all the benefits of a merchant without being subject to any of the usual liabilities which may arise in the course of trade. They hold themselves out to the world as the owners of the goods, with every outward appearance of ownership, and may thereby obtain a false credit. *Hilliard v. Cagle*, 46 Miss. 309. They can sell the property as they see fit, devote a large portion of the proceeds to their own benefit, and set their creditors at defiance. They can hinder and delay these as long as they please and their confidential vendors may deem proper. *Bump, Fraud. Conv.* 123.

Very different is the case where specifically designated articles, particularly described, and which can be easily identified, are sold conditionally to a party who himself has no power to sell to a third person. Purchasers cannot complain if they buy from him, because the appearance of ownership of personal property is mere evidence of it, and not ownership itself. They must know that the possessor cannot give him the title of another, and they must take heed accordingly. For the same reason creditors who deal with him on account of his possession are not always protected if this possession is of such character as not to rest title in him. But where parties are in possession of a stock of goods, wares, and merchandise, holding them in their own name,

disposing of them daily in the usual course of trade, and adding to them at their will, and no notice is given of a right other than that which usually accompanies such dealing with goods, every circumstance is inconsistent with anything but an ownership existing in these parties, and the apparent must be treated as the real ownership as to purchasers and creditors. The policy of our statutes is entirely opposed to allowing such a contract as that under decision to be supported as against creditors. No deed of trust, mortgage, or lien which permits the grantor to continue in possession and sell the goods mortgaged in the usual course of trade is allowed to stand. If Surber & Taylor had originally owned these goods, they could not have mortgaged them to Johnson & Co., and reserved the same terms as are contained in this agreement, without doing a void thing, though the instrument was recorded, and no one deceived thereby. *Garrity v. Thompson*, 64 Tex. 597. But here the same advantage is sought to be given to a debtor by a sale reserving title of which no notice of any character is given, and there seem much stronger reasons why the transaction should not be upheld. In fact, when all its features are considered, it bears a closer resemblance to a reservation of a lien than a reservation of title. To that portion of the goods purchased after the contract was signed the appellees never had any title to reserve, and the interest reserved in the entire stock is, at least till the happening of certain contingencies, a claim to have three-fourths of the proceeds of their sale applied to the payment of an indebtedness, the other fourth to go to the vendees themselves. The purpose of the conveyance was to vest title in the vendees for the purposes of sale, the proceeds to be applied to the debt of the vendors, and the balance to become the property of the vendees, all of which are important characteristics of a deed of trust with power of sale. Its resemblance to a conditional sale, such as is treated of in *Bank v. Tufts*, is of a much less striking character. That sale cannot be called conditional as to the title vested in the vendee, when it contemplates a sale by the latter of the article conveyed prior to the performance of any conditions on his part; and the only conditions annexed are such as are to be performed after title has passed from both vendor and vendee. We think the instrument was void as to creditors, and the goods liable to the attachment.

This view could be well maintained on the ground that the goods on hand at the date of the contract were mingled with those purchased thereafter, to which latter the appellees could reserve no title; and, as they were not and could not be distinguished from each other, creditors were authorized to treat them all as the property of the defendants in attachment. The judgment below is erroneous, and will be reversed, and judgment here rendered for the appellants.

FORT WORTH ST. RY. CO. v. ROSEDALE ST. RY. CO.

(Supreme Court of Texas. April 22, 1887.)

1. STREET RAILWAY—CONSTRUCTION OF ORDINANCE.

An ordinance passed in 1874, by the city council of Fort Worth, authorized a street-railway company to construct one or more lines of street railway on either of certain streets designated in the ordinance, but reserved to the city council the right to determine when any further track than the one selected by the company should be necessary. *Held*, that the intentment of the ordinance was that one or more lines might be constructed on one only of the streets named, to be determined by the selection of the company, not that lines might be constructed on all the streets, and that the company was limited to the selection made.

2. SAME—LOSS OF RIGHT.

Where, by the same ordinance, it was provided that the city council should notify the company when new lines were desirable, said notice to be complied with within a fixed time, and the council passed two ordinances in May and November, 1882, allowing the company to construct lines in other streets, to be completed within 90 days from the date of the ordinances, which the company failed to do,

held, that the two ordinances of 1882 were sufficient notices that the city desired a line to be placed upon the streets mentioned in said ordinances, and that the company lost its right to use those streets by non-compliance with the ordinances.

3. SAME—CONFLICTING CLAIMS.

Upon the company claiming the right to use Houston street under the ordinance of 1874, the right to use the center of which street was granted to another company by an ordinance of 1884, held that, even if the former had a general right, under the ordinance of 1874, to use Houston street, the city had power to permit both companies to construct lines on the same street; but that the express grant to the latter company of the right to use the center of the street would exclude the former from using that particular part of the street.

Appeal from Tarrant county.

J. D. Templeton and Carter, Wynne & De Berry, for appellant. *Hunter & Stewart*, for appellee.

STAYTON, J. This action involves a contest between the corporations plaintiff and defendant as to their respective rights to use, for the purposes of their roads, Houston and Weatherford streets and Jennings avenue, in the city of Fort Worth. Both corporations were incorporated under the general incorporation law of this state; the appellant on June 8, 1874, and the appellee on March 20, 1884.

The appellant bases its right on the following ordinance:

“ORDINANCE No. 60.

“An ordinance granting certain privileges to the Fort Worth Street Railway Company.

“Be it ordained by the city council of the city of Fort Worth:

“Section 1. The Fort Worth Street Railway Company, a corporation duly organized and authorized by charter under the laws of the state of Texas, certified to by the secretary of state under the great seal of the state of Texas, bearing date June 8, 1874, be, and said company is hereby, fully authorized and empowered with the right to construct, equip, operate, maintain, own, and control, in accordance with the conditions and terms in their said charter contained, one or more lines of street railway, together with all necessary switches, stables, offices, and depots, on either of the following named streets, and their extensions in said city, to-wit, Belknap and Weatherford streets, running east and west, Jennings avenue, Houston, Main, and Rusk streets, running north and south, and such other streets or avenues in said city as may, on application of said company, be designated by ordinance by the said city council aforesaid: provided, said company shall construct and operate at least one line of street railway on one of the above-named streets, running from the public square to the Texas Pacific Railway depot, or vicinity thereof, within eighteen months from the date of this ordinance, or within six months from and after the completion of the Texas Pacific Railway to the said city of Fort Worth: and provided, further, that said Fort Worth Street Railway Company shall fix a rate of passenger fare not to exceed ten cents per mile or less, and a freight tariff not to exceed fifty cents per hundred lbs. per mile or less.

“Sec. 2. That the city council of the city of Fort Worth reserve the right to determine when the requirements of traffic necessitate any further track than the one selected and built by said company, in pursuance of the rights granted it, in the first instance, and shall then notify the company of their judgment, and specify the street on which they deem the railway desirable; and, if the company shall not comply with said notice within twelve months, then the right to those streets shall be forfeited.

“Sec. 8. That on the filing, by said Fort Worth Street Railway Company, of a duly certified copy of their said charter, and the written acceptance of said company of this ordinance, with the secretary of said city, said company

shall be authorized to act hereunder without further ordinance or permit by the city council.

"Sec. 4. This ordinance to take effect and be in force from and after its passage.

"Passed July 14, 1874. Approved July 15, 1874."

It selected Main street, and thereon constructed a line of road, from the public square of the city, to, at, or near the depot of the Texas Pacific Railway, within the time prescribed by the first section of the ordinance, but prior to the passages of the ordinances under which appellee claims it had not constructed any line of road on either of the streets in controversy.

The appellee claims the right to use the streets under several ordinances which in terms give the right, and one of them gives the right to lay its track in the center of Houston street. These ordinances also embrace other streets, and the first of them was passed on April 4, 1884, and the last on June 20, of same year. On May 2, 1882, an ordinance was passed giving the appellant the right to construct its road on Jennings avenue, and other streets named, which are not involved in this controversy; and this, by the terms of the ordinance, was required to be done within 90 days after the passage of the ordinance. On November 4, 1882, another ordinance was passed giving to the appellant the right to use Weatherford or Belknap streets, and this also required the road, on whichever of these streets was selected, to be completed within 90 days from the passage of this ordinance. Another ordinance was passed on June 20, 1884, giving to the appellant the right to use a part of Jennings avenue, less than the length of a block, and the track on this was required to be completed within 90 days. Houston, Main, and Rusk streets are parallel; Main street being separated from each of the others by one block, and Jennings avenue is practically a continuation northward of Houston street from its intersection with Ninth street. Weatherford and Belknap streets are parallel, and separated by only one block.

This action was brought by the Rosedale Company under an agreement to settle the rights of the parties, and an order was made restraining it from doing any more work on Houston street until there should be a hearing, which was set for September 26, 1884. The cause was finally disposed of on May 16, 1885, at which time the restraining order formerly granted was discharged, and judgment entered perpetually enjoining the defendant from building or operating a railway on the parts of streets which the plaintiff asserted its rights to use, and from this judgment an appeal is prosecuted.

The main controversy is as to the right of the respective parties to use the center of that part of Houston street to which the plaintiff asserts claim. The condition of the two companies with reference to work on their respective lines, intention, and preparation to use Houston street, and facts which immediately preceded the institution of this suit, are thus stated in the findings of fact by the court: "(7) That the plaintiff, at the time of the disagreement between the two companies, by reason of the work begun in the night-time on Houston street by defendant, had, at great cost, to-wit, ——— dollars, built its line of railway along the route indicated in the ordinance granting it the right of way, making its line complete from its southern terminus to a point within about five hundred feet of Houston street. (8) That, about the time stated in the petition and answer, the defendant, with a large force of laborers, and about 1 o'clock in the morning of August 19, 1884, went to work on Houston street in the construction of a street-railway track, and dug up Houston street from Fifteenth street to a point 30 feet north of Sixth street, and along the center thereof, when the disagreement arose, and resulted in the agreement filed and pleaded by both parties submitting their controversy to the courts; that the defendant was acting, in doing work on Houston street, under the supposed right given it by ordinance No. 60; that defendant was acting under legal advice, and desired not to lose their right to occupy and

build on Houston street, and that, if allowed to do so, it [defendant] would yet build and operate a line of railway on Houston street, so that, in connection with their line on Main street, the line would make a kind of a circle, so that the cars might go around both streets. (9) Prior to the nineteenth day of August, 1884, the day on the morning of which, at 1 o'clock, the defendant begun work thereon, neither defendant nor plaintiff had broken dirt on Houston street. The plaintiff, however, had built from its southern terminus to a point on Ninth street, within say 500 feet of Houston street, and was engaged in the construction of its road in the direction of Houston street, and Houston street lay in its contemplated and projected route, and plaintiff had on hand materials for the purpose of doing said work on Houston street. (10) The defendant had not commenced to build or contemplated building any line of which their contemplated line on Houston street was to be a part, save and except that ultimately they intended to build on Houston street, so as to have one continuous line traversing both Houston and Main streets, so as to make round trips, but no conclusion had been arrived at when this work was to be done."

It is not claimed that the ordinances under which the appellee claims are not sufficient to confer the rights asserted if, by reason of the ordinance under which the appellant claims, power to confer such rights upon the appellee was not taken away from the city. All the right which the appellant has to use the three streets in controversy, except such as it may have to use a part of Jennings avenue under the ordinance of June 20, 1884, it derives through the ordinance of July 14, 1874. Whatever may be the true construction of that ordinance, it is clear that under its second section the appellant has lost the right to use Weatherford street or any part of Jennings avenue other than such part of it as it may be entitled to use under the ordinance of June 20, 1884; for it is evident that the ordinances of May 2, 1882, and November 4, 1882, were sufficient notices of the fact that the city desired a line of road to be placed upon each of them.

The only question is as to the right of each of the parties to use the center of that part of Houston street which the ordinances in terms give the appellee the right to use; for neither party asserts an exclusive right to use this or any other of the streets mentioned. The solution of this question involves two inquiries: "(1) What rights did appellant take under the ordinance of July 14, 1874? (2) If it acquired the right to use either or all of the streets mentioned in the ordinance, did it acquire the right to use any particular part of any of these streets before an actual appropriation?"

Through its act of incorporation the appellant acquired simply a corporate existence, through which it might conduct the business specified in its articles of incorporation; this being such as the general law, under which incorporation was effected, contemplates. This is the extent of the right and power acquired by the appellant through its articles of incorporation, which are not before us. The statute specifies the purposes for which, under it, corporations may be created by the voluntary act of the incorporators, and it declares the general powers which such corporations may exercise. One of these purposes is "the construction and maintenance of a street railway;" but a compliance with the statute gives no right other than a corporate existence, and no power other than such as the law itself declares the corporation, when created, may exercise, or such as may be fairly implied from the powers expressly conferred, or the nature of the business to be carried on by the corporation. The appellant had the power to construct and maintain a street railway, and we may infer that it was incorporated for the purpose of constructing and maintaining such a road in the city of Fort Worth; for the statute requires the articles of incorporation to state certain facts: (1) The name of the corporation; (2) the purpose for which it is formed; (3) the place or places where its business is to be transacted; (4) the term for which

it is to exist; (5) the number of its directors or trustees, and the names and residences of those who are appointed for the first year; (6) the amount of its capital stock, if any, and the number of shares into which it is divided. Rev. St. arts. 566, 567.

The articles of incorporation could not give any right to use a street, and it is a matter of no importance, in this respect, what recitals other than those required by law the articles of incorporation filed in the office of the secretary of state may have contained. To acquire the right to use any of the streets in the city of Fort Worth for the construction and maintenance of its railway, the consent of the city had to be obtained. The legislature, at the time the appellant was incorporated, through a special charter, might have given it the right, without the consent of the city, to use any of its streets; but this was not done. The legislature now has no such power. Const. art. 10, § 7. The ordinance under which the appellant asserts its right, recognizes its corporate existence, and was passed in view of that fact, and of the general purpose for which it was incorporated, and it assumes to confer upon it "the right to construct, equip, operate, maintain, own, and control, in accordance with the conditions and terms in their said charter contained, *one or more lines of street railway.*" No conditions or terms could legally have been inserted in the articles of incorporation which constitute the charter that could have any influence in the determination of the rights involved in this cause. If the appellant was of the opinion that there were recitals in the articles of incorporation with reference to which the ordinance was passed, and that those were necessary to the proper construction of the ordinance, then the articles should have been brought before us, and we cannot assume that they contained anything which the law neither authorized nor required.

The inquiry is, what rights did the ordinance give? The appellant contends that it gave the right to use all the streets mentioned in it; while the appellee contends that it only contemplated that one street running north and south, and another running east and west, should be used, and that the right to the former attaches to a street selected and used, and not to Houston street, and that the right to the streets running east and west was forfeited under the terms of the ordinance. The first section of the ordinance gives the right to construct and operate "one or more lines of street railway." This may mean that the company should have the right to construct and operate one or more lines on any one street, or that it may construct and operate a line or lines on a street running north and south, and one or more lines on one street running east and west, and that these lines may be separated or connected; or it may mean, considered without reference to the other language used in the first section of the ordinance, that it may construct and operate a line on any street named in the ordinance. To determine what was meant, the entire ordinance must be considered, and all its provisions must be reconciled or given effect if they may be.

After using the language we have quoted, determining what the company might do, it becomes necessary to declare *where this might be done*, and, to fix that, the ordinance declares that those things may be done "on either of the following named streets, and their extensions in said city, to-wit, Belknap and Weatherford streets, running east and west, Jennings avenue, Houston, Main, and Rusk streets, running north and south." The word "either" does not mean "all," but does mean one or the other of two or more specified things. The only fair construction of the first section of the ordinance is that it was intended that the "one or more lines" should be constructed on one of the streets named, and not that they might be constructed on "all." The formation of the several clauses of the sentence, in connection with the naming two streets running in one direction and four running in another, however, would serve to indicate an intention to confer the right to construct *one or more lines* on one of the streets running east and west, and *one or more*

lines on one of the streets running north and south. The proviso to the first section, that at *least one line on one* of the above-named streets shall be constructed within the time named, gives force to the proposition that it was intended more than one line might be constructed on the same street; for otherwise the requirement would only have been that a street railway should be constructed between the named points within the time prescribed. It was evidently contemplated that the appellant might desire to use some street or streets not designated; but, as to this, the further action of the city council was necessary, and an intimation that at some future time the city would, if deemed proper, make a further grant, cannot make the grant actually made more extensive than the language used authorizes. It cannot be claimed that the first section of the ordinance gave the right to construct and operate one or more lines on every street named in it. That section makes whatever grant was made, and is entitled to a controlling effect in determining what was granted; but it is proper to consider every part of the ordinance, and to give to all the language used every reasonable intendment, that we may ascertain the real intention.

The second section of the ordinance is one reserving or asserting the right of the city to compel the appellant to exercise the rights and powers conferred by the first, and not one giving rights. By it the city reserved the right "to determine when the requirements of traffic necessitate any further *track* than the *one selected* and built by said company in pursuance of the rights granted it in the first instance, and shall then notify the company of their judgment, and specify the *street* on which they deem the railway desirable." The word "track" is doubtless here used in the same sense as the word "lien," in the first section; but in its connection conveys the further idea of place,—one place, and that a *selected place*, under the power of selection given in the first section. Right was given by the first section to build *one or more lines* on either of the named streets running from the public square to the vicinity of the railroad depot named, of which there were three; and the second section assumes that one of these streets would be selected, and, in compliance with the ordinance, at *least one line of street railway* be built thereon. Why assume that one track or street would be selected? Certainly for no other reason than that the selection was made necessary by the ordinance. This one selected track was one to be built by the company "in pursuance of the rights granted it [the company] in the first instance."

The first section, as we have said, made an express grant, and this was the grant in *the first instance*, but it, in effect, promised to make other grants of right to use streets not named; and the city, by the second section, may have intended to secure the power to compel the construction of tracks upon other streets, when deemed necessary, or otherwise to be released from any obligation thought to have been incurred to make further grant. Or if the words, "in the first instance," have reference to the track first constructed, it may have been the intention of the city, after one track had been built on one street running north and south, to reserve the power to compel the company to build on one of the named streets running east and west whenever the city deemed it necessary, or, in case of the failure of the company to do so in the time specified, to withdraw the right to build on either of the named streets running east and west. This latter view receives support from the fact that the second section gives the city the right to "*specify the street* on which they deem the railway desirable, and, if the company shall not comply with said notice within twelve months, then the right to *those streets* shall be forfeited." Under the first section, the right to select a street was given to the company, but if it failed to do this, and construct when the traffic necessitated it, the second section evidently gave to the city the right to specify what *street* should be used, and, in the event the company failed to construct as required, to withdraw the right to use some, if not all, of the streets named. The dec-

laration is that the failure to construct on the *street* to be specified by the city shall operate a forfeiture of the right to "use *those streets*,"—not simply the street on which the company may be notified to construct a track. The words "those streets" evidently refer to some streets in the ordinance before named, or in some way pointed out or to be pointed out. Whether these words embrace all the streets named in the first section of the ordinance, or only the street to be specified, it is not necessary to determine, as it is not necessary to determine whether they may also refer to streets which, though not named, it was provided would be designated for the use of the appellant on its application. One or the other of the constructions to which we have referred must be placed on the second section of the ordinance, and under neither of them is there anything which can so enlarge the grant expressly made by the first section as to give to the appellant the right to construct and operate one or more lines on each and all of the streets named. If we look to the location of the streets named with relation to each other as grouped in the ordinance, to the condition of affairs at the time the ordinance was made, and to the subsequent conduct of the parties, there can be but little, if any, doubt as to the real intention and understanding of the parties at the time the ordinance was passed, and up to a short time before the litigation began. These all tend to sustain the construction of the ordinance which we believe to be the true one.

If, however, we are incorrect in the construction which we place on the ordinance, the same disposition of this case would follow upon another ground. Neither party claims nor could claim an exclusive right to use any one of the streets named in the ordinance now in controversy in this case. If the city deem it necessary to the public welfare that both companies may operate a railway on any one or more of the streets, it doubtless has the power to permit this to be done, unless it be shown that one of them has a prior grant of right which cannot be exercised if another like grant be used by another company. If the appellant's theory of the case was correct, and, under the ordinance, it has the right to construct and operate a street railway on Houston and Weatherford streets and on Jennings avenue, it is certainly true that a like right has been given to the appellee to use parts of these same streets. If the grant to one was no more specific than to the other, it would seem that the first actual occupant would have the right, so far as the other company was concerned, to use the part of the street so occupied, and the last occupant would be compelled to use some other part of the street. We cannot doubt, however, that the city, if it had the power to make the grant made to either party, had the power to declare that one company should occupy one part of the street, and the other another. The general right, however, to build and operate a street railway in a given street does not confer a right to use any particular part of the street prior to the time the railway is actually constructed, with the consent, express or implied, of the municipal government. In the case before us, the city of Fort Worth had conferred on the appellee expressly the right to construct and operate its railway in the center of a part of Houston street, and at the time that right was conferred the appellant had not occupied any part of that street, and, as the record shows, did not then contemplate using that street at all for an indefinite period. The appellant had no express grant to use any particular part of that street, and such a right cannot be implied from the more general right to use some part of the street, nor can such a right be established by custom. The city had the power to determine what part of a street any street railway should occupy, or whether a street should be so used at all. This power, given to it to be exercised for the public welfare, it may and must freely exercise, and its determination is conclusive of this question.

In disposing of this case, we have not deemed it necessary to consider the power of the city council, at the time the ordinance on which the appellant

bases its right was passed, to make such an ordinance. The appellee shows a right to use so much of the center of Houston street as it asserts the right to use, and it shows a right to use Weatherford street and Jennings avenue so far as it claims such right; from which it follows that the judgment of the district court is correct, and it must be affirmed. It is so ordered.

JACKSON v. CASSIDY.

(*Supreme Court of Texas. May 17, 1887.*)

1. APPEAL—ASSIGNMENT OF ERRORS—BRIEF.

Under the Texas practice, the failure of appellant to specify, in the assignment of errors, the errors complained of, is not remedied by specifying them in the "propositions" as set out in appellant's brief.

2. USURY—WHAT IS—BUILDING ASSOCIATION.

A member of a building and loan association who owned five shares of stock in the association worth \$500, in order to obtain a loan, agreed to take 43 per cent. on that amount, and execute her note for the full amount of \$500, and pay interest thereon at the rate of 6 per cent. per annum, and, besides, to pay one dollar per month on each share of stock, and all fines. *Held*, that the rate of interest thus agreed to be paid exceeded 12 per centum, and the contract was a mere device to evade the usury law, and was therefore void.

3. SAME—CREDITING EXCESSIVE INTEREST—EFFECT.

The association retained a lien on the member's stock, with the right to sell it in case she made default in paying principal or interest. Claiming that default had been made, the association sold the stock, but afterwards credited the member on its books with an amount sufficient to reduce the interest to 12 per cent. per annum, the legal rate. *Held*, that the vice in the contract could not be cured in this way.

4. BUILDING AND LOAN ASSOCIATIONS—STOCK—SALE.

If stock of a member of a building and loan association is sold by the association for default in payment of interest which is due by the terms of a usurious contract, but not legally collectible, the sale will pass no title even to a *bona fide* purchaser.

Appeal from Travis county.

Robertson & Williams and Smith & Trigg, for appellant. *Walton, Hill & Walton*, for appellee.

WILLIE, C. J. Under repeated decisions of this court, the first error assigned upon this appeal cannot be considered. We are not informed by the assignment whether the court erred in overruling the general demurrer, or whether it erred in overruling some one of the many special exceptions taken to the answer. The fact that the errors complained of are specified in the propositions does not cure the defect in the assignment. In view, however, of our decisions upon the findings of law and fact made by the judge below, his ruling upon the demurrer and exceptions becomes of no importance. The Austin Home Building & Loan Association was incorporated under the general laws of our state, for the erection of buildings, and the accumulation and loan of funds for the purchase of real property. Its charter had "this extent; no more." The association adopted a set of by-laws, which it will not be necessary to repeat, as they are substantially the same as those which govern the numerous associations of the kind existing throughout the United States. On the fourth day of each month the money of the association was offered for loan to the member who would pay the highest premium for it; that is, receive the smallest amount in cash upon his shares of stock, and execute his obligation for the payment of their full ultimate value, *i. e.*, \$100 to each share. The appellee owned five shares, whose ultimate value was \$500. She agreed to take 43 per cent. on that amount in cash, bidding thereby a premium of 57 per cent., and accordingly she received from the association \$215, and executed her obligation for \$500. This \$500 bore interest at the rate of 6 per cent. per annum, to be paid in monthly installments of $\frac{1}{2}$ per cent.; and the obligation for its payment included a further stipulation to pay one dollar

a month on each share of stock, and all fines and other charges that might be assessed against the obligor. It provided for a return of the loan at any time,—which, according to the by-laws, could be done by repaying the amount received, and a part of the premium bid, in the proportion the apparent value of the stock bore to its ultimate par value,—and for foreclosure in default of over six months in payment of dues and interest. To secure the performance of this obligation, Miss Cassidy transferred her stock to the association by way of collateral security, and executed a deed of trust to that body upon the land in controversy. She paid dues, fines, and interest for some time, but finally defaulted for more than six months; and thereafter the deed of trust was foreclosed, and the property sold under it was purchased by one Morris, who transferred his bid to the appellant. The deed of trust made the then president of the association, and his successors in office, trustees for the execution of the trust; and, in default of their acting, it was to be executed by the sheriff of Travis county. The sale under the deed was made by a deputy sheriff of Travis county. At the time the sale took place the books of the company showed that Miss Cassidy's account with the company was as follows:

She was charged with the amount paid her,	-	-	-	-	\$215	00
Fines,	-	-	-	-	7	10
Dues on stock in arrears,	-	-	-	-	74	60
Interest,	-	-	-	-	82	50
Total,	-	-	-	-	\$329	20
She was allowed as credits:						
Value of her stock at the time,	-	-	-	-	\$247	25
Rebate of interest for 52 months, at 85 cents,	-	-	-	-	18	20

Which statement brought her in debt to the company, - \$63 75

The property was sold under the deed of trust for \$90, part of which went to pay the expenses of the trust; but there was a balance still left more than sufficient to pay the \$63.75 due from Miss Cassidy. What became of this balance is not shown. The land sold was worth about \$750. It is apparent that if the account is to be stated, or it is taken from the books of the company, the appellee was indebted to the association in the sum of \$63.75, and it was authorized to foreclose the deed of trust. But it is claimed by the appellee that her contract with the company was usurious, as it stipulated for more than 12 per cent. per annum interest on the sum received by her; and that, as a consequence, she must be credited with all sums paid by her as interest, and no other amounts of this kind must be charged against her. If this be so, the \$82.50 charged as interest must be deducted; and, it having been proved that Miss Cassidy had paid to the company \$95 as interest on her loan, that amount must be credited to her. This restatement of the account brings the association in debt to her, and makes the sale under the deed of trust unauthorized. Our statute declares that all written contracts whatsoever, which may in any way, directly or indirectly, stipulate for a greater rate of interest than 12 per cent. per annum, shall be void and have no effect for the whole rate of interest. Rev. St. art. 2979. If, therefore, the contract bound Miss Cassidy to pay more than 12 per cent. interest upon the money she received from the association, it is void as to the entire interest, and she must receive credit for every item of interest paid, and must not be charged for such unpaid amounts as have accrued in this way under the contract. The effect of the contract was to bind Miss Cassidy to pay 6 per cent. interest on \$500 for the use of \$215, which would be more than 14 per cent. on the latter sum. She therefore either paid lawful interest upon money she had never received, or unlawful interest upon money she had received. The weight of authority holds it unlawful to charge interest upon the premium;

for this is a charge, not upon what the member received, but upon what he relinquishes to the society. It is very easy to see how, under the guise of such a transaction, the usury law may be evaded, and the member be made to pay for the use of money a much larger premium than our statute allows. *Association v. Gallagher*, 25 Ohio St. 208; *Society v. Taylor*, 41 Md. 409; *Association v. Blackburn*, 48 Iowa, 385; *Gordon v. Association*, 12 Bush, 110; *Martin v. Association*, 2 Cold. 418. Hence, if the contract was a loan of \$215 to the appellee, and required her to pay more than 12 per cent. per annum for the use of the money, by reason of charging 6 per cent. upon \$500, then it was forbidden by law, and void as to the whole amount of interest. It was a device to evade the usury laws, and must not be permitted to succeed. It matters not what would be the legal conclusion if the sums paid as interest were not more than 12 per cent. per annum upon the sum loaned. We are to deal in this case with a contract where the interest reserved is more than 12 per cent. upon the amount received by the borrower. It is contended that no question of usury arises, because the transaction was not in reality a loan of money, but an advance by the association to Miss Cassidy of what she was willing to receive for her stock at that time, rather than wait till it attained its ultimate par value. Such contracts have been upheld in England and some of the American states, on the ground that they were not, properly speaking, loans, but advancements made to a partner out of the common fund, in which he has an equal interest with his fellow-members. *Silver v. Barnes*, 37 E. C. L. 571; *Massey v. Citizens', etc., Association*, 22 Kan. 624; *Delano v. Wild*, 6 Allen, 1; *Association v. Stephens*, 26 N. J. Eq. 351; *Shannon v. Dunn*, 43 N. H. 194; *Parker v. Fulton, etc., Association*, 46 Ga. 166. It is to be remarked that in some of these cases the charter of the associations authorized them to make such contracts with their members, and the decisions rest upon the authority thus granted in their acts of incorporation. In others, the associations were not incorporated, and were in fact partnerships.

There seem to be serious objections to considering the contract a partnership transaction when made with an association like the present, or others existing under similar laws. The association is not a partnership, but a body incorporated by the statutes of the state. While in a partnership each member preserves his individuality for many purposes connected with the firm business, in a corporation he loses it altogether, in all dealings had between himself and the corporate body. The member, as a person, has entirely different rights from what he possesses as a stockholder in the company. When he deals with the latter he does so as if he were dealing with another individual, or with a body in which he held no membership. If he makes a contract to receive money from it, and agrees to pay therefor more than lawful interest, the contract is usurious, though his ultimate right in the interest to be paid is enough to reduce the remainder to less than the prohibited per cent. Nor can the amount paid the member be treated as a mere advance in such sense as to deprive the sums paid for the use of the money of their character as interest. If the transfer were an absolute sale, it would be unobjectionable; because the owner could part with his property for any price he might choose to take for it. But the transfer is not of that character. If so, the rights and duties of the vendor as a member of the body would cease immediately upon the sale. But in this case the appellee still continued to be a member of the corporation, and subject to all the duties imposed upon other members. She had to continue the payment of dues and fines as in case of other members; and not only so, but had to pay interest on the amount received upon her stock. Besides, the by-laws themselves term the transferred stock a collateral security for the performance of the obligation made when the loan is taken. The borrower, too, had the privilege of returning the money, with interest and a proportionate amount of premium, and thereby

to redeem her stock. In case of default in the payment of dues and interest, both principal and interest might be collected by proceeding upon the securities given by Miss Cassidy to the association. The stock became forfeited, and the deed of trust liable to be foreclosed for the purpose of collecting this principal and interest. In the ordinary affairs of life, money advanced upon such securities, with the understanding that both principal and interest may be collected by realizing upon the securities, is called a loan. A debt is created; otherwise the party advancing the money has no right to recover principal, together with interest on the amount advanced. Having the full effect of a loan, it must be treated as such, considered in reference to our usury laws; otherwise the few features of the transaction which give it a different appearance would furnish a device by which those laws might be evaded altogether. Besides, the by-laws of the association call the transaction a loan, and treat it as such wherever it is mentioned. We think the contract was one for the loan of money, and that the interest to be paid was more than 12 per cent. per annum, and the agreement to pay it was void. In this view we are supported by a large number of courts of the highest authority, the decisions of some of which we here cite: *Mills v. Salisbury Ass'n*, 75 N. C. 292; *Association v. Graham*, 7 Neb. 178; *Martin v. Nashville Ass'n*, 2 Cold. 418; *Herbert v. Building Ass'n*, 11 Bush, 296; *Bechtold v. Brehm*, 26 Pa. St. 269.

This vice in the contract was not cured by the entry, after the sale, of a credit to the borrower sufficient to reduce the interest to 12 per cent. per annum. The law does not allow the usurer to evade punishment in that way. It will not allow him to violate its provisions, take the chances for collecting the unlawful interest, and, when detected, by a stroke of his pen to place himself in the position of one who has demanded no more than the law allows him. If this can be done, the statute against usury had as well be repealed. The fact that the association allowed this credit is, however, proof satisfactory that they were conscious that it had received more interest than the law allowed, and that the transaction was just what we have held it to be. The contract being usurious, the court below properly restated the account by deducting the item of interest charged, and crediting the appellee with that already paid. This left the association in debt to her at the very time it proceeded to sell the land in controversy to satisfy a debt due from her to the company. The sale was therefore without authority, and void. The appellant was in reality the purchaser at the sale, as he took Morris' bid off of his hands. Performance extinguished the power to sell, and a sale afterwards was void, even as to an innocent purchaser. 2 Perry, Trusts, § 602. Besides, the appellant was charged with notice of the recitals in the deed of trust, and these were sufficient to put him upon inquiry as to the whole state of the transaction between Miss Cassidy and the association. Had he examined this, he would have found that the sale was unauthorized. These views render it unnecessary to pass upon the right of the deputy sheriff to make the sale; but we may add that the deed authorized the then president of the association and his successors in office to execute the trust. If these declined or were unable to act, then the sheriff of the county might do so. We cannot see what authority the deputy-sheriff had to act as trustee, when he was neither named in the deed, and no reason is shown why the president then in office did not make the sale.

We think there is no error in the judgment, and it is affirmed.

GAINES, J., does not sit in this case.

REECE and others v. RENFRO and others.

(Supreme Court of Texas. April 22, 1887.)

1. HOMESTEAD—ABANDONMENT—EVIDENCE.

Husband and wife, owning a homestead in Texas, removed to another state, and lived there for seven years, giving by their acts every indication of an intent to stay away, though the wife had been unwilling to leave, and frequently expressed an intention of returning and reclaiming the homestead. Upon returning to Texas they failed to reclaim the property, which had meanwhile been sold, but rented it from the parties then in possession. *Held*, that their acts constituted an abandonment of the homestead.¹

2. SAME—RIGHTS OF PURCHASER.

Appellees became purchasers of part of this homestead during the time the appellants were acting in such a manner as to induce the belief that they had abandoned all claim to it. *Held*, that if appellants could, under the law, change their minds, and resume their former homestead, under any state of case, they could do so only up to the time that the title under which the appellees claimed had taken effect.

3. EVIDENCE—PAROL—DEED.

William Reece, the brother of the appellant D. W. Reece, under appellants' instructions deeded the southern half of the homestead, of which William Reece and appellants were joint owners, to a third party; appellants receiving the consideration money. The deed was not made part of the bill of exceptions or statement of facts, but the general testimony established that D. W. Reece's share had been conveyed. Appellants excepted to the admission of parol evidence to show what the deed purported to convey. *Held*, that if the deed was in general terms, without stating whose interest was conveyed, it was proper to prove this by parol.

Appeal from circuit court, Johnson county.

Bledsoe & Fisher, for appellants. *Brown, Ramsey & Crane*, for appellees.

WILLIE, C. J. Renfro brought this action of trespass to try title to recover of D. W. and Jane Reece 150 acres of land, and at the same time sued out a writ of sequestration. The defendants claimed the property as their homestead, and, having alleged that the land in suit was part of a 320-acre tract in which the other appellees claimed an interest, had them made parties defendant, and prayed for a partition.

The following are substantially the facts of the case: The land in controversy was patented September 23, 1870, to William Reece, assignee of Amasa Howell. The Howell certificate belonged jointly to William and his brother, D. W. Reece. Appellants are husband and wife, and lived on the land before the patent was granted, and William Reece lived with them. William moved to another place in 1865. D. W. Reece and family, in 1867 or 1868, rented the place to one Turpin, and removed to Arkansas. In October, 1871, William Reece, under verbal instructions from D. W. Reece, deeded the south half of the 320 acres to Abraham Reece. The latter paid part of the consideration to D. W. Reece, and the rest of it was paid to him, after Abraham's death, by his children. Abraham Reece went into possession of said south half in 1871, and occupied it till his death, and his children have occupied it ever since. D. W. Reece and wife returned from Arkansas to Texas in 1875, and lived in Tarrant county, and in 1877 lived in Ellis county, on a place different from the one in controversy. In the fall of 1877, D. W. and wife moved on this land, renting it from William Reece, and as such renters occupied it until put off by the officer executing the writ of sequestration. William Reece and wife, on July 25, 1882, sold to Renfro a part of the 320-acre tract, which is the land in controversy. Not till after that time had Reece ever heard of the claim of D. W. and wife to the land sold to Renfro.

There was proof showing that Mrs. Reece left the homestead unwillingly,

¹ As to abandonment of homestead, see *Gates v. Steele*, (Ark.) 4 S. W. Rep. 53, and note; *McElroy v. Magoffin*, *post*, 547, and note.

when the family removed to Arkansas, and that she frequently, while living in that state, expressed her intention to return and reclaim the homestead she had left. There is nothing in the evidence tending to show that these facts were known to Renfro when he purchased, or to William Reece, who made the deed to him.

The court, to whom the cause was submitted, rendered judgment in favor of Renfro for the 150 acres, and quieted the title of the other appellees in the portions of the 320 acres respectively claimed by them. From this judgment D. W. Reece and wife have appealed to this court.

It has been frequently held by this court that the homestead right may be lost by abandonment, and that, to constitute an abandonment, it is not necessary that another homestead shall have been acquired. *Jordan v. Godman*, 19 Tex. 273; *Smith v. Uzzell*, 56 Tex. 315; *Woolfolk v. Ricketts*, 48 Tex. 28. One instance in which an abandonment has been conclusively presumed against both husband and wife is where they have removed from Texas to another state. In such case the wife is held to have relinquished any right of homestead which she might have retained had she continued an inhabitant of this state. "Her removal," say the court, "from the state, is inconsistent with any right remaining to her former homestead, and effectually precludes her from afterwards asserting such right." *Jordan v. Godman*, 19 Tex. 275. This principle was reasserted in the case of *Smith v. Uzzell*, 56 Tex. 315, and it was held that the power of the husband to bind his children by such abandonment was clear, and the rights of the wife were lost by her voluntary leaving the homestead, and accompanying the husband when he abandoned it.

The only difference between those cases and the present lies in the fact that in them the wife made no declarations as to her supposed abandonment, while in this she expressed an unwillingness to leave, and declared upon several occasions, while in Arkansas, an intention to reclaim her homestead in Texas. These statements do not seem to have been made known to the appellees, or the persons under whom they claim title. The effect of such declarations is fully passed upon in *Woolfolk v. Ricketts*, *supra*. It was then held that, when contemporaneously made, they could have weight only when the removal was uncertain and equivocal in its character. It was further said: "It would be most unreasonable to ask that the mere declarations of the wife, that she did not intend to abandon the old place as her homestead, when she removed from it with her husband, and had never subsequently designed or consented to do so, should outweigh the contrary evidence furnished by the acts and conduct of herself and husband during the period of nine or ten years while residing elsewhere."

Here the conduct of the husband and wife were unequivocal, to all appearances. They abandoned Texas for another state. They purchased there a house upon government ground, and lived in it. They remained out of the state for seven years; and, so far from giving any indication of an intention to return, gave every indication to the contrary. The husband made a temporary visit to the state, and sold the interest of himself and wife in the land, and received a part of the purchase money, subsequently receiving the balance. After the family had remained in Arkansas seven years, they returned, but, instead of laying claim to the land as their homestead, they rented land in other places, and lived upon it; and finally, when they did reoccupy the land from which they had removed, it was as tenants of a party whose claim was necessarily in opposition to their homestead right, thereby acknowledging that they had no homestead claim to the property. In the language of the case just cited, every action of both husband and wife for a series of years indicated that their removal from their old home was intended to be final and permanent, and it would be inconsistent with good faith and fair dealing to allow the wife's declarations to overcome the proof to be derived from their open and palpable abandonment of their former homestead. The title of the appellees to the

land accrued during the time the appellants were acting in such manner as to induce the belief that they had abandoned all claim to it. If they could, under the law, change their minds, and resume their former homestead, under any state of case, they could do so only up to the time that the title under which the appellees claimed had taken effect. *Shepherd v. Cassidy*, 20 Tex. 24. It was too late to repudiate their tenancy after purchase from their former landlord. We think the district judge properly held that the appellants' homestead right had been lost by abandonment.

A bill of exceptions was taken to the admission of evidence to show that William Reece, in making the deed to Abraham Reece, intended to convey, not his own interest in the land, but that of D. W. Reece. This deed is not made part of the bill of exceptions, nor is it in the statement of facts, to which we are referred for its contents. What is said about it in the statement of facts would lead to the conclusion that the deed, on its face, purported to convey the interest of D. W. Reece, though signed by William Reece, who held the legal title for him. The statement of facts says it was a deed from William Reece to Abraham Reece, dated October 20, 1871, for all of the south half of the Amasa Howell 320-acre survey, and that it was a general warranty deed and for a valuable consideration, to-wit, the sum of \$500 in hand paid. All this it might have been, and yet on its face expressly conveyed D. W. Reece's interest. That it did so might be inferred from William Reece's testimony. He says: "I made the same for D. W. Reece, who, while here in 1870, and before I got the patent, instructed me when I got the patent to deed to Abraham Reece his share of the land." There is nothing in the bill of exceptions or statement of facts to show that the deed purported to convey William Reece's interest, and that parol evidence was introduced to show that it conveyed D. W. Reece's share. If, however, the deed was in general terms, without stating whose interest was conveyed, we think it was proper to prove this by parol, as, the legal title being in William Reece, he could convey either interest, and such language might be referred as well to one interest as the other. All parties had notice of the character of the deed, and the land intended to be conveyed, and none were deceived by the idea that the land of William Reece was meant, instead of that of his co-tenant.

We do not think it necessary to consider the point raised by the second bill of exceptions, for, if the deed was improperly admitted, which, however, we do not hold, it did not prejudice the defendants. The case was tried by the court, and the title of the parties claiming under this deed was abundantly proved by other evidence.

There is no error in the judgment, and it is affirmed.

M'ELROY and another v. MAGOFFIN.

(*Supreme Court of Texas*. April 29, 1887.)

HOMESTEAD—ABANDONMENT—MARRIED WOMAN.

Where a married woman, having acquired a homestead right in certain land in Texas, removed with her husband and changed her domicile to another state, where, upon the death of her husband, she remarried, and remained for several years with no fixed intention of returning, held, that her acts constituted an abandonment of the homestead.¹

Appeal from El Paso county.

W. M. Chandler and Carter, Wynne & De Berry, for appellants. *Davis, Beall & Henry*, for appellee.

¹ Respecting what constitutes an abandonment of a homestead, see *Newman v. Franklin*, (Iowa,) 28 N. W. Rep. 581, and note; *Tipton v. Martin*, (Cal.) 12 Pac. Rep. 244; *Gates v. Steele*, (Ark.) 4 S. W. Rep. 53, and note; *Kaes v. Gross*, (Mo.) 3 S. W. Rep. 840; *Sanders v. Sheran*, (Tex.) 2 S. W. Rep. 804; *Honaker v. Cecil*, (Ky.) 1 S. W. Rep. 394, and note; *Reece v. Renfro*, (Tex.) *ante*, 546.

WILLIE, C. J. We deem it unnecessary to discuss the various points raised by the assignments of error in this case. Two important questions were before the jury on the trial below: (1) Did Mrs. McElroy ever acquire a homestead interest in the land in controversy? And, (2) if she did, was that interest lost by abandonment? The last of these questions was of no importance if the first was answered in the negative; and the first was of no importance if the last was answered in the affirmative. It was the duty of Mrs. McElroy to establish, to the satisfaction of the jury, that she had acquired a homestead right in the property; and, when that was done, it was the duty of the appellee to show that she had abandoned it in order to defeat her recovery. There was some conflict in the evidence as to whether or not she acquired this homestead right, but we do not deem it worth while to inquire as to whether the charges on this question were correct, or the finding of the jury supported by sufficient testimony. Admitting that Mrs. McElroy acquired this homestead right, we are of opinion that the uncontradicted evidence shows that she abandoned it, and had no such right when she attempted to assert it in this action. She left the state in 1881, and continued to reside beyond its limits until shortly before this suit was commenced by herself and husband to recover the property. As to this there is no conflict. Her own testimony shows it. She removed from place to place outside of our state,—she and her former husband,—and their every action was inconsistent with any claim to a residence in Texas; and, after the death of her first husband, she married another, living outside the state, and still continued to reside beyond its limits.

This case is brought fully within the decision in *Jordan v. Godman*, 19 Tex. 273. In that case the principle was distinctly announced that a wife, by removing and changing her domicile from this to another state, relinquished any right of homestead which she might have retained had she continued an inhabitant of this state; that her removal from the state is inconsistent with any right remaining to her former homestead, and effectually precludes her from afterwards asserting such right. This principle has been reasserted in subsequent decisions of this court, and must now be considered as a rule of property from which we cannot depart; it is certainly one the correctness of which we do not doubt. *Smith v. Uzzell*, 56 Tex. 315; *Reese v. Renfro*, ante, 545, (present term.) The appellant having relinquished her homestead right in the property by ceasing to be an inhabitant of Texas, it was unimportant what was the nature of the business she and her husband engaged in while abroad, or how long they pursued it at each place beyond the state where they made their home. This could not restore the lost right, nor destroy the effect of an abandonment already accomplished by a removal from the state, with no fixed intention to return.

The abandonment of the homestead by Mrs. McElroy having been fully established by uncontradicted evidence, it became of no importance what charges were given by the court upon any of the questions submitted to the jury, or upon whom the burden of the proof devolved under the instructions of the court. No other verdict but one for the defendant was authorized by the evidence under any charge which the court could have given. Under the facts, had the jury found for the plaintiffs, the verdict should have been set aside as against the law and evidence.

We see no error in the judgment, and it is affirmed.

ULLMAN and others v. VERNE, Adm'r.

(Supreme Court of Texas. June 3, 1887.)

1. HOLIDAY—FILING COMPLAINT—WAIVER OF OBJECTION.

Where a complaint in a civil action is filed on a legal holiday contrary to statute, and the defendant puts in a general demurrer and general denial, he waives any objection to the irregularity in the filing of the complaint.

2. ADMINISTRATOR DE BONIS NON—POWERS.

An administrator *de bonis non* has power to bring an action to recover the proceeds of a note which had been fraudulently disposed of by the first administrator; following *Todd v. Willis*, 1 S. W. Rep. 803.¹

3. TROVER—PROMISSORY NOTE—ADMINISTRATOR—PARTIES.

In an action by an administrator *de bonis non* against appellants to recover the proceeds of a note belonging to the estate, which had been fraudulently transferred to them by a former administrator, in satisfaction of his personal debt, *held*, that the defendants were liable; and that, though the bondsmen of the former administrator, and the makers of the note, who had paid it to the wrong party, might also be liable, they were not necessary parties, the action being in tort for the wrongful conversion of property.

4. SAME—DAMAGES.

In such a case the claim by the defendant that there should have been deducted from the judgment the share of the former administrator, as an heir of the deceased, can only be sustained upon pleading and proof that there would have been a surplus of the estate after payment of the debts.

5. ADMINISTRATOR DE BONIS NON—APPOINTMENT—PETITION.

Under article 1969, Rev. St. Tex., which provides that "when the administrator of the estate not administered has been, or shall be hereafter, appointed, he shall succeed to all rights," etc., it is sufficient, in an application for letters as administrator *de bonis non*, merely to represent to the court that the estate is not fully administered, and the necessity for administration need not appear therein.

6. SAME—OATH.

The omission in the oath taken by an administrator *de bonis non* of the statutory words, "died without leaving any lawful will," is unimportant; the question of a will being presumed to be set at rest by the oath of the former administrator.

7. SAME—BOND—AMOUNT.

Rev. St. Tex. art. 1889, requiring the bond of an administrator to be double the estimated value of the estate, means double the value estimated by the court, and it will be presumed, from the order of the court fixing the penalty of a bond, that it estimated the estate at half that amount.

Appeal from Wise county.

A. Edwards and Crane & Trenchard, for appellants. *J. W. Patterson and John L. Lovejoy*, for appellee.

GAINES, J. The court did not err in overruling the exceptions of appellants, who were defendants in the court below, to plaintiff's amended petition. The original petition, it is true, was filed upon a legal holiday; and the statute provides that no civil suit shall be commenced, or any process issued or served on such day, except in certain cases. Rev. St. art. 1184. But defendants first answered by a general demurrer and general denial, and thereby, as we think, waived any objection to the further prosecution of the action by reason of the irregularity in filing the petition. Besides, when the exceptions were filed, plaintiff had filed his amended original petition under the rules.

A further ground of exception was that the petition showed that it was an action brought by an administrator *de bonis non*, to recover the proceeds of a note belonging to the estate, which had been fraudulently disposed of by the first administrator. It is contended that an administrator *de bonis non* is not authorized to bring such a suit; but that he has such power is, we think, definitely settled by this court in the elaborate opinion in the case of *Todd v. Willis*, 1 S. W. Rep. 803, to which we need only refer.

The other grounds of exception are for the want of proper parties defendant. John Barrick, the former administrator, transferred the note, the property of the estate, to appellants, in satisfaction of a debt due them by him and his brother, D. M. Barrick, and afterwards died. S. L. Terrell & Sons, the makers of the note, executed to appellants, in lieu of the original, new notes payable to the latter, which they subsequently paid. It is insisted, in sup-

¹See *Todd v. Willis*, 1 S. W. Rep. 803, and note; *Capt v. Stubbs*, (Tex.) 4 S. W. Rep. 467.

port of the exceptions, that the bondsman of the former administrator, and Terrell & Sons, were liable for the conversion of the original note, and not these appellants. It may be that the transfer of the note by the administrator was such maladministration as would render his bondsmen liable to account for its value; and that Terrell & Sons, having paid it to a party not entitled to receive the proceeds, were not discharged of their obligation to the estate, and still owe the debt, if the administrator *de bonis non* saw proper to demand it of them. But defendants were also liable. They appropriated property belonging to the estate to their own use, without authority of law, and received the proceeds in money, and they can be held to account to the estate for it. If the administrator *de bonis non* saw proper to ratify the payment so far as the makers of the note are concerned, and to proceed against them, they have no right to complain. They have received money to which they are not entitled, and, in the eye of the law, will have lost nothing when compelled to disgorge it. They will have their claim against the parties whose debt was paid by the transfer of the note, as they had before, and are not injured. Should Terrell & Sons be made to pay again to the estate, appellants would be liable to them; so that their ultimate responsibility would have been the same however the suit may have been brought. The appellants were sued for a tort, in the wrongful conversion of the property of the estate, and are liable to be sued alone, without reference to other parties who may have participated in, or been connected with, the transaction. Pom. Rem. § 281 *et seq.*

What we have already said is sufficient to dispose of appellants' second and fourth assignments.

Appellants' sixth assignment of error is as follows: "The court erred in rendering judgment for plaintiff for the full amount of the note in suit, because the pleadings of the plaintiff and the testimony shows that John and D. M. Barrick were heirs of A. M. Barrick, and had received the entire proceeds of the note, and their shares as such heirs should have been deducted from the amount for which judgment was rendered." We find no evidence in the record showing that John and D. M. Barrick would have any interest in their father's estate. Admitting, for the sake of the argument, that appellants should have been permitted to retain the respective shares of these heirs in any case, it could only be upon pleading and proof showing that there would be a surplus of the estate after the payment of the debts. But even this would be calculated to embarrass the administration, and in our judgment could not be permitted.

Defendants pleaded under oath that plaintiff had not been duly appointed, and had not legally qualified as administrator of the estate of A. M. Barrick. The application for letters, the oath, and the bond were offered in evidence, for the purpose of showing the invalidity of the letters of administration which had been introduced by plaintiff. It is contended that the petition is not sufficient because it does not show the necessity for the administration. Article 1959 of the Revised Statutes reads as follows: "When the administrator of the estate not administered has been, or shall be hereafter, appointed, he shall succeed to all rights," etc. We think it sufficient, under this, merely to represent to the court that the estate is not fully administered, without the allegations named in the statute for an application for an original grant of letters. The application before us alleges that John Barrick had been appointed and qualified as administrator of the estate, and had "died before winding up the estate of A. M. Barrick aforesaid." We are of opinion this is sufficient, even if it was essential to the validity of an administration that the necessity therefor should appear in the face of the application for letters. But it has been decided that this is not necessary; that proof may be made in the probate court of a fact not alleged in the pleading; and that the presumption should be indulged that the proper evidence had been offered to support the judgment. *Kleincke v. Woodward*, 42 Tex. 311, and cases there

cited. The objection to the oath is that it omits the words, "died without leaving any lawful will." The reason for this averment in the oath, it seems to us, does not exist in case of administrators *de bonis non*, because the oath of the former administrator, and the further lapse of time may be presumed to have set at rest the question of a will. We think, therefore, the omission unimportant. It is insisted that the bond is insufficient because it is only in the sum of \$3,500, when the application for letters states the value of the property of the estate at \$3,000. The statute requires a bond in double the amount of the estimated value of the estate, (Rev. St. art. 1889,) and this means double the value estimated by the court. The order of the court in evidence shows that it fixed the penalty of the bond at \$3,500, from which it must be inferred that the court estimated the value of the estate at half that amount.

We find no error in the judgment, and it is affirmed.

ACERS v. CURTIS.

(Supreme Court of Texas. June 3, 1887.)

PRINCIPAL AND SURETY—CONTRIBUTION—FORM OF JUDGMENT.

Plaintiff, one of four sureties on a note, being compelled to pay it, brought suit for contribution against his three co-sureties, and recovered a joint judgment against them for three-fourths of the amount paid by him, interest thereon, and an attorney's fee provided for in the note, but which plaintiff had not been compelled to pay. *Held*, (1) that judgment should have been rendered against each surety separately for his proportionate share; (2) plaintiff, not having paid the attorney's fee provided for in the note, was not entitled to recover it as against his co-sureties.

Appeal from district court, Clay county.

Barrett & Stine, for appellant. *E. W. Terhune*, for appellee.

WILLIE, C. J. Curtis brought this suit against the firm of Brannen Bros., and also against H. Eddy, A. S. Mercer, and the appellant, C. F. Acers. He alleged that he and the three last-named defendants were sureties on a note which they, together with Brannen Bros., executed to George W. West for \$2,842.60; which note bore interest at the rate of 12 per cent. per annum, and in case of legal proceedings 10 per cent. attorney's fees on the amount of the note was to be collected from the makers. The note matured on the fifteenth October, 1884, and payment was not made, though demanded of the makers; whereupon Curtis paid the note, and had it indorsed to himself. When paid, the note amounted to \$3,193.17, principal and interest, and this sum was paid to the payee by the appellee, Curtis. Brannen Bros. were insolvent at the maturity of the note and at the commencement of the suit. Curtis claimed that his co-sureties were bound to pay him their *pro rata* of the above sum, with interest, and 10 per cent. attorney's fees, viz., \$319.31. He prayed for such judgment as he was entitled to under the allegations of his petition. Citation issued upon this petition was served upon all the defendants except A. J. Mercer, as to whom it was returned "not found." He was alleged in the petition to be a resident of Cheyenne, Wyoming territory. No answer was filed, and judgment was rendered for plaintiff, reciting that all the defendants had been duly served with citation, and had failed to appear. This judgment was against Brannen Bros. for the sum of \$3,691, to bear interest at 12 per cent. per annum; and, in case this could not be made out of the other parties, against the other defendants for the sum of \$2,792.41, which was said to be their *pro rata* of the amount paid by Curtis upon the note. This, too, was to bear interest at 12 per cent. per annum. From this judgment Acers prosecutes a writ of error to this court.

It is apparent that the recovery given to Curtis against his co-sureties was three-fourths of the amount due on the note at the date of the judgment, with

attorney's fees added. The appellee was not entitled to such a judgment under the allegations of his petition. He was one of four co-sureties on the note. When he paid it he became entitled to contribution from each of his co-sureties in aliquot parts, according to their number; that is to say, one-fourth of the amount paid, with interest, from each surety. *Morrison v. Poyntz*, 7 Dana, 307; *Stothoff v. Dunham*, 19 N. J. Law, 182.

He was not entitled to recover the whole three-fourths from these three sureties in a joint judgment against them. The injustice of such a judgment is apparent from the fact that the whole of it could be made out of one defendant, and, in case of the insolvency of the others, this defendant would be forced to pay three times the amount the plaintiff was entitled to recover of him. The rule in equity in case of such insolvency is that the solvent sureties bear equally the burden of payment. This rule, as well as that which requires all the sureties when solvent to share equally in the payment, is violated by the present judgment. *Powell v. Matthis*, 4 Ired. 83; *Henderson v. McDuffee*, 5 N. H. 85.

Nor can we perceive upon what principle the plaintiff recovered 10 per cent. attorney's fees of the defendant sureties. He had not paid attorney's fees to the owner of the note. They were not to be paid except in case of suit, and it does not appear that any suit had been commenced on the note when he took it up. He says that he was forced to pay it, but the inference is that this was by reason of the insolvency of the makers. At all events, he paid no attorney's fees, and was entitled to receive contribution only for what he did pay. A surety cannot speculate off of his co-sureties. If he purchases the note for less than its face value, they are entitled to share in the benefit of the bargain. Much less can he get from them more than a proportionate share of the face value if he pays the note in full.

From this it is apparent that the judgment below was wrong. It was not authorized by the pleadings, and hence could not be rendered, though no appearance was made for the defendants. This view of the judgment relieves us of the necessity of passing upon the question as to whether or not it could be sustained against Mercer, who *was not* served according to the sheriff's return; but *was*, according to the recitals of the judgment. It is not probable that a recovery will be attempted again as to Mercer, without bringing him into court in some manner recognized by our statutes.

For the errors pointed out, the judgment is reversed, and the cause remanded.

McCLURE and another v. HEIRS OF SHEEK.

(Supreme Court of Texas. June 7, 1887.)

1. TRIAL—STIPULATIONS—FORCE OF.

Agreements of counsel in regard to the trial of a cause are not absolute, and are not to be treated as contracts to be enforced under all circumstances. They may be set aside by the court in the exercise of a sound discretion, when their enforcement would result in serious injury to one of the parties, and the other would not be prejudiced by such setting aside.

2. DEPOSITIONS—PRESENCE OF WITNESS.

In Texas the deposition of a witness present at the trial cannot be read over the objection of the adverse party.

3. EVIDENCE—TITLE—HEARSAY.

In an action involving the title to certain cattle, plaintiff offered in evidence the declaration of a person who had charge of the cattle, to the effect that they belonged to S., through whom plaintiff claimed. *Held*, that the evidence was strictly hearsay, and properly excluded.

4. SAME—REBUTTING EVIDENCE—CUSTOM.

Where a party shows, as a circumstance tending to prove title to cattle in the person through whom he claims, that the property was assessed in the name of such person, opposing evidence is admissible of a custom of the country for persons

having charge of cattle, belonging to other persons, to render the property for assessment in their own names. For this purpose it does not become material whether the custom is lawful or otherwise.

5. **SAME—CATTLE—BRANDS.**

Although Rev. St. Tex. art. 4556, provides that a party shall have but one mark and brand for his cattle, this was not intended to prohibit a stock-owner from changing his mark and brand; and the records of different counties, showing different brands for the same cattle, are admissible when the evidence shows that the owner removed his cattle from one county to the other, and there registered a different brand because the former was claimed by other parties.

6. **FRAUDULENT CONVEYANCES—ACTION—INSTRUCTION.**

Judgment creditors of A. levied upon certain cattle standing in the name of B. The issue tendered by plaintiffs presented two phases: (1) That the bill of sale was made to B. for A.'s benefit, and that, while the former was the ostensible owner, the latter was the actual owner; (2) that, though it was intended to convey the absolute title to B., yet the transfer was made in fraud of the creditors of A. *Held*, that an instruction that, in order to subject the property levied upon to plaintiff's debt, the jury "must believe from the evidence that A. was the actual owner of the property," evidently applied only to the first phase of the issue, and could not have misled the jury as to the question of fraud.¹

7. **SAME.**

Upon an issue of fraudulent transfer, the court charged that if B. "bought the cattle with intent to hinder, delay, or defraud the creditors" of A., the jury should find for the plaintiffs, and refused to charge that "if A. sold the cattle to B. with intent to defraud his creditors, and the latter knew the intent, *or could have known it by reasonable inquiry*, then the jury should find for plaintiffs." *Held*, that the latter clause was unnecessary, because, from the circumstances of the case, B. must have known of the fraudulent intent, if any in fact existed.¹ *Held, further*, that even if such refusal were error, it did not prejudice plaintiffs; an examination of the evidence showing that there was no fraudulent intent.

8. **SAME—EVIDENCE.**

Upon such issue, the question whether a certain appropriation by A. of a portion of the consideration received for the sale was legal or not, cannot affect B., the latter not being shown to have had any connection with it.

9. **APPEAL—ASSIGNMENTS OF ERROR—GENERALITY.**

An assignment of error containing a general exception to the court's refusal to give special charges asked, but without pointing out the specific grounds of objection, will not be considered.

Appeal from circuit court, Baylor county.

Action to subject personal property alleged to have been fraudulently transferred to the payment of a judgment. Plaintiffs, D. H. & C. H. McClure, appeal.

McCall & McCall, for appellants. *Duncan G. Smith*, for appellees.

GAINES, J. The court did not err in overruling appellants' application for a continuance. Before the term of the court at which the case was tried, the attorneys for appellants had telegraphed the attorneys for appellees asking that the cause be continued by consent, and had received an answer through the same channel acceding to the request. Appellees hearing of this, and not being willing to continue for the term, appeared at court on the first day, and employed other counsel, and had notice given to appellants' attorneys that they would not carry out the arrangement. On the fifth day of the first week the case was called for trial, and appellants, who were plaintiffs in the court below, asked that the case be continued under the agreement. Appellees resisted the motion on the ground that they had not authorized the agreement by their attorneys, and that it was greatly to their prejudice; and thereupon the court set down the case for trial on a day of the third week of the term. Upon the case being called, upon the day set down, plaintiffs presented an

¹Respecting the subject of fraudulent conveyances, see *Witz v. Osburn*, (Va.) 2 S. E. Rep. 33, and note; *Oppenheimer v. Half*, (Tex.) *post*, 562; *Davis S. M. Co. v. Dunbar*, (W. Va.) 2 S. E. Rep. 91; *Jackson v. Beach*, (Pa.) 9 Atl. Rep. 380; *Heath v. Slocum*, *Id.* 259.

application in writing for a continuance of the cause on account of the agreement; and defendants filed an affidavit resisting the application, setting forth that the agreement was made without their consent, and facts showing that it was greatly to their prejudice to continue the cause to another term. Plaintiffs did not show that they were not ready for trial, nor did they show that the agreement had operated in any manner to prevent their being ready. Agreements of counsel in regard to the trial of a cause are not absolute, although in writing; and are not to be treated as contracts to be enforced under all circumstances. They may be set aside by the court, in the exercise of a sound discretion, when their enforcement would result in serious injury to one of the parties, and the other would not be prejudiced by its being set aside. *Hancock v. Winans*, 20 Tex. 320. Here defendants showed that the continuance of the cause would likely result in the loss of the cattle which were the subject-matter of the litigation, and plaintiffs showed no grounds for a continuance except the naked agreement.

Neither did the court err in excluding the deposition of the witness Martin Lane. The bill of exceptions shows that the witness was in attendance upon the court at the time, and was held under the rule. That a deposition cannot be read under such circumstances, over the objection of the adverse party, is expressly decided by this court in the case of *Randall v. Collins*, 52 Tex. 435. The question in that case arose under the act of 1879, (Rev. St. art. 2218, note;) and the ruling is in accordance with the former decisions of the court under the previous law, (*Elliot v. Mitchell*, 28 Tex. 105; *Boetge v. Landa*, 22 Tex. 105.)

It was not error to exclude the testimony of McClure as to a declaration made to him by one of a party who were driving a portion of the cattle, to the effect that the cattle they were driving belonged to J. W. Sheek. Plaintiffs claimed that the cattle in controversy were the property of J. W. Sheek. He was in control of a number of cattle bearing the same brand when the declaration was made; but we infer he was not immediately present. But, whether present or not, the declaration was inadmissible. He could not, by his own declaration, have made evidence in favor of his own right against J. W. Sheek, under whom defendants claim, nor could a third party do so for him. Hence plaintiffs, who claimed through him, could not avail themselves of such declarations. The evidence was strictly hearsay, and was properly excluded.

Appellants, by their fifth assignment, allege that the court erred in permitting a witness to testify that it was the custom of the country for persons having charge of cattle belonging to other persons to render the property for assessment in their own names. Plaintiffs had shown that G. W. Sheek had given in to the assessor the cattle in his own name. This evidence was offered as a circumstance tending to show that they were J. W. Sheek's cattle. Now, if it were true that such a custom existed in that county, this fact was calculated to weaken the force of the circumstance which plaintiffs had proved, and was therefore good evidence for defendants in rebuttal. It was explanatory of a suspicious circumstance against defendants, and was therefore admissible without reference to any question whether such custom was lawful or unlawful. The witness was the assessor of the county, and was in a position to have known the fact about which he testified. We conclude the court did not err in admitting the evidence.

The proposition, under the sixth and seventh assignments of error, is that "the court erred in admitting the pretended copies of brands of G. W. Sheek, in Palo Pinto and Jack counties, because they showed different brands in each county, and because the law allows but one mark and one brand for one person." It is true that the statute provides that a party shall have but one mark and brand, (Rev. St. art. 4556;) but this was not intended to prohibit a stock-owner from changing his mark and brand. The bill of exceptions to

the introduction of the record from Palo Pinto was based upon the grounds (1) that the record was a mere recital of the mark and brand, ostensibly made by the clerk; and (2) that it appeared that G. W. Sheek had another brand in Parker county. It is sufficient to say, in regard to the first objection, that the entry upon the record book showed distinctly the brand and mark claimed by G. W. Sheek, and that this attained all the purposes of the law. Its form was a matter of no importance otherwise. As to the second ground, the bill of exceptions shows that the Palo Pinto brand was recorded in 1875, and the Parker county record was not made until 1880, long after the cattle in controversy had been removed from that county. We do not see that the latter record invalidated the former. A different brand from that of record in Palo Pinto was registered in Jack county, 1877. The evidence shows that the brand was changed to that recorded in the latter county after the cattle were removed there, and that this was made necessary by others claiming the former brand in that county. We see no error in admitting the evidence.

The other assignments relate to the giving and refusal of charges. It appears that in 1872 J. W. Sheek sold a tract of land for \$2,700, of which \$700 was paid. J. M. Lane, a debtor of Sheek's vendee, assumed to pay the balance in cattle. It was agreed that this debt should be paid to G. W. Sheek, a brother of J. W. Sheek, and the debtor executed an obligation to him. J. W. Sheek was then insolvent, and owed the debt upon which the judgment was obtained which plaintiffs in this proceeding are seeking to enforce. Defendants claim, and the evidence shows, that, at the time of the transfer of the debt to their father, G. W. Sheek, by J. W. Sheek, the latter was indebted to the former in the sum of \$696, and that the transfer was made to secure this debt, and that the balance, when collected, was to be paid on a debt of \$3,000 J. W. Sheek owed to J. S. Sheek, another brother, provided the last-named creditor was not paid out of certain collaterals he then held. When the obligation for the cattle fell due, Lane made a bill of sale to G. W. Sheek to 58 head of cattle valued at \$696, which discharged the debt due from J. W. Sheek to G. W. Sheek, which the transfer was intended to secure. J. S. Sheek having collected his debt from the collaterals, Lane paid the balance to J. W. Sheek, who, as he testifies, appropriated a part of it in payment for a home for his sister, to whom he felt under obligation for having taken care of his children, and paid the balance upon his debts. The bill of sale was dated in 1874, 10 years before the levy was made which gave rise to the trial of the right of property in the court below. The cattle levied upon were, in part at least, the cattle transferred by the bill of sale, and their increase. There was evidence, on part of appellants, tending to show that J. W. Sheek had had the management and control of the cattle until 1883, and that he had exercised acts of ownership over them. This was rebutted by showing that he was managing the cattle for G. W. Sheek, who was physically unable to attend to them, and that he received the value of a third of the calves for his services.

Under this state of case the court instructed the jury, in the sixth paragraph of the charge, that, in order to subject the property levied upon to plaintiffs' debt, they "must believe from the evidence that J. W. Sheek was the actual owner of the property. This is assigned as error. Under the issues tendered by plaintiffs their case presented two phases: (1) That the bill of sale was made to G. W. Sheek for J. W. Sheek's benefit, and that, while the former was the ostensible owner, the latter was the actual owner; and (2) that, though it was intended by the transfer to convey the absolute title to G. W. Sheek, yet it was made in fraud of the rights of J. W. Sheek's creditors, and was therefore void as to them. The instruction complained of presents very accurately the issue made by the first phase of the case, and, taking the whole charge together, it is very evident that the court intended to apply it to that issue alone. It would, perhaps, have been more satisfactory

if the court had expressly limited it, but we hardly think the jury could have been misled by the failure to do so.

The next succeeding paragraphs of the charge are devoted to very full instructions upon the question of fraud, and in the main are very favorable to plaintiffs. In the seventh paragraph the court instructed the jury that if G. W. Sheek bought the cattle with the intent to hinder, delay, or defraud the creditors of J. W. Sheek, they should find for plaintiffs; and it is complained that the charge should have been that if J. W. Sheek sold the cattle to G. W. Sheek with the intent to defraud his creditors, and the latter knew the intent, or could have known it by reasonable inquiry, then the jury should find for plaintiffs. A charge embracing this last proposition was asked and refused. The charge requested presents the law more directly, and would have been better than the charge actually given. But the fairness of the original transfer of Lane's obligation from J. W. Sheek to G. W. Sheek is not put in issue by the pleading of plaintiff. It is only the bill of sale that is alleged to be fraudulent; and it would seem from the facts surrounding that transaction, that, if J. W. Sheek's intent was fraudulent, G. W. Sheek must have known it, and have participated in it. We think it unnecessary to have told the jury that if G. W. Sheek "could have known the intent by reasonable inquiry," as requested, because he must have known it, if it in fact existed; and it may be doubted whether the charge given was not equivalent to an instruction that a fraudulent purpose on part of J. W. Sheek, and a knowledge of it on part of his brother, was sufficient to avoid the transaction as to creditors. But, if the charge here complained of be erroneous, it does not follow that the judgment must be reversed. The question arises: Have appellants been prejudiced by the error, if error it be? Would the evidence have warranted the jury in finding the transaction fraudulent? If this court would have set aside the verdict if they had so found upon that issue, then the error is harmless, and the verdict, as it stands, will not be set aside on that account.

This leads us to consider the evidence bearing upon the question of fraud in the transfer of the cattle by the bill of sale. That J. W. Sheek, though insolvent, had the right to prefer his creditors, cannot be questioned. His right to transfer a debt due to him collaterally to secure his brothers is equally clear, provided his intent was merely to secure them, and not to hinder, delay, or defraud his other creditors, although the effect of this may have been to place the property beyond the reach of the latter. His reservation of the balance to himself, in the event it was not required to pay J. S. Sheek, does not make the transaction fraudulent. Such a reservation is a distinctive feature of all pledges and mortgages, which, as is well settled, may be made by insolvent debtors, even of the whole of their property, for the purpose of securing such creditors as they may wish to prefer. *Stiles v. Hill*, 62 Tex. 429; *Waterman v. Silberberg*, 2 S. W. Rep. 578. Plaintiffs introduced no evidence of any fact existing or occurring at the time of the transfer of the debt to show a fraudulent intent on the part of the transferor, except the relationship of the parties. This alone was not sufficient to overcome the presumption of fairness. Neither was there anything to show fraud in the bill of sale, provided the witnesses were to be believed who testified distinctly and clearly to the facts that J. W. Sheek owed his brother \$696, and that, in accordance with their original agreement, at the time of the transfer of the debt on J. M. Lane, the bill of sale was made to satisfy the claim due G. W. Sheek. It appears that, after the latter was paid, the other debt secured by the transfer having been discharged from another source, the balance was turned back to J. W. Sheek, and was disposed of by him without the control or participation of G. W. Sheek. This was strictly in accordance with the law. The latter having received the debt secured by the collateral, the balance that remained after this payment belonged to the transferor,—was subject to his disposition and con-

trol. What he did with this could not affect G. W. Sheek's rights, and, even if he had placed it unlawfully beyond the reach of his creditors, this would not have avoided the bill of sale. It follows, from what we have said, that, if plaintiffs could have recovered at all, they must have recovered upon the theory that J. W. Sheek owed G. W. Sheek nothing; that the alleged debt was a mere pretext; that the bill of sale was made to the latter for the former's benefit; and that all the time J. W. Sheek was the real, or, as the court expressed it, the *actual*, owner of the property. This was the true issue under the evidence, and this was very distinctly presented in the sixth paragraph of the charge heretofore discussed.

The other grounds of exception to the charge relate to the question of fraud in the bill of sale, even if made for a *bona fide* debt, and good between the parties; and we deem what we have said sufficient to dispose of them. We will say, however, that, whether J. W. Sheek's appropriating a part of the money received of Lane in payment of land for his sister was legal or not, it did not affect the rights of the parties in this case, because G. W. Sheek is not shown to have had any connection with that transaction. And it may be remarked that the fact that Lane transferred to the latter only about one-third of the cattle due by his obligation tends to show that the bill of sale was not for the purpose of covering up the property for the benefit of J. W. Sheek. If this had been the object, it does not appear why the whole was not transferred in the same manner, no reason appearing in the evidence why this could not have been done. It would seem the object was simply to pay G. W. Sheek's debt.

The eighth assignment, which we have had under discussion, is to the effect that the court erred in its charge, and in refusing instructions as shown by bill of exceptions. It may be doubted whether this be not too general for any purpose. But the bill of exceptions points out specifically the objections to the general charge, and we have therefore considered such of them as called for discussion. The bill, however, excepts generally for refusing to give the special charges asked by plaintiffs. This does not aid the generality of the assignment, and, under the rules of this court and its uniform practice, the action of the court upon the request for these instructions will not be considered.

In conclusion, it may be said that the witnesses J. W. Sheek and John L. Sheek so fully and clearly explained the whole transaction, and so satisfactorily explained the circumstances proved by plaintiffs, to show the title in J. W. Sheek, that, if the jury believed them, the verdict could not have been different. The record discloses no reason why they should not have been believed; and we think it must be inferred from the finding that the jury gave their testimony full credit; and we are of opinion that they were not misled by the alleged imperfections in the charge which have been assigned as error. The evidence as disclosed by the record was overwhelmingly in favor of appellees, and we do not think that the verdict should be disturbed.

The judgment is therefore affirmed.

JOHNSTON and others v. BLANKS and others

(Supreme Court of Texas. June 7, 1887.)

GARNISHMENT—COSTS—ATTORNEY'S FEE.

Under Rev. St. Tex. art. 219, providing that, "where the garnishee is discharged upon his answer, the costs of the proceeding, including a reasonable compensation to the garnishee, shall be taxed against the plaintiff," an attorney's fee of \$10 is properly allowed to a garnishee so discharged, who has employed an attorney to draw his answer denying indebtedness, and the court need not take testimony to determine the value of the attorney's services.

Appeal from district court, Caldwell county.

Nix, Storey & Storey, for appellants. *Thomas McNeal*, for appellee.

GAINES, J. Appellants, W. R. Johnson & Co., who were plaintiffs in a garnishment proceeding in the court below, appeal from a judgment allowing appellees, who were the garnishees, an attorney's fee of \$10 for preparing their answer. The answer was to the effect that respondents owed the debtor nothing, and prayed that they be discharged with a reasonable compensation for making it. It was signed by attorneys for the garnishees, sworn to by a member of the firm, and was not contested by plaintiffs. Our statute provides that, "where the garnishee is discharged upon his answer, the costs of the proceeding, including a reasonable compensation to the garnishee, shall be taxed against the plaintiff." Rev. St. art. 219. By compensation is meant a sufficient sum to remunerate the garnishee for expenses necessarily incurred in protecting his interest in the proceeding. That reasonable attorney's fees is a necessary expense in every case we have no doubt. A person unskilled in the law is not to be expected to prepare a written answer under our statutes which would secure him from liability, although he owed nothing to the defendant in the original proceeding. Besides, many cases arise in which his liability is doubtful, and the advice and assistance of counsel are necessary to shield him from the danger of having to pay his debt twice. Whatever else it may include, we are clearly of the opinion that the statute was intended to cover a reasonable fee to the garnishee for the services of an attorney in assisting him in the proceeding. *Holbrook v. Waters*, 19 Pick. 354.

But it is insisted that the court had no power to make the allowance without hearing evidence as to the nature and value of the services rendered. But this we think a mistake. It would certainly be competent for the court to demand evidence if it saw proper, and in some cases this might be necessary. But it is to be presumed that the court is sufficiently acquainted with the value of professional services in preparing a garnishee's answer which is presented to it without hearing testimony. It being the rule in Pennsylvania that the stipulation in a mortgage for a certain commission as attorney's fees in case of default is to be deemed in the nature of a penalty, and that under it only reasonable attorney's fees may be recovered, the supreme court of that state held that the amount may be fixed by the court without the aid of extrinsic evidence. *Daly v. Matland*, 88 Pa. St. 884. In the opinion in the case cited, Chief Justice SHARSWOOD says: "The courts, from a practical knowledge of professional work, are able to say in every particular case what ought to be the compensation or rate of commissions for collecting a debt by suit." Litigants who have to pay attorney's fees in such cases are not apt to lose by leaving the amount to the determination of the court. It is likely to be less than that established by the testimony of the experts, who are alone competent to testify as to the value of such services. We have no doubt that appellants had the right to introduce evidence to show that a sum less than that awarded by the court was reasonable. But no offer to do this was made.

For the reasons stated, we find no error in the judgment, and it is affirmed.

FARRAR v. TALLEY and another.

(Supreme Court of Texas. May 27, 1887.)

1. ATTACHMENT—WRONGFUL—ACTION—EVIDENCE.

In an action, afterwards dismissed, brought against A. and B., to recover the price of goods sold to A., an attachment was sued out, and B.'s property attached, on the ground of the non-residence of B. In an action against the plaintiff therein for wrongful attachment, he testified that he sued out the attachment because B. had the reputation of not paying his debts until obliged to do so. The only evidence of B.'s liability was the representation of A., who kept B.'s sheep, of authority to con-

tract the debt on behalf of B., and the fact that B. had paid debts of his contracting before. B. was a man of property, residing in another county. *Held*, that the action for wrongful attachment was maintainable.

2. SAME—DEFENSE—RELEASE OF ATTACHMENT.

An action will lie for the wrongful attachment of sheep, although the attachment is afterwards released, and the sheep are then in better condition than when attached.

3. SAME—DAMAGES—VALUE OF PROPERTY.

Release of property from a wrongful levy of attachment will not relieve plaintiff in the attachment from liability for the value of the property, if he does not return it to the owner, but it is lost to the latter without any fault on his part, by reason of another attachment being immediately levied thereon for the debt of another.

Appeal from Throckmorton county.

West & McGown and *A. H. Carrigan*, for appellant. *W. H. Beckham*, for appellees.

GAINES, J. Appellant brought this suit in the court below against appellees to recover damages for the wrongful and malicious suing out of an attachment. Appellant had a flock of sheep in Throckmorton county, which was in charge of one W. B. Hamilton. Hamilton contracted an indebtedness with appellees amounting to \$267.10, for which he gave them a draft on appellant, but which was not paid. Appellees thereupon brought suit in the latter county against appellant and Hamilton on the account, and sued out a writ of attachment, which they caused to be levied upon appellant's sheep. The affidavit for the attachment, as special grounds for obtaining the writ, stated only that defendant, Farrar, was not a resident of Throckmorton county, and that defendant, Hamilton, secreted himself so that ordinary process of law could not be served upon him. The sheep were levied upon, by virtue of the writ, as the property of Hamilton, and described as "the James Farrar and W. B. Hamilton sheep." The suit was brought on the thirteenth day of June, 1885, and dismissed on the twenty-sixth of the same month as to Farrar, and on the — of September, 1885, as to Hamilton. On the trial of the case before us, appellee Talley testified that he instructed the sheriff to levy upon the sheep, and that he dismissed his suit in September because one Maj. Smith wanted to buy the flock under an execution against Hamilton, and offered to pay appellees' debt, which he did. Appellant testified that the sheep had never been returned to his possession. There was testimony tending to show that they were more valuable when the attachment was released than when it was levied. Appellant testified that he bought the sheep originally, and that he had made a contract with Hamilton to give him part of the wool and the increase to take care of them at the expense of the latter; but that, in 1884, Hamilton became dissatisfied, and sold his interest to appellant for \$700. This sale was evidenced by a bill of sale, which was recorded in Throckmorton county. There was no evidence to show that Hamilton was the agent of appellant to contract the debt with appellees, except Hamilton's own statement to that effect, and the fact that appellant had previously paid some drafts drawn upon him by Hamilton. The only reason given by appellee Talley, in his testimony, for suing out the attachment, was that he had heard that appellant never paid his debts until he was forced to do so. It appeared that appellant resided in Ellis county, was entirely solvent, owing no debts, and owning a large amount of property in the county of his residence, and live-stock in Throckmorton county in addition to the sheep upon which the levy was made. Under this state of facts, the court below concluded that appellant was entitled to recover no damages, either actual or exemplary, and gave judgment for the defendants.

The assignments of error are numerous, but need not be considered in detail. They are sufficient to raise the question of the correctness of the conclusion and the judgment of the court. In our opinion, the court erred in its

judgment. That the attachment was wrongfully sued out there can be no question. The appellees, as the evidence shows, had no ground whatever for an attachment. In the first place, appellant owed them nothing. They wholly failed to show that Hamilton had authority to buy the goods on Farrar's credit. That Hamilton could not charge appellant, by representing himself as the agent of the latter, is too clear for discussion. Nor did the fact that Farrar paid Hamilton's drafts on former occasions prove that an agency existed; nor did it estop Farrar, as the court below concluded, from denying that Hamilton was authorized to purchase the goods on his account. But, even had a debt existed, the affidavit shows no ground for suing out the writ, and the testimony of appellee Talley makes it clear that none whatever existed. It is evident, therefore, that the attachment was issued wrongfully, and without the shadow of a cause. The facts show that appellees, although not actuated by any malevolent purpose, availed themselves of the forms of the statute to procure the issuance of a writ which the law, under the circumstances, did not warrant, and thereby to obtain an illegal advantage in the attempt to collect a pretended claim. This rendered their act not only wrongful, but malicious. *Culbertson v. Cabeen*, 29 Tex. 247.

In determining the question of damages, the court below seems to have proceeded upon the idea that if live-stock other than work animals be wrongfully seized, and subsequently released in better or more valuable condition than when taken, no action will lie for the wrong. This we conceive to be erroneous. The injured party in such case is entitled to his action, and to recover at least nominal damages and costs. *Champion v. Vincent*, 20 Tex. 811. But such is not all of appellant's case. The court, it is true, finds, as a matter of fact, in effect, that the sheep were returned to him by appellees. But the undisputed fact is that they were not returned, but were merely released from the attachment, and left with the sheriff to be sold under an execution against Hamilton, appellees receiving the amount of their debt as a consideration of discharge of their levy. If they had placed the property back into the possession of appellant, they would have repaired their wrong *pro tanto*, and, under the evidence, may have been liable only for nominal damages for the mere wrongful issue of the writ.

In *Heibroner v. Douglass*, 45 Tex. 402, it was held that the release of property from an attachment by the plaintiff in the suit does not relieve him from liability for its value, when it is lost to the defendant without any fault on his part.

In *Champion v. Vincent*, *supra*, the defendant had killed the plaintiff's hogs, and had returned him the carcasses; and the court held that, although the animals may have been worth as much slaughtered as when alive, yet plaintiff was entitled to recover nominal damages for the trespass, and that the defendant, having committed the act "deliberately, and in wilful violation of plaintiff's rights, in a manner and under circumstances of aggravation showing a violent, reckless, and lawless spirit," the law would allow also exemplary damages by way of punishment for the wrong.

It follows from what we have said that we are of opinion that the appellant was entitled to recover upon the facts proved in the court below, and that the judgment is therefore erroneous, and will be reversed. Should it appear, upon another trial, that appellant lost his property by reason of the levy of the attachment, he will be entitled to recover its value at the time of the levy; and, should it further appear that there was no probable cause for the attachment, malice may be implied, and exemplary damages may be awarded.

The judgment is reversed, and the cause remanded.

DAVIDSON v. KILLEN.

(Supreme Court of Texas. June 3, 1887.)

1. SURVEY—BOUNDARIES—PATENT.

The south-east corner of a survey was fixed with reasonable certainty, though not by the objects called for, which had disappeared, and the north-western corner with absolute certainty, and lines run from these corners, on courses called for, would intersect at a point from which the true bearing of a tree referred to in the patent would be S., 30 W., 96 varas. The patent named the bearing of the tree from the corner as S., 30 E., 96 varas. *Held*, that the point of intersection, found by running lines as described, should be considered as the true corner rather than that ascertained by adopting the bearing from the tree given in the patent, and rejecting the courses from the south-east and north-west corners.

2. SAME—SUCCESSIVE GRANTS.

A subsequent locator is not entitled to rely upon a single call in a previous survey of an adjoining grant to determine the boundary line, when such call is in conflict with others.

Appeal from Falls county.

Goodrich & Clarkson, for appellant. No counsel for appellee.

STAYTON, J. The appellant owns two grants of land south of the John H. Harvey grant, which is in part owned by the appellee. The Harvey grant is the elder, and no question arises, in this case, other than as to the true southern boundary of the John Harvey survey. This survey, from its field-notes, is rectangular in form, with sides of equal length; and its north-east and north-west corners are well identified by objects called for in the patent. The south-east corner cannot now be identified by the objects called for, they having been in some manner destroyed. The south-west corner, as called for in the patent, is at a point from which a cotton-wood tree bears S., 30 E., 96 varas, and an elm S., 76 E., 75 varas. The elm bearing tree could not be found, but the cotton-wood was, and fully identified. The south-east corner is called for at a point on the west line of the James Harvey survey, 1,620 varas from its south-west corner, by course and distance from the south-western corner of the James Harvey survey, as well as from the north-eastern corner of the John H. Harvey survey. The south-east corner of the latter survey is found to be at a point further south than the defendant claims it to be, and 68 varas further south than the plaintiff claims it to be. From the point thus fixed as the south-east corner of the John H. Harvey survey, a line run on the course called for will place the cotton-wood tree called for as a bearing to the south-west corner, when the distance called for is run S., 30 W., 96 varas, instead of S., 30 E., 96 varas. If a line be run from a point from which the cotton-wood will bear S., 30 E., 96 varas, to the known north-west corner of the survey, the corner will not be that called for in the patent; but, if a line be run from the north-west corner of the survey, the course called for, until it intersects the line run from the south-west corner, established as before stated, then the cotton-wood tree is found to be at a point S., 30 W., 96 varas, from the point at which these lines will intersect. The court below found that the call for the cotton-wood S., 30 E., 96 varas, was a mistake, and that the true call was S., 30 W., 96 varas; and it seems to us that, giving due weight to all the calls, this conclusion is correct. The call for the corner at a point from which the cotton-wood bears S., 30 E., 96 varas, requires the corner to be determined by course and distance from the tree called for; and this call is of no higher dignity than the calls for the north-east and north-west corners of the survey, which are admitted to be well established.

Course and distance from the corners last named are as reliable as course and distance from the cotton-wood tree, except as this may be affected by the fact that there is more likelihood of mistakes in the measurement of long lines than in the measurement of short lines. The various calls should be har-

monized as far as they may be; and, if effect cannot be given to one without disregarding the others, then effect should be given to those which with the greatest certainty tend to show where a corner or line is and harmonize, though another call of equal but not greater dignity be disregarded. The south-east corner of the survey is fixed with all reasonable certainty, and the north-western corner with absolute certainty; and lines run from these corners, on course called for, will intersect at a point which shows that the true bearing of the cotton-wood tree from the corner is S., 30 W., 96 varas. To place the corner at a point from which that tree will bear S., 30 E., 96 varas, lines running from it to the north-west and south-east corners will be on courses different from those called for, and the configuration of the survey will be changed; while to place the corner at a point from which that tree will bear S., 30 W., 96 varas, will be in harmony with the other calls in the grant, and with the lines called for in the contiguous surveys.

From the finding by the court below, and from the brief of counsel, we learn that this cause and another, entitled "*E. F. Davidson v. L. B. Scott et al.*," and involving the same questions of boundary, were tried at the same time; and it is urged in the brief of counsel that facts exist which estop the appellee from claiming the south line of the Harvey survey to be at the place at which he does now claim it. We find no facts in the transcript of this case bearing on such a question, unless it be claimed that, as the surveys under which appellant claims were made and patented since the Harvey grant was made, the appellant, and those from whom he claims, were entitled to rely upon the call for a corner of the Harvey survey at a point from which the cotton-wood tree would bear S., 30 E., 96 varas, and, having so relied, are entitled to have the line so fixed. Such a proposition cannot be maintained; for it was the duty of the subsequent locator to ascertain, from all the calls in the Harvey survey, its true locality, and he was not entitled to rely upon the true southern line being at a point where one call would place it, when this call is in conflict with all the others.

We find no error in the judgment, and it will be affirmed.

OPPENHEIMER v. HALFF and another.

(Supreme Court of Texas. June 3, 1887.)

1. FRAUDULENT CONVEYANCE—WHAT IS—DEBTOR AND CREDITOR.

If a creditor, with knowledge of his debtor's insolvency, takes the latter's stock in trade in satisfaction of his debt, and pays a sum of money in addition, the transaction will be fraudulent and void as to other creditors, in case the stock was worth more than the amount of the debt, if the design of the transaction was not only to pay the debt, but to protect the residue of the stock against attachment; but not otherwise.¹

2. SAME—EVIDENCE OF VALUE—SALE.

Where a creditor bought out his debtor's stock in trade for his debt and something more, and the transfer was afterwards attacked as fraudulent by other creditors, held, that the purchasing creditor could not show the price which he got for the goods upon a sale made by him after the other creditors had attached them.

Appeal from Maverick county.

P. H. Ward and W. Kelso, for appellant. No counsel for appellee.

STAYTON, J. F. Burkhardt, a merchant, was indebted to the appellees in the sum of \$7,968.92, and they, knowing of his insolvency and indebtedness to other persons, bought his entire stock of merchandise. The consideration for this purchase was the satisfaction of the debt held by appellees and \$1,000, which they paid to Burkhardt in cash. There is much evidence tending to

¹Respecting the general subject of fraudulent conveyances, see *Davis S. M. Co. v. Unbar*, (W. Va.) 2 S. E. Rep. 91; *Verner v. McGhee*, (S. C.) Id. 113; *Witz v. Osburn*, (Va.) Id. 33, and note; *Jackson v. Beach*, (N. J.) 9 Atl. Rep. 380, and note; *Dice v. Irvin*, (Ind.) 11 N. E. Rep. 488, and note; *Foster v. Knowles*, (N. J.) 7 Atl. Rep. 296.

show that the merchandise was of value greater than the sum paid for it, but there is evidence tending to show that it was not worth more than the sum due the appellees by Burkhardt. After the purchase by appellees, and while they were in possession of the property, the appellant, who was a creditor of Burkhardt, brought an action to recover the debt due to him, and caused an attachment to be levied on a part of the goods conveyed by Burkhardt to the appellees. This proceeding was instituted by the appellees to try the right of property. Appellees admit that, at the time of their purchase, they knew that Burkhardt was insolvent and indebted to other creditors. Appellant contends that the purchase by appellees with such knowledge, and the giving of \$1,000 in cash as a part of the consideration, rendered the sale fraudulent as to other creditors. Appellees contend that, notwithstanding the purchase by them with such knowledge, and the payment of \$1,000 in cash in addition to the extinguishment of their debt, the sale was not fraudulent as to the other creditors, because they received no more goods than were reasonably required to satisfy the debt, and that, therefore, Burkhardt's other creditors were not prejudiced by the sale; and that the \$1,000 in cash was given as an inducement or a bonus to obtain the preference over other creditors. It appears that the appellees insisted upon having the merchandise in payment of their debt, but that Burkhardt refused to convey on this consideration, and insisted upon having \$1,000 more for the support of himself and family, which was paid, and the sale consummated. The court below instructed the jury as follows: "If the jury believe from the evidence that said transfer was made by Burkhardt, before the levy, to the claimants in satisfaction and payment of a debt or debts at that time existing and due from said Burkhardt to the claimants, and if the latter acted in good faith in the transaction, then the jury will find for the claimants, who are defendants, unless the jury believe, from the evidence, that the claimants, by said transfer, obtained more property of the debtor than was, under all the circumstances of the case which relate to the value of the goods, and the mode and cost of realizing the debt therefrom, reasonably required to discharge their debt."

It is urged that this charge was erroneous. The charge states correctly an abstract rule of law; and, when considered in connection with the part of the charge which immediately followed, was not calculated to mislead, though it may not have clearly presented the very point which the plaintiff desired to have the jury pass upon. The part of the charge which followed was: "If the jury believe from the evidence that the claimants obtained, by the transfer, more goods or property than was reasonably required to satisfy their claim against Burkhardt, taking into consideration all the facts and circumstances of the sale, the value of the goods in the market, and the expense, or probable expense or costs, of claimants realizing their debt or claim out of the goods, then the jury should find for the plaintiff; otherwise they will find for the claimants, unless the transfer was fraudulent under the law and the evidence as before explained to you by the court." The court had also instructed the jury generally and correctly as to the character of conveyances which are deemed fraudulent as to creditors. The last part of the charge quoted, in effect, contained the proposition for which the appellant contends, and denies that asserted by the claimants. If the appellant desired a charge more pointedly presenting the question, a proper charge should have been asked. This we find was done, and the charge refused, but the action of the court in refusing this charge is not presented by an assignment of error insisted on in the brief of counsel.

The debtor had the right to prefer his creditors to whom he sold, and to pay the debt due to them, by conveying to them his entire stock of goods, and, if in fact the goods received by the creditors were not of more value than the debt, then no fraud was perpetrated, if the sole purpose of the creditors, in taking the conveyance, was to collect the debt due them. If, how-

ever, the merchandise conveyed clearly exceeded in value the sum due, and the creditors, knowing this fact, and that the debtor was insolvent and had other creditors, paid to the debtor a sum of money to induce him to make the conveyance to them, whereby other creditors were to be prevented from enforcing their claims against a part of the property not necessary to pay the creditors' claim, then the conveyance ought to be deemed fraudulent; for through it, in such case, the creditors would enable and assist the debtor to put out of his hands property held by him open to observation and subject to execution, and at the same time to retain the value of a part of it in money, which, while subject to execution, is easily hidden and often difficult to reach. The effect of such a transaction would be as hurtful to other creditors as though the preferred creditor had first taken from an insolvent debtor enough of the property to pay the debt due to him, and afterwards paid money for the residue to enable the debtor to place it beyond the reach of other creditors. As to creditors, the law declares all sales made by an insolvent debtor for money fraudulent, when the purchaser knows, or ought to know, that the sale is made by the debtor for the purpose of putting the property sold beyond the reach of creditors; and, when this is the effect of a sale as to a part of the property when a creditor is the purchaser, the rule will make the transaction, however it may be disguised, and the whole transaction, if an entirety, will be held void as to creditors. The law gives to the creditor sufficient protection when it allows him to acquire an honest preference by the purchase of property from the debtor in good faith in payment of the sum due him; and, when the right to do this is made the pretext to place beyond the reach of other creditors property legally subject to their claims, and not necessary to the payment of his, the law will not undertake, in an entire transaction, to separate the valid from the invalid, but the whole transaction, as to other creditors, will be held invalid.

The charges referred to in the second and third additional assignments of error were properly refused. The first of them would make the sale void if the appellees paid Burkhardt \$1,000, without reference to whether the intention of the parties to the sale was fraudulent, or its effect such as the law forbids; and the other would have precluded any inquiry as to the consideration actually paid, which is a matter that may ordinarily be shown.

The claimants were permitted to prove what sum they received from the sale of the goods; and so, without showing that they brought their fair market value. The goods were sold after they were seized under the writ of attachment sued out by the plaintiff, and we are of the opinion that the evidence should have been excluded. In so far as the value of the merchandise was material, the value at the time the plaintiffs purchased was the true inquiry, and not the value at some subsequent time. This was a matter doubtless susceptible of proof, and the very issues raised in this case illustrate the impropriety of admitting proof of the sum for which the claimants sold the goods. It became to their interest, under this view of the case, to sell the goods for a sum not exceeding that due to them by Burkhardt, and thus establish, if it could be done in this way, that other creditors were not hindered, delayed, or defrauded by the transaction. It may have been thought advantageous to the claimants to sell the goods for less than their real value, and thus show that they were not worth more than the sum due them, rather than to sell them for their full value, and thus show that they were worth more, and expose them to the claims of other creditors. The court admitted the evidence as tending to show the real value of the goods, and to show good faith in the claimants. The evidence, unless it had gone further, was not admissible for the purpose first named, and the claimants were not in a position to show good faith in their purchase in this way.

For the admission of this evidence the judgment will be reversed, and the cause remanded. It is so ordered.

BALDRIDGE and others v. PENLAND.

(Supreme Court of Texas. June 7, 1887.)

1. JUDGMENT—RECORD—TERM—PRESUMPTION.

Where a transcript from the county court fails to state that the judgment therein was rendered at a regular term, but states that the judgment was entered on May 6, 1885, it will be presumed, in the absence of contrary evidence in the record, that such judgment was rendered at a regular term, as fixed by the county commissioners.

2. APPEAL—BOND—NAMES OF SURETIES.

An appeal-bond contained the name of the principal in the body of the bond, and a blank was left for the names of the sureties, the latter signing under the signature of the principal at the bottom. *Held*, that the bond sufficiently designated who were the sureties.

3. EVIDENCE—BOOKS OF ACCOUNT.

Plaintiff sued for balance of account. He offered in evidence an account taken from his books as a liquor and billiard saloon keeper, before the books were destroyed by fire. Some of the charges were, "To bar, for billiards and drinks;" some, "To billiards, games, and drinks,"—without further specification; others for cash, one for one bushel corn, and others for "balance." He testified that his books were correctly kept, and two persons who had served him for a short time stated that they made some of the entries, and that the articles embraced in the entries made by them were delivered to defendant. The other entries were in the handwriting of plaintiff, but there was no evidence that such entries were contemporaneous with the transactions to which they related, nor that the articles entered by him were ever delivered. *Held*, that the account was improperly admitted, (1) because, as to the items for "games," "corn, and money," the transactions are not a part of the business of a saloon keeper; (2) as to the other items, they fail to show with sufficient certainty what thing was made the basis of each charge; (3) the plaintiff's testimony alone was not sufficient to prove that his books were correctly kept.

Appeal from district court, Coleman county.

Frank L. Snodgrass, for appellants. No counsel for appellee.

STAYTON, J. The appellee presented to the administrator of the estate of Thos. Hays, deceased, a claim for \$212.85, which was by the administrator allowed. Before this claim was acted upon by the probate court, the persons interested in the estate filed objections to the allowance of the claim, and their objections were heard, and the claim allowed only for \$74.15. From the action of the probate court, rejecting the residue of the claim, Penland appealed, and, on hearing in the district court, the entire claim was allowed. There was a motion filed in the district court to dismiss the appeal, on the ground that the transcript did not show that there had been a judgment rendered in the county court, and on the ground that the appeal-bond was not sufficient. The judgment of the county court is regular in form, but it is contended that the transcript does not show that it was rendered at a regular term of the court. The transcript shows that the judgment was entered on May 6, 1885. Presumptions are to be indulged that the proceedings of courts are regular and in accordance with law, in the absence of proof to the contrary, and there is nothing in the record before us tending to show that the judgment was not rendered at a regular term of the county court. The county commissioners' court had power to fix the times when the court should be held, and it is to be presumed that it was held at the time fixed. Gen. Laws, 1884, p. 36; Gen. Laws, 1885, p. 53.

The objection to the appeal-bond is that the names of the sureties do not appear in the body of the bond, and that it does not appear in the face of the bond that the persons who signed as sureties so intended to be bound. The name of the principal appears in the face of the bond, and a blank was left for the names of the sureties who did sign it, from which it appears that all the persons who signed it, except the named principal, signed as sureties. This was sufficient. The account made the basis of the appellee's claim was proved to have been taken from his books kept as a retail dealer in liquors and

keeper of a billiard saloon. Many of the charges are, "To bar, for billiards and drinks," without further specification of items. Some are, "To billiards, games, and drinks," without further specification except as to charges for the separate items of billiards, games, and drinks, which are not further itemized. Others are for cash, one for one bushel of corn, and others for balances. The books of the appellee were shown to have been destroyed by fire, but it was shown that the copy of the account was correctly taken from the books before their destruction. The appellee made oath that his books were correctly kept, and two persons who had served in his establishment, each for a short time, stated that they made some of the entries in the books while so employed, and that the articles embraced in the charges in the books made by each of them were delivered to Hays. It was shown that the other entries in the books were in the handwriting of the appellee, but there was no evidence to show that the entries made by him were contemporaneous with the transaction of the matters to which they relate, nor that any of the articles entered by him were ever delivered. On this evidence the account was objected to on many grounds, among which were that the items were not given, and on the further ground that sufficient proof had not been made to authorize the admission of the books had they been produced. Tradesmen's books of original entries, made in the ordinary course of their business, are admitted in evidence under certain restrictions, on account of the impracticability of making better proof of the sales and delivery of articles in the course of a business conducted from day to day between parties, in reference to which it is not usual to make or evidence contracts in the methods in which isolated transactions are ordinarily transacted or evidenced. Certain facts must be shown, however, before such books are admissible: (1) It must be shown that the books offered contain the daily record of the business of the person for whom they are kept, as it transpires from day to day between himself and his customers, and that the entries therein are original entries, made contemporaneously with the transaction of the business which the entries are intended to evidence. (2) The entries must relate to the business carried on by the person for whom the books are kept, and not to matters in no way connected with that business. (3) The entries must be sufficient to show with reasonable certainty what thing is made the basis of the charges. (4) The book must be on its face regular, and the entries free from suspicion of alteration. (5) The person offering such books, if they be kept by himself, must ordinarily, if living, make oath suppletory; and we think, further, that he should be held to make proof tending to show his probity and fair dealing,—as that the accounts of other persons kept in the same manner are usually found correct, or so treated by customers. It is not shown in the case before us, with any reasonable degree of clearness, that the book, from which the copy filed in the county court was taken, was a record of the daily business between the appellee and his customers, except for a short time while kept by a clerk; nor is it shown that the entries made by appellee, which constitute the greater part of the account, were made at or near the time the several sales are claimed to have been made, nor that this was the usual course of the appellee.

Some of the entries evidently relate to matters in no way related to the business of the appellee. He was the keeper of a drinkingsaloon and billiard table or tables; and neither the lending of money, sale of corn or "games," had relation to that business; and in so far the books, if offered, could not have been received to prove an indebtedness based on such matters. If the entries in the books be given the most liberal construction, it cannot be told from them what things are made the basis of the several charges. We may infer with reasonable certainty that the charges for "drinks" are for liquors sold to Hays in small quantities, and drank at the bar, at such intervals as he desired, and we may infer that the charges for "billiards" are for use of the billiard table, and other things necessary to play the licensed game known

by that name, and that for every game of billiards so played by Hays a charge was made. The greater number of the entries, however, do not show what the charge for "drinks" and "billiards" each were for a given day on which an entry was made. The entries are, "To bar, for billiards and drinks." There are charges for "games" in the same entries in which "billiards" are charged for; and it certainly ought to be made to appear what is meant by "games," used in such a connection, before books containing entries of such charges are received for the purpose of proving an indebtedness. In the connection used, the word "games" cannot mean the same as may be inferred to be meant by "billiards." It is not shown that the business of the appellee, among other things, was to sell anything known as "games," or to perform any act which could be so termed. On the contrary, his business is shown to have been that of a liquor and cigar dealer, and the keeper of billiard table or tables, and his books would not be admissible to prove the sale of anything in no way connected with that business, any more than to evidence the sale of a horse by the appellee to Hays. Besides, entries, to be admissible, should not be uncertain or equivocal; and from them it should appear that the thing sold is a legitimate subject of commerce which *prima facie* has value, or that the act performed, and for which compensation is claimed, is one legal in its nature. Some of the entries are for "balances" for drinks, cigars, and billiards. These but involve the declaration that on account of general dealings, on the separate days named, in some way payment in part was made for the things had, and that there was a balance unpaid. This is, in effect, but a declaration of dealings, and a settlement made by the creditor, the result of which he enters, instead of entering the facts on which he bases his adjustment of the account for the day. Some of the items testified to by the clerks seem not to have been entered at or about the time they are shown to have been delivered, and this tends to throw suspicion upon the correctness of the entries, as well as to show that they are not declarations contemporaneous with the daily dealings.

The books were not offered, and therefore their true condition, and the manner in which they were kept, could not be ascertained by the court from an inspection of them. This is one of the most satisfactory means a court can have for determining whether the books are what they profess to be,—a faithful record of each day's business. That copies taken from books correctly kept may be used when, for any reason, the books cannot be produced, seems to be very generally held; but when such evidence is offered it ought not to be received unless the proof shows, with all reasonable certainty, that the books were so kept as to render them admissible were they produced. The testimony of the person who proposes to prove the contents of his books, that they were correctly kept, is not enough. There was no offer made to identify the things sold and entered in the books by the clerks who testified in the case; and, in the absence of this, we are of the opinion that the proof did not justify the admission of any part of the copy of the account. 1 Greenl. Ev. 118, 119; 1 Whart. Ev. 681-684; *Underwood v. Parrott*, 2 Tex. 172; *Burnham v. Chandler*, 15 Tex. 444; *Burleson v. Goodman*, 32 Tex. 229.

For the error in admitting the copy of the account on which the appellee's claim is founded, the judgment of the district court will be reversed, and the cause remanded.

GULF, C. & S. F. RY. CO. v. TRAWICK.

(Supreme Court of Texas. May 20, 1887.)

1. CARRIERS—CONTRACT—LIMITATION OF LIABILITY.

Tex. Rev. St. art. 278, provides that railroad companies and other common carriers shall not limit or restrict their liability, as it exists at common law, by any general or special notice, or in any other manner whatever, and that no special agreement in contravention of its terms shall be valid. *Held*, that under this stat-

ute that part of a contract between a railroad company and a shipper of live-stock which attempted to relieve the company of liability for all loss or damage, except such as arose from the willful negligence of its servants, and provided that, as a condition precedent to the shipper's right to recover damages for any loss, he should give notice in writing of his claim at a certain place, and in a certain time, was not valid.¹

2. SAME—TIME OF SUING.

But a clause of a contract between a shipper and a railroad company, which limits the time within which a suit may be brought by the shipper, for any claim for damage arising under the contract, to less than the time prescribed by the statute of limitations, does not limit or restrict the liability of the railroad company, within the meaning of the statute, and, if reasonable, will be enforced.¹

3. SAME—INSTRUCTIONS.

The refusal of the court to instruct the jury as to the effect of the failure of the shipper to institute suit within the time prescribed by the contract is error.

Appeal from Lampasas county.

Mutthews & Woods, for appellant. *A. J. Peeler and Walter Acker*, for appellee.

STAYTON, J. This action was brought by the appellee to recover damages for injury to cattle while in course of transportation from Navasota to Lampasas; for cattle alleged to have been lost through a defective stock pen at the place of shipment; and cost of passage for himself,—he alleging an agreement to give him passage free of charge other than that made for transporting the cattle; and that the train on which his cattle were, left Navasota without him, through the negligence of the employees of the appellant. The cattle were shipped under a special contract, as it is claimed, at a rate lower than the regular rate. By this contract the appellant sought to make its liability only that of a private carrier, and to release itself from liability for any delay in receiving, shipping, or transporting the cattle, or for injury to them, caused otherwise than through fault or negligence of its officers, agents, or employees. It attempted to bind the shipper to accept such cars as the company might furnish for transportation of the cattle, and to relieve the carrier from liability for loss resulting from heat, suffocation, or other ill effects caused by the animals being crowded in the cars or on account "of being injured by burning of hay, straw, or other material used by the owner for feeding the stock or otherwise, and all risk of damage which may be sustained by reason of any delay in such transportation, whether occasioned by any mob, strike, or threatened violence to person or property from any source to track or yards, and all risk of escape or robbery of any portion of said stock, or of loss or damage from any other cause or thing not resulting from the willful negligence of the agents of the carrier." It attempted to bind the shipper to load, unload, and reload the stock at his own risk, and at his own risk to feed, water, and attend to them while in stock-yards, on the cars, and at feeding and transfer points; and it further attempted to impose upon the shipper the duty of seeing that the stock was securely placed in the cars the carrier might furnish, and so to fasten the cars as to prevent the escape of animals therefrom. It also provided that laborers furnished by the carrier to load and unload the stock should be deemed the employees of the shipper; and that, "as a condition precedent to his right to recover any damages for any loss or injury to said stock, he will give notice in writing of his claim therefor to some officer of said party of the first part, or its nearest station agent, before said stock is removed from the place of destination above mentioned, or from the place of delivery of the same to said party of the second part, and before such stock is mingled with other stock."

¹ Respecting the limitation of a carrier's liability by contract, see *Missouri Pac. Ry. Co. v. Harris*, (Tex.) 2 S. W. Rep. 574, and note. See, also, *Marr v. Western Union Tel. Co.*, (Tenn.) 3 S. W. Rep. 496, and note.

The statutes of this state provide that "railroad companies, and other common carriers of goods, wares, and merchandise for hire, within this state, on land, or in boats or vessels on the waters entirely within the body of this state, shall not limit or restrict their liability, as it exists at common law, by any general or special notice, or by inserting exceptions in the bill of lading or memorandum given upon the receipt of the goods for transportation, or in any other manner whatever, and no special agreement made in contravention of the foregoing provisions of this article shall be valid." Rev. St. art. 278. That railroads are common carriers is determined by the constitution and laws of this state, as well as by the nature of the business in which they are engaged, is not an open question; and their duties, obligations, and liabilities, resulting from this public character, attach, when animals are tendered or received for transportation, as fully as they do in reference to other classes of property tendered or received for transportation. As has been correctly said: "The law has introduced by implication, into every contract for the carriage of goods, an exception to the carrier's liability, in cases where the loss to them, while in his charge, has been occasioned by the act of God or of the public enemy, or by their own decay from an inherent infirmity, or by the fault of the owner himself. So it has, from the necessity and justice of the case, introduced an exception in favor of the carrier of live-stock, of accountability for its loss or injury resulting from its own uncontrollable, vicious propensities, and the damages incident to its carriage from its inherent natural character." Hutch. Carr. 222. Under the statute of this state, a railway company must receive and transport live animals as other property, and, after receiving, it becomes an insurer of them, as in the case of other property which it is bound to transport, against loss from any cause except the act of God, or of the public enemy, the act of the owner, vicious propensities, or inherent character, or, as it is sometimes termed, the "proper vice" of the animals.

This is the liability imposed upon the common carrier by the common law, and the statute declares that the "liabilities of carriers in this state shall be the same as prescribed by the common law." Rev. St. art. 277. Such being "their liability as it exists at common law," the declaration of the statute that they "shall not limit or restrict their liability, as it exists at common law, in any manner whatever," and that "no special agreement made in contravention of the foregoing provisions of this article shall be valid," deprives such carriers of the right to limit their liability by contract, even as to matters in reference to which they might legally contract under the common law. The common-law duties and liabilities, and not those duties and liabilities as they may be affected by contracts lawful under the common law, are the duties and liabilities of common carriers under the statutes of this state, and they cannot be restricted or limited by any contract or agreement whatever, in cases to which the statute is applicable. The rule may seem a harsh one, but, be that as it may, the legislature of this state has established it, and courts have no power or right to refuse to enforce it, or to place a construction on the statute which its language does not authorize. The duties and liabilities imposed upon common carriers are inseverable. A failure of duty resulting in loss to the shipper fixes liability; and if, by contract, duties imposed by the common law may be dispensed with, then a restriction or limitation of the common-law liability would necessarily follow to the extent to which duty existing without contract might be dispensed with by it. *Railway Co. v. Harris*, 2 S. W. Rep. 574. The carriage, in this case, was wholly within this state, and the statute is directly applicable to it. The special contract, in so far as we have given in substance its terms, was invalid, and therefore cannot shield the appellant from any liability that would have existed had it not been made.

The contract further provides as follows: "It is further hereby and herein expressly provided and mutually agreed that no suit or action against this

company, for recovery of any claim by virtue of this contract, shall be sustained in any court of law or chancery, unless such suit or action shall be commenced within 40 days next after the damage shall occur; and should any suit or action be commenced against this company, after the expiration of the aforesaid 40 days, the lapse of time shall be taken and deemed conclusive evidence against the validity of such claim, any statute of limitation to the contrary notwithstanding." If this clause of the contract, within the meaning of the statute, does not limit or restrict the liability of the carrier as it exists at common law, it must determine the right of the shipper to maintain this action, unless it contravenes some rule founded on public policy. By "liability, as it exists at common law," we understand to be meant such state and degree of legal responsibility as the common law fixes upon the carrier under a given state of facts. The word "limit" ordinarily means to fix the extent of the subject to which it is applied, rather than to fix the duration of time within which a right, growing out of the subject, may be enforced; and, as used in the statute, may mean no more than that the carrier shall not relieve himself by contract from obligation to make such full compensation for breach of duty as the common law would impose under the facts in the given case. The word, however, ordinarily has much the same signification as the word "restrict;" but the inference, arising from the use of both words in connection and in relation to the same subject, is that they were not used as exact equivalents. The word "restrict" means "to restrain within bounds;" and, as used in the statute in connection with the carrier's liability before declared, was evidently used to prohibit the carrier from so contracting as to make his liability to depend on facts other than such as would fix liability under the settled rules of the common law. In case of contract, the facts made necessary by it to the existence of legal obligation become restraints or restrictions on legal liability if, in the absence of contract, liability, under the settled rules of the common law, would be fixed by the existence of facts other than made requisite to liability by the contract. The statute fixes the boundaries of fact which will impose liability on the carrier, by making it to depend on the facts sufficient to create it under the rules of the common law; and a contract which, if given effect, would defeat liabilities thus arising, would be invalid. A contract, however, which does not in any way, if given effect, defeat the complete vestiture of the rights to recover from a common carrier for a breach of duty that at common law would give it, does not operate as a restriction on the common-law liability of the carrier, even though it may require the assertion of that right by action at an earlier period than would be necessary to defeat it through the operation of the ordinary statutes of limitation.

In the case before us, so much of the contract as sought to limit or restrict the liability of the carrier as it exists at common law being invalid, the liability of the carrier was fixed, and, under the terms of the contract, the shipper might have enforced it by action at any time within 40 days after he sustained injury. The statutes of this state only forbidding such contracts as would limit or restrict the common-law liability of carriers, we see no reason why contracts executed upon sufficient consideration, and reasonable in character, looking only to the time within which such liability may be enforced, should not be held valid. There is no rule of the common law which forbids such contracts. In England, and in many of the states of this Union, in which there are not statutes forbidding the making of contracts limiting or restricting the carrier's common-law liability, it has been held that even contracts having such effect were valid if reasonable in character. Under the statutes of this state such contracts, whether reasonable or not, can have no standing; for the simple reason that the common-law liability of the carrier, and not the liability as the carrier might fix it by contract under the common law, is by the statutes of this state imposed on the carrier. The classes of cases to which we have referred, illustrate, however, the fact that, in the ab-

sence of statutory prohibition, carriers may make contracts reasonable in their nature. It has been held in many cases that a carrier may make a contract which will relieve him from liability for loss or injury to property received for transportation, unless claim be made within a named period after the loss occurred. *Express Co. v. Caldwell*, 21 Wall. 264; *Dawson v. Railway Co.*, 76 Mo. 516; *Express Co. v. Hummcutt*, 54 Miss. 566; *Express Co. v. Harris*, 51 Ind. 127; *Westcott v. Fargo*, 61 N. Y. 551.

In these cases the periods within which claim was required ran from five to sixty days, and, under the facts of the cases, the periods were deemed reasonable. It has been held in many cases in which contracts had been made between persons other than carrier and shipper, by which a period shorter than that prescribed by the statutes of limitation had been fixed within which actions must be brought or the right to do so be barred, were valid. *Riddlesburger v. Insurance Co.*, 7 Wall. 389; *Insurance Co. v. La Croix*, 35 Tex. 249; *Wood*, Lim. 80; *Greenhood*, Pub. Pol. 505. In the notes given by those elementary writers cases are fully cited. The unequal position of the carrier and the shipper, and the public nature of the carrier's business, furnish the grounds on which their right to contract as to them seems proper, in the absence of a statute regulating the matter, ought to be denied, and the only grounds on which the reasonableness of their contracts ought to be inquired into. As the statutes of this state do not forbid the making of contracts prescribing a time after which a fixed liability shall not be enforced by action, it seems to us that the only inquiry which can be made, in reference to such contracts, when executed upon sufficient consideration, is, are they reasonable? The injuries complained of occurred on May 8 or 4, 1884, and this action was not instituted until eleventh November following. The run from Navasota to Lampasas required less than 12 hours. The plaintiff resided at and reached Lampasas on the evening of the fourth of May, 1884, and had means promptly to ascertain the extent of the injury, and no reason is shown why the action was not sooner brought. The defendant pleaded the failure to bring the action within the time prescribed by the contract as a bar to the action, and the sufficiency of this defense was questioned by a demurrer, which the court overruled. This would indicate that the court was of the opinion that the answer set up a good defense, and that the time within which the contract required the action to be brought was reasonable. It seems to us, under the facts of this case, that these conclusions were correct. The court was asked to give an instruction as to the effect of the failure of the plaintiff to institute an action within the time prescribed by the contract, and this was refused, notwithstanding the court had failed to give any charge bearing on that defense.

We are of the opinion that a charge should have been given upon that subject, and for the failure of the court to do so its judgment will be reversed, and the cause remanded.

RICHARDS v. SMITH and another.

(Supreme Court of Texas. April 12, 1887.)

1. LIMITATIONS OF ACTIONS—ADVERSE POSSESSION—EXCLUSIVE POSSESSION.

The mere placing of rails for a fence upon land is not sufficient evidence of possession to establish an adverse claim. The possession necessary in such cases must be adverse to the claim of all others, and accompanied by an actual possession exclusive in its character.

2. NEW TRIAL—NEWLY-DISCOVERED EVIDENCE.

A motion for a new trial on the ground of newly-discovered evidence will not be granted where it appears that the evidence relied on is to be given by the party making the motion, who was present at the trial, and heard the witnesses in the case, but did not offer to testify in rebuttal or explanation of their statements.

3. SAME—DUE DILIGENCE.

A motion for a new trial on the ground of newly-discovered evidence will not be granted where it appears that the evidence relied on is that of the wife of the party making the motion, who came to the place of trial for the purpose of testifying, but was unable to take the stand on account of illness, it appearing that no postponement on account of her illness was asked for, and no effort made to take her testimony in any of the modes provided by law.

Appeal from Travis county.

Walton, Hill & Walton, for appellant. *Carleton & Morris*, for appellees.

STAYTON, J. This action was brought by Joel P. Smith, as we learn from the conclusions of fact found by the judge who tried the case, on February 11, 1885, against R. H. Kirby and Samuel Richards, to partition one-third of a league of land, in which the plaintiff asserted the title to three-fourths, and alleged title to the residue to be in the defendant Kirby. It was alleged that Richards claimed some interest in the land which was alleged to be unknown to the plaintiff. The land was alleged to be and was in Llano county, and the defendant Richards was alleged to be a resident of Blanco county, and the defendant Kirby a resident of Travis county. The prayer was for adjudication of the rights of the respective parties and for partition. The defendant Richards interposed a plea to the jurisdiction of the district court for Travis county, which, however, never was acted upon. On June 4, 1885, the plaintiff dismissed as to the defendant Kirby, who at the same time became a party plaintiff. On the same day the plaintiff and Kirby filed an amended petition having all the essentials of a petition in an action of trespass to try title. The defendant Richards pleaded not guilty, and set up title in himself to 735 acres of the tract, including its west end. He also pleaded limitation barred on five years' possession, under a tax deed dated June 6, 1879, which it is not claimed was sufficient to pass title, but was a deed sufficient to furnish the basis for limitation pleaded. This deed was properly recorded on June 22, 1879; and taxes on the land claimed under it for the year 1879, and the five succeeding years, were paid by appellant. The defendant Richards, in the fall of 1879, began preparations for inclosing a pasture which was to include about 25 acres of the land covered by the tax deed, and other land not on the same survey. With a view to this, in that year some rails were put on the land in controversy, but no fence was erected during that year, nor does it appear that any act was done indicating clearly an intention to inclose any specific part of the land in controversy so as to exercise an exclusive control of it. The evidence for the defendant tends to show that he inclosed about 25 acres of the land in controversy as early as May, 1880, and that, from the time of such inclosure, he had exclusive possession. The evidence for the plaintiff tends to show that no part of the land in controversy was inclosed until the latter part of the summer of 1880; but one witness stated that the inclosure was completed in June or July of that year. The court found that limitation ran until the filing of the amended petition on June 4, 1880, but that the evidence was not sufficient to show an actual possession for five years prior to that date.

We see no reason to doubt the sufficiency of the original petition to stop the running of the statutes of limitation from the date it was filed. It asserted title in the plaintiff and the defendant Kirby to the entire tract, and sought an adjudication of the right. It was not shown that, five years before the petition was filed, the defendant had any exclusive possession whatever. The placing of rails on land, no further act being shown, is not sufficient evidence of such possession. It may indicate an intention at some future time to take an exclusive possession, and it may afford some evidence of an intention to claim adversely; but an intention to assert an adverse claim, or its actual assertion, gives no right, however long such intention to assert or actual assertion of adverse claim may continue, unless it be accompanied with exclusive

possession. We do not think an actual inclosure, by fence or otherwise, necessary in all cases to give an exclusive possession.

The character and situation of the land, and the uses to which it is adapted, and may be and is actually put, must be considered in determining whether an occupation is exclusive or not. To give title by limitation there must be an adverse claim and exclusive possession or occupation of the thing for the length of time and under the circumstances prescribed by the statute. The adverse claim may be manifested by facts which will not amount to an exclusive possession, while an exclusive possession may be such as to be sufficient evidence of an adverse claim. The placing of material around a tract of land for the purpose of erecting a fence, or the placing of material on land to erect a house, would be evidence, more or less strong, as it might be affected by other facts, that the person so placing material asserted a claim to be the owner of the land, and, unexplained, might be held sufficient evidence of an adverse claim. If, in addition to placing material around a tract of land, the person so placing it should commence to erect a fence around it, and while doing so should, by other means than a fence, secure to himself, and actually have, the exclusive possession and occupation of the land, it would seem that limitation would run from the time the exclusive occupation began. The facts must clearly show the adverse claim, and from its nature, as well as an exclusive possession, of which an inclosure substantial and permanent in character, accompanied with such use as the land is adapted to, is often the most satisfactory evidence.

When the acts done upon a tract of land are such as to give unequivocal notice to all persons of a claim to it adverse to the claim of all others, and this is accompanied by an actual possession, exclusive in its character, then limitation will run in favor of the persons so asserting adverse claim, and enjoying an exclusive possession from the time such exclusive occupancy began, whether the land be inclosed or not.

In the case before us, there is no evidence of an exclusive possession by the appellant for a period continuing for five years before the institution of the suit. If limitation, however, was not suspended until the filing of the amended petition on June 4, 1880, we do not see that the finding of the court was not that required by the evidence. There was no pretense of an exclusive possession of any part of the land prior to the time the fence was completed around about 25 acres, and the court, after declaring that the burden of proving the facts which would support the plea of limitation rested upon the defendant, found that "the testimony as to the date of the completed inclosure does not clearly show it to have been made before June 4, 1880, and five years' possession, such as required by statutes, does not exist." The evidence offered by the defendant leaves the time when the exclusive possession began uncertain, while that offered by the plaintiff tends strongly to fix the date of the inclosure later than June 4, 1880. Under such facts the finding cannot be disturbed.

Witnesses for the plaintiff, who showed from their testimony that they were familiar with the land in controversy, and with the improvements placed upon it from time to time by the defendant during the year 1880, gave testimony tending strongly to show that no land was inclosed by the defendant, on the tract in controversy, prior to June 4, 1880. They further showed that they were aware that the defendant inclosed a larger part of the tract subsequently to the inclosure of about 25 acres, on which limitation in this case is based. The defendant testified in the case, and, so far as the record shows, heard the evidence of the witnesses for the plaintiff; but he did not propose to testify in rebuttal or explanation of the testimony given by the witnesses for the plaintiff. He now urges that the court erred in overruling his motion for a new trial, which was based on what he claims to be evidence of the nature of newly-discovered evidence. This evidence consists of the testimony of him-

self and wife. He showed by his motion for new trial that upon another trial he would state facts which would tend to show that the witnesses for the plaintiff were mistaken as to the time when the first inclosure was made, and he gave as a reason for not testifying in rebuttal of their evidence given on the trial that both he and his counsel understood the witnesses for the plaintiff to testify as to the time when a second inclosure was made by him on the land, and not as to the time when the first inclosure was completed by him. The testimony of the witnesses, as we find it written in the statement of facts in plain English words, left no ground for misunderstanding their evidence if even slight attention was given to it. They both spoke of the first improvement made on the land, and one of them testified explicitly that the last and largest pasture was built after his removal to Hays county, which was in the autumn of 1880. If the defendant did not understand the evidence of these witnesses, it must be attributed to his want of ordinary attention; and his failure to understand it, and to testify in rebuttal, furnished no sufficient ground for a new trial.

The defendant, who lived in Blanco county, on the day before the trial brought his wife to Austin to testify in the case in his behalf, but on the next day she was so affected by the fatigue of the journey that she was unable to go to court and testify. It is not claimed that the defendant was not aware of what her evidence would be, and it does not appear that any postponement of the cause was asked on account of her inability to attend court and testify, nor that any effort to take her testimony in any of the modes provided by law was made. A new trial was sought to enable the defendant to have the benefit of the testimony of his wife on another trial; and by her he proposed to prove that the evidence on which he based his plea of limitation was completed as early as the month of May, 1880. This evidence was not shown to have been discovered after the trial, and the inferences from the record are that the existence of the evidence was well known before. If, under such a state of facts, a party goes to trial without objection, and without having used the means the law places in his hands to procure evidence, he has no just ground for complaint if a motion for new trial, based on evidence which he might have had by the exercise of ordinary diligence, is refused.

There is no error in the judgment, and it will be affirmed.

MILTON v. STATE.¹

(*Court of Appeals of Texas.* March 12, 1887.)

1. RAPE—ASSAULT WITH INTENT TO RAPE—EVIDENCE.

A conviction for assault with intent to rape is not supported by evidence showing an attempt to rape by fraud.

2. SAME—PROOF OF FORCE.

Assault with intent to rape can only be established by proof of force, or attempted force, and not by proof of threats or fraud, as the means of accomplishing the offense. But an attempt to commit rape may be committed by means of threats or fraud, and the use of chloroform as the means comes within the meaning of fraud, and cannot be construed to be force.

Appeal from district court, Navarro county.

This conviction was for an assault with the intent to rape an unmarried female, and the penalty assessed against the appellant was a term of five years in the penitentiary. Although no statement of the facts proved upon the trial is essential to this report, it is not improper to say that the testimony tended strongly to establish the fact that the defendant invaded the private room of his intended victim, and attempted her outrage by subjecting her to

¹ Reported by Messrs. Jackson & Jackson, official reporters of the Texas court of appeals.

the influence of chloroform, with which he saturated the neck of her night-dress. However, his hand, coming in contact with her face, awakened the prosecutrix, and the purpose of the ravisher was frustrated.

Read, Greer & Greer, for appellant. *Asst. Atty. Gen. Davidson*, for the State.

WILLSON, J. The charge in the indictment is an assault with intent to commit rape by means of *force* alone. It is very clearly shown by the evidence that the means used to accomplish the intended crime was *fraud* and not *force*. It was by means of the use of chloroform upon the sleeping woman that the rape was attempted, and intended to be accomplished. Such a means comes within the meaning of "fraud," as defined by the statute, and cannot be construed to be force. Pen. Code, arts. 529-531. The court in its charge properly limited the jury to a consideration of the offense charged in the indictment; that is, an assault with intent to commit rape by means of *force*. There is not sufficient evidence to warrant a conviction for the offense charged in the indictment; and, although the evidence is amply sufficient to sustain a conviction for the offense of an *attempt* to commit rape by means of *fraud*, this conviction cannot stand, because the indictment does not allege such offense. It is not competent to indict for an assault with intent to rape, and convict upon evidence establishing an *attempt* to rape by *fraud*. An assault with intent to rape can only be established by proof of force, or attempted force. This offense cannot be committed by means of *threats* or *fraud*. The offense of an *attempt* to commit rape may, however, be committed by the use of such means. *Burney v. State*, 21 Tex. App. 565, 1 S. W. Rep. 458.

Because the verdict of the jury is contrary to the charge of the court, and is not supported by the evidence, the judgment is reversed, and the cause is remanded.

HOMAN, *alias* WENAR, v. STATE.¹

(Court of Appeals of Texas. March 12, 1887.)

CONSTITUTIONAL LAW—RIGHT TO PROCESS FOR WITNESSES.

The constitution of this state (Bill of Rights, § 10) guaranties to any one accused of crime the right to have compulsory process for his witnesses, and of this right it is not in the power of the legislature to deprive him. In so far, therefore, as the act of the eighteenth legislature, "to provide for the payment of attached witnesses in felony cases," deprives a defendant of his right to an attachment for his absent witnesses, that act is unconstitutional and void.

Appeal from district court, Tarrant county.

The opinion states the case. The conviction was for bigamy, and the penalty assessed was a term of three years in the penitentiary.

M. D. Priest and *B. G. Johnson*, for appellant. *Asst. Atty. Gen. Davidson*, for the State.

WHITE, P. J. This appeal is from a judgment of conviction for bigamy. But two bills of exception appear of record, and upon these the errors complained of are assigned. These bills were saved to rulings of the court, (1) in refusing defendant's application for an attachment for a witness; and, (2) the order of the court overruling defendant's application for a continuance. Appellant was indicted September 17, 1886. On September 20, 1886, he made application to the judge of the district court, then in session, for an attachment for one J. F. Henderson, of Hood county, stating in his affidavit the facts he expected to prove by said witness, and which facts he proposed to use in connection with other testimony to be adduced by him to support his de-

¹ Reported by Messrs. Jackson & Jackson, official reporters of the Texas court of appeals.

fense to the prosecution, to-wit, a plea of insanity. This application for attachment was refused by the judge, and, as he states in his explanation to the bill of exception, for the reason that "it did not appear that the evidence desired was material."

In the second section of an act entitled "An act to provide for the payment of the expenses of attached witnesses in felony cases," (Gen. Laws 18th Leg. 117,) it is provided that "witness fees shall be allowed to such state's witnesses only as the district or county attorney shall state in writing are material for the state, and to witnesses for defendant after he has made affidavit that the testimony is material to his defense, stating the facts which are expected to be proved by the witness, which certificate and affidavit must be made at the time of procuring the attachment: * * * provided, that the judge to whom an application for attachment is made may, in his discretion, grant or refuse such application, when presented in term time. No attachment shall be issued in a felony case until the state's attorney shall have first made the statement in writing, or the defendant shall have made the affidavit, which will authorize the payment of the witness to be attached." It is contended that this provision prescribes the only rule and practice for obtaining attachments for witnesses during the term of court, where the witness resides out of the county of the prosecution, and that it is a matter entirely discretionary with the judge to grant or refuse the application.

This identical question was before this court in *Roddy's Case*, 16 Tex. App. 502, and it was there held that the right of one accused of crime to have compulsory process for obtaining witnesses in his favor is a constitutional guaranty of which it is not in the power of the legislature to deprive him, (Const. Bill of Rights, § 10;) that the exercise of this right is regulated by arts. 488 and 489, Code Crim. Proc., and that the act of the eighteenth legislature above quoted does not and cannot repeal those articles; that the object, purpose, and constitutionality of said act must be tested by its title as to the subjects legitimately contained in the body of said act, (Const. art. 3, § 35;) and that, the object as expressed in the title being simply to regulate the compensation of attached witnesses in felony cases, it was beyond the power of the legislature to so regulate that matter as to deprive the accused entirely of his constitutional right at the discretion of the trial judge. In so far as it went to that extent, said act was declared unconstitutional and void.

We can add nothing to the cogency and conclusiveness of Judge HURT's reasoning in *Roddy's Case*. Tested by the requirements of article 489, Code Crim. Proc., defendant's application for the attachment for his witness was substantially sufficient, and the process should not have been denied him. Its denial has been to deprive him of a constitutional as well as statutory right.

The second error complained of, viz., the overruling of defendant's motion for new trial, it is unnecessary to discuss.

Because defendant was by the action of the court deprived of his constitutional right of process for his witness, the judgment is reversed, and the cause remanded.

WATSON v. WALKER and another.

(*Supreme Court of Texas*. April 19, 1887.)

1. CONTRACTS—INTERPRETATION.

The defendants purchased cotton at L., under price limits designated by plaintiff, and shipped it to the latter at H., it being orally agreed that the plaintiff should report the classification of the cotton at H., if there was any falling off either in grade or quality. Held, in a suit to recover an alleged balance of an account, that the stipulation that the plaintiff should report any falling off in weight or grades, not being a condition precedent to the plaintiff's right to recover under the agreement, and it not being stated that the report should be made immediately, or within from three to five days after classification, that time was not of the essence of the

agreement, and that it was error for the court to instruct the jury to the effect that the plaintiff could not recover if he did not make the reports within a reasonable time, and if such failure on his part induced the defendants to continue their shipments to him.

2. EVIDENCE—RELEVANCY—RES INTER ALIAS ACTA.

In such a case, evidence of one of the defendants that his firm had had dealings with other firms in H., previous to their dealings with plaintiff and that the former had always reported classifications immediately, or from four to five days after classification, held, inadmissible.

Appeal from Caldwell county.

Mrs. Storey & Storey, for appellant. *Stringfellow & McNeal*, for appellees.

GAINES, J. Appellant sued appellees in the court below to recover an alleged balance due upon an account. Walker & Co., being merchants at Luling, agreed with Watson, who was doing business at Houston, that they would buy cotton, under limits as to price to be designated by him, and ship the same to him at his place of business; he undertaking to pay their drafts for the cotton so bought, less the freight from Luling to Houston. Upon its arrival in Houston, he was to pay the freight, cause it to be weighed and graded according to the classification of that market, and was to account for it according to its value there; that is to say, that if it should be worth more in Houston than it cost in Luling, with the freight added, appellees were to have credit for the difference; but, if it was worth less, he was to pay them the deficit. It was also agreed that appellant was to report the Houston classification and weights to appellees, in case there was any falling off either in grade or quality. Appellant alleged that this report was to be made within a reasonable time after the cotton was received, but appellees averred it was to be done immediately. The contract was by parol, and this is the only substantial difference in the allegations of the parties as to its terms.

The first assignment of error is that "the court erred in permitting defendant J. K. Walker to testify before the jury that defendants had contracts with J. H. Blake & Co. and Innan & Co., of Houston, Texas, during the fall of 1882, like the one they had with plaintiff, and that they had no trouble with said firms; and that they reported on weights and classifications immediately, or from three to five days after shipment." The plaintiff testified that different shipments arrived at the same time, and that there were no marks on the cotton by which they could be separated from each other; that this rendered it impossible to make a report of the different invoices or lots of cotton separately; and that, therefore, he had to hold back his reports until all the lots were classified and checked up, which was in February, 1883. The shipments were made from September to December, 1882, inclusive. It is to be presumed that the object of the evidence excepted to by appellant was to rebut his testimony as above set out. Under the circumstances, it may be that, in order to prove that appellant could have reported promptly the classification and weights of the several lots of cotton, it was competent to show that cotton shipped to other parties about the same time, and marked in a similar manner, was promptly classified, weighed and reported; but no reason is seen why the facts of such reports being made could not have been established by direct evidence without resorting to proof of the facts that appellees had had no trouble with these other parties. So much of the evidence was improper, and we think that the court erred in not excluding it.

Appellant complains, in his fourth assignment, that the court erred in charging the jury as follows: "And if he did not make returns of the classification and weights as determined in Houston, and the losses, within a reasonable time, and if you believe the failure to make such return induced the defendant to continue his shipment, then plaintiff cannot recover for said losses." It was not claimed by appellees in their answer that the stipulation

that appellant should report the falling off in the weights or grades of the cotton either immediately or within a reasonable time was made by the contract a condition precedent of his right to recover under the agreement. Nor does it appear that any damage resulted to them from appellant's failure to make prompt reports, except that they may have been embarrassed in meeting with evidence the case made by him. We fail to see that if they had been notified, and had transferred the cotton to another party, they would have been in any better position. Appellant was bound to account to them for the value of the cotton in Houston. It could have yielded them no more in the hands of other parties. The question is, was it correctly classified and weighed at Luling? If so, appellant must account according to those weights. Appellees might have obviated this embarrassment by stipulating that, if reports were not made in a certain time, appellant should lose his right to a reclamation, thereby making time of the essence of the contract. This was not done, and therefore the charge complained of in this assignment presented a false issue to the jury, and is a material error for which the judgment must be reversed.

The other questions presented by the assignments will probably not arise upon another trial, and need not be considered.

For the error pointed out the judgment will be reversed, and the cause remanded.

BOWDON v. GILLET and another.

(Supreme Court of Texas. April 22, 1887.)

SET-OFF AND COUNTER-CLAIM—JUSTICES' COURTS—JURISDICTION.

Under Rev. St. Tex. art. 316, in an action in a justice's court, to which a counter-claim has been filed, and judgment rendered in the whole case, and an appeal taken to a district court, the party filing the counter-claim will not be allowed in the latter court to enlarge the counter-claim, by adding items of damages not embraced in the pleadings in the justice's court, which amounted to a sum greater than the justice's court would have jurisdiction of.

Appeal from Limestone county.

Kimble & Smith, for appellant. *Burrow & Kincaid*, for appellees.

STAYTON, J. This action was brought by the appellant in a justice's court on a note for \$300, executed by appellees, on which a payment of \$100 had been made. Appellees claimed a failure of consideration, and in reconvention claimed \$400, which they urged, in so far as necessary, in satisfaction of the balance on the note sued for, and for the residue they sought a judgment. The note was given to recover the purchase money for a stock of horses sold by the appellant to the appellees, and the grounds of the defense set up were deceit and misrepresentations made by appellant in regard to the sale by him of animals out of the stock, and the death of animals between the time of the purchase and a former period. There was a judgment in the justice's court in favor of the appellant for \$63, from which an appeal to the district court was prosecuted. In the district court the defendants enlarged their counter-claim by adding items of damages not embraced in the pleadings in the justice's court, which amounted to a sum greater than the justice's court would have jurisdiction of.

It is urged that the court erred in allowing this counter-claim to be set up in the district court for the first time, and we are of the opinion that this was error. The statute provides that "either party may plead any new matter in the county court which was not presented in the court below, but no new cause shall be set up by the plaintiff, nor shall any set-off or counter-claim be set up by the defendant which was not pleaded in the court below." Rev. St. art. 316; *Curry v. Terrell*, 1 W. & W. Civil Cas. 239; *Rush v. Lister*, 2 W. Civil Cas. 442; *Railway Co. v. Mclear*, Id. 457.

The additional items of counter-claim set up in the district court were not

asserted in the justice's court, and should not have been permitted in the district court. The pleadings in the justice's court, and in the district court, in so far as they set up a failure of consideration for the note, were sufficient, and, if sustained, gave a good defense against the note sued upon which might be urged in any court. The counter-claims set up in the justice's court, and in the district court, on which relief other than the defeat of the collection of the note sued on was asked, each exceeded the amount of which the justice's court had jurisdiction, and they should not have been entertained. *Newman v. McCullom*, 1 W. & W. Civil Cas. 273-275. If the appellees desired relief on their claims, they should have brought suit thereon in some court having jurisdiction of the amount claimed. How far the counter-claim set up in the district court for the first time may have influenced the verdict of the jury it is impossible to tell.

For the error mentioned, the judgment will be reversed, and the cause remanded.

BALDING v. STATE.¹

(Court of Appeals of Texas. March 9, 1887.)

1. ASSAULT AND BATTERY—AGGRAVATED ASSAULT—INDICTMENT.

Indictment for assault with intent to murder will authorize a conviction for aggravated assault, notwithstanding it alleges no circumstance of aggravation. *HUNT, J., dissents.*

2. SCHOOLS—AUTHORITY OF TEACHER.

Moderate restraint and correction of a pupil by his teacher is not an offense, but is authorized by law; and it seems that the authority of a teacher is not limited to the time the pupil is at the school-room, or under the actual control of the teacher.

3. JURY—COMPETENCY—BIAS.

On the *voir dire* of a juror he said that he heard a person in whom he had confidence make a statement of the case upon hearsay, and that thereupon he (the juror) formed an opinion, provided the statement was true, but had formed no conclusion as to whether or not it was true. *Held* not a disqualifying conclusion.

4. SAME—HARMLESS ERROR.

That the trial court erroneously overruled a good challenge for cause to an unqualified juror, and required the defense to exhaust a peremptory challenge on him, is not reversible error, when it does not appear that any objectionable juror was forced upon the defendant.

Appeal from district court, De Witt county.

The indictment charged an assault to murder Alexander Murphree. The conviction was for aggravated assault, and the penalty imposed was a fine of \$25, and 30 days in the county jail.

It appears from the testimony that the injured party was a teacher in the public schools of De Witt county; that the appellant, who was 13 years old, was one of his pupils; that on Monday of the week the teacher assigned to his class in arithmetic two examples to be worked at home over night, and returned next morning; that all the members of the class save defendant worked the examples. Defendant said that he did not want to work examples at home. The teacher then assigned him two other examples to be worked over night, and returned next day, and warned him that a whipping would be the penalty of non-compliance. When the examples were called for the next day, the defendant said that he would work them in school if allowed to, but would not work them at home, giving no excuse for his contumacy. The teacher undertook to chastise the defendant, and struck him one blow with a switch, when the defendant drew a butcher knife, and stabbed the teacher under the shoulder blade, and in the thigh.

Fly & Davidson, for the appellant. *Walter Weaver*, for the State.

¹Reported by Messrs. Jackson & Jackson, official reporters of the Texas court of appeals.

WILLSON, J. An unbroken line of decisions in this state hold that, under an indictment charging an assault with intent to murder, a conviction may be had for an aggravated assault, although no circumstance of aggravation is alleged in the indictment. In *Davis v. State*, 20 Tex. App. 302, we gave our views at length upon this question, citing the authorities in support of the same. We adhere to the opinion there expressed, and so often announced in other cases, both by our supreme court and this court. The law confides to teachers a discretionary power in the infliction of punishment upon their pupils, and will not hold them responsible unless the punishment inflicted be excessive, or be inflicted merely to gratify their own evil passions. Moderate restraint and correction by a teacher of a pupil is not an offense, but is authorized by the law. Penal Code, art. 490; *Dowlen v. State*, 14 Tex. App. 61; *Stanfield v. State*, 43 Tex. 167; 2 Bish. Crim. Law, §§ 880, 881, 886; 1 Whart. Crim. Law, § 632.

Teachers have the right, the same as parents, to prescribe reasonable rules for the government of children under their charge, and to enforce, by moderate restraint and correction, obedience to such rules. This authority of a teacher over his pupils is not, in our opinion, necessarily limited to the time when the pupils are at the school-room, or under the actual control of the teacher. Such authority extends, we think, to the prescribing and enforcement of reasonable rules and requirements, even while the pupils are at their homes. We find no material error in the charge of the court. We think it correctly and fully explains the law of the case, and there was no error in refusing the special instructions requested by the defendant.

As to the objection to the proposed juror Burns, we are of opinion that the court did not err in holding him to be competent. The character of the opinion which said Burns entertained of the guilt or innocence of the defendant is not such as disqualifies. *Rothschild v. State*, 7 Tex. App. 519. Moreover, it is not shown that any juror objectionable to the defendant was forced upon him. *Loggins v. State*, 12 Tex. App. 65. As to the teacher's testimony with reference to the custom of requiring pupils to study at other times than during school hours, we are of the opinion that it was immaterial, and, even if inadmissible, which we do not concede, it could not have affected the result, and was harmless to the defendant.

We find no error in this conviction, and the judgment is affirmed.

HURT, J., dissents from that portion of this opinion which holds that under an indictment for an assault with intent to murder, in the usual form, a conviction may be had for an aggravated assault. He is of the opinion that the authorities in support of this doctrine are incorrect, and should be overruled.

BOND v. STATE.¹

(Court of Appeals of Texas. March 9, 1887.)

LARCENY—INSTRUCTIONS.

It is an invariable rule of practice in this state that the charge of the court must respond to every issue raised by the evidence. Purchase is a valid defense to larceny, and, if such defense is supported by evidence, it is the right of the accused to have that question of fact submitted to the jury.

Appeal from district court, Gonzales county.

This conviction was for the burglary, by force, of the outhouse of W. N. and H. P. Bond, with intent to steal therefrom 15 bushels of shelled oats. A term of two years in the penitentiary was the penalty assessed. For all practical purposes, the opinion sufficiently states the case.

¹Reported by Messrs. Jackson & Jackson, official reporters of the Texas court of appeals.

Fly & Davidson, for appellant. *Walter Weaver*, for the State.

WHITE, P. J. When the oats alleged to have been stolen were found in defendant's crib, defendant told the searching party that he had bought the oats from one Jim Bond, Kemp Bond, and Charles T. Rather; that, in the months of August and September just preceding the alleged burglary, (October 1st,) Jim Bond had purchased as much as 11 bushels of oats of Rather, most of which he let appellant have. On this state of facts there were clearly two theories,—for the state, that the oats found were taken from the burglarized premises; for the defense, that defendant had purchased them. The only defense relied upon, as we read the evidence, was a purchase. This theory was not directly submitted as part of the case in the charge of the court to the jury. It is true that the court properly instructed the jury with regard to explanations made by a defendant when found in possession of property recently stolen, (*Hernandez v. State*, 18 Tex. App. 134; *Windham v. State*, 19 Tex. App. 418;) but the defendant denied that the property was stolen, and, on the contrary, positively claimed to have purchased it. It is a well-settled rule in criminal practice that "a defendant is entitled to have a distinct and affirmative presentation to the jury by the charge of the court of the issues which arise upon the evidence, to the end that the jury shall not ignore his defenses, but may be guided to the proper verdict if they find his evidence true; and, however improbable his evidence may seem to the trial court, it is his right to have its truth or falsity determined by the jury, without being forestalled by the court." *White v. State*, 18 Tex. App. 57; *Irvine v. State*, 20 Tex. App. 13; *Herron v. State*, Id. 296.

Because the charge of the court failed to present the law pertinent to the only defense relied upon by appellant on his trial in the lower court, the judgment is reversed, and the cause remanded.

SHULER v. STATE.¹

(Court of Appeals of Texas. March 9, 1887.)

BURGLARY—INSTRUCTION.

The defense interposed on a trial for burglary and larceny was that the appellant's co-defendant, in appellant's presence, claimed to have purchased the alleged stolen property. There being evidence to support the co-defendant's claim of purchase, the trial court should have charged both the law of opportune explanation of the possession of recently stolen property and of the defense of purchase.

Appeal from district court, Gonzales county.

This is a companion case to that of *Bond v. State*, ante, 580, the indictment impleading Bond and appellant jointly for the same offense. A term of two years in the penitentiary was the penalty assessed.

Ponton & Fly, for appellant. *Walter Weaver*, for the State.

WHITE, P. J. This is a companion case to *Bond v. State*, ante, 580, (just decided,) both appellants having been jointly indicted for the same burglary and theft of oats. The alleged stolen property was found on the premises and in the possession of Bond, and appellant made no claim of any kind to it. His guilty connection, if any, with the property, arose from the fact that he was a principal who acted in connection with Bond in the perpetration of the burglary. When the oats were found in Bond's possession, he, (Bond,) in presence of defendant, claimed that he had purchased the oats. Under the circumstances, situated as he was, the defendant was entitled to the benefit of any explanation of possession made by his co-defendant, Bond, in his pres-

¹ Reported by Messrs. Jackson & Jackson, official reporters of the Texas court of appeals.

ence. Such being the state of the evidence, the court should in this case have instructed the jury with regard to the law, both as to reasonable explanation of possession of property recently stolen, and also the law with regard to a purchase of the property as claimed by Bond.

For error in the charge of the court by failing to submit pertinently and affirmatively the law applicable to the material issues of the defense, the judgment is reversed, and the cause remanded.

ROWLETT v. STATE.¹

(Court of Appeals of Texas. March 12, 1887.)

1. **INDICTMENT—FORM OF.**

An indictment which concludes with the phrase, "against the peace and dignity of the state," is not vitiated by any words following that phrase, if they form no part of it.

2. **SAME—PRESENTMENT OF—PRACTICE.**

Objection to the sufficiency of the presentment of an indictment comes too late when made for the first time in this court.

3. **SAME.**

The clerk of the trial court is not required to enter upon his minutes the name of the offense charged against an accused, and the fact that he misnamed the offense on his minute book cannot vitiate the indictment.

4. **MURDER OF THE SECOND DEGREE.**

See the statement of the case for evidence held sufficient to support a conviction for murder of the second degree.

Appeal from district court, Williamson county.

This conviction was in the second degree, for the murder of James Davis, on the fifteenth day of June, 1886. A term of five years in the penitentiary was the penalty awarded.

Stated in brief, the proof shows that the deceased, who was the step-father of Miss Mattie Bains, and the brother-in-law of the defendant, left his old home, in Bastrop county, Texas, on the fourteenth day of June, 1886, to remove to Bell county, taking Miss Bains and his own smaller children with him; the party traveling in a wagon drawn by four horses. On the evening of the thirteenth, Miss Bains sent word to her grandmother, defendant's mother, that she did not want to go to Bell county with Davis, but wanted to take up her abode with her. Defendant, on the morning of the fifteenth, ascertained that Miss Bains had gone off with deceased. He, and a relative named Dunbar, followed Davis, with the avowed purpose of taking Miss Bains back to her grandmother's, if she was being taken off against her will, but not to interfere if she was going voluntarily. Defendant and Dunbar overtook deceased's wagon as it was going into camp at noon on the next day. Defendant and deceased addressed each other in friendly terms, and, while the latter was gone with two of his horses for water, defendant asked Miss Bains if she was going off voluntarily. She replied that she was, and defendant remarked that he had nothing more to say. When Davis returned with the horses, defendant asked why he did not take the children by to bid their relatives adieu. Davis asked in reply angrily, and with an oath, if that was why defendant followed him. Defendant replied that it was. The two then approached each other. Defendant then stepped back, and Davis, having nothing in his hands, continued to advance. Defendant ordered him three times to stop. Davis continuing to advance, (though making no hostile demonstrations,) the defendant drew his pistol and shot Davis dead. A large butcher knife, such as it was shown by the evidence, Davis usually carried in his belt, was found on the ground near the body, after the homicide.

¹Reported by Messrs. Jackson & Jackson, official reporters of the Texas court of appeals.

G. W. Jones and Fisher & Townes, for appellant. Asst. Atty. Gen. Davidson, for the State.

WILLSON, J. It is objected to the indictment that it does not conclude, "against the peace and dignity of the state," and is therefore a nullity. The original indictment is before us, and we find that the words, "against the peace and dignity of the state," follow immediately after the charging portion of the indictment, and on the last words used by the pleader. In the next line below these words, and without any grammatical or other connection therewith, in a different handwriting from that of the indictment, are the words, "A true bill," followed immediately, and in the same handwriting, by the official signature of the foreman of the grand jury. We hold that these interpolated words, "A true bill," do not vitiate the indictment. They are no part of the indictment; are outside of and wholly disconnected with it. They are no part of the conclusion of said indictment, and in this respect the case differs materially from that of *Hawn v. State*, 13 Tex. App. 388, as will be seen by reference to that decision. The language of that decision may be, and we think is, too broad and unqualified, but the conclusion arrived at with respect to that particular indictment was, we still hold, correct; for the reason that the words following the conclusion proper were connected with said conclusion in the same sentence, and manifestly formed a portion of said sentence; and therefore the indictment upon its face did not conclude as required by the statute and the constitution. We are of the opinion that, when the indictment upon its face shows the pleader's conclusion to be "against the peace and dignity of the state," these words forming a complete sentence, no words following thereafter, and not forming a part of said sentence, can vitiate the indictment.

Another objection to the indictment is for the first time presented in this court. It is that it affirmatively appears from the record that the said indictment was not presented in open court by the grand jury. The record shows the file number of the cause in the district court to be 706; the charge in the indictment being *murder*. The entry upon the minutes of the said court of the presentment by the grand jury of indictment No. 706 names the charge in said indictment, "An assault with intent to kill." Upon its face the indictment shows that it was presented in the district court by a legal grand jury. This recital in the indictment must be presumed to be true until it is shown to be otherwise. It devolves, therefore, upon the defendant to show that the indictment was not in fact presented in court. How and when does the law permit him to make such question? We answer, by exception to the indictment, which exception must be made before a plea of not guilty is entered. It cannot be entertained when made for the first time in this court. *Hardy v. State*, 1 Tex. App. 556; *Alderson v. State*, 2 Tex. App. 10; *Strong v. State*, 18 Tex. App. 19; *De Olles v. State*, 20 Tex. App. 145.

But even if the objection now for the first time urged had been made *in limine* in the trial court at the proper time, and in the proper manner, we do not think it would have been a valid objection to the indictment. It is only required that the style of the action and the file number of the indictment shall be entered upon the minutes. Code Crim. Proc. art. 415. In this instance this requirement was fulfilled. It was not essential that such entry should name the offense charged in the indictment. *Steele v. State*, 19 Tex. App. 425. Not being essential to the sufficiency of the entry to name the offense charged, it was an unnecessary act on the part of the clerk to do so, and should not be held to vitiate the indictment, although the offense named in said entry is not the offense charged in the indictment.

It is earnestly contended by counsel for appellant that the evidence is insufficient to sustain the conviction, in this: that the evidence in support of the plea of self-defense is at least cogent enough to raise a reasonable doubt of the

guilt of the defendant. In this view of the evidence we do not agree with counsel. We do not think the facts show, or even strongly tend to show, that character of self-defense which would either justify or reduce the homicide to manslaughter. If the deceased, at the time he was shot, had been advancing upon the defendant in an angry manner, armed with a butcher-knife, then, indeed, would defendant's theory of self-defense be established. But, unfortunately for the defendant, the evidence does not disclose such a state of the case. On the contrary, all of the eye-witnesses to the transaction testified on the trial that the deceased was unarmed at the time he was shot by the defendant. They were in positions where they could and did see the deceased at the time, and they saw no knife or other weapon on or about his person.

The only evidence which even remotely tends to prove that the deceased was armed with a butcher-knife is that such a knife was found upon the ground where the homicide occurred a short time after the difficulty, and that this knife belonged to the deceased. How, when, or by whom the knife was placed upon the ground is not disclosed. Deceased was at the time of the occurrence traveling in a wagon with his family, consisting of several small children, and had stopped to camp for dinner. These children were around the wagon, and may have had and dropped the knife where it was found. Deceased may himself have dropped it before the difficulty occurred. After defendant had shot deceased, witness Dunbar said to defendant: "You have killed Davis!" Defendant replied: "Yes; he ought to have kept off of me." Nothing was said by defendant at that time about the deceased having a knife. If in fact deceased had been advancing upon the defendant with a butcher-knife in his hand, and defendant had seen that he was thus armed, it is passing strange that he did not mention the fact to Dunbar at the time of said conversation, and call the attention of that witness to the knife. Instead of doing so, however, he mounted his horse, and fled the country, and avoided trial for a number of years.

As to the charge of the court, it is full and correct, and fair and liberal to the defendant, presenting clearly the law applicable to every phase of the case made by the evidence.

We are of the opinion that there is no error in the conviction, and the judgment is affirmed.

BARBEE v. STATE.¹

(Court of Appeals of Texas. March 12, 1887.)

1. CRIMINAL PRACTICE—EVIDENCE—OFFER OF COMPROMISE.

A state's witness was permitted to testify that, after the commission of the offense, and in the absence of the accused, certain persons came to witness, and made overtures for a compromise, inquiring how much money it would take, etc. There was no proof these overtures were made by the authority or with the knowledge of the accused. *Held*, that the evidence was hearsay, and inadmissible, and was calculated to prejudice the accused.

2. SAME—INSTRUCTIONS.

A jury in a felony case should always be instructed that they are the exclusive judges of the facts proved, and of the weight to be given to the testimony.

Appeal from district court, Navarro county.

The conviction was for an assault with attempt to rape Mrs. A. B. Briscoe, and the penalty assessed was a term of two years in the penitentiary.

Mrs. Briscoe testified, for the state, that her husband, having to leave home to be absent several days, requested the defendant, who lived in the neighborhood, to sleep at his house at nights during his absence, in order to aid witness in the event of sickness in her family. He came about dusk on the night of the

¹ Reported by Messrs. Jackson & Jackson, official reporters of the Texas court of appeals.

day her husband left home, and went to bed on a pallet spread by the witness for him on the gallery. Witness went to bed early in the night, with three of her children. During the night the defendant entered her room, and spoke to her in an indecent manner. She ordered him to leave the room, but he cursed and refused to do so. Witness undertook to get up, but defendant pressed her back on the bed, and appealed to her, and ordered her to yield to his passion. She replied that she would die first. After further persecution and threats to kill witness if she reported his attempt to her husband, the defendant returned to his pallet, and left the house early on the next morning, and witness did not see him again for six or eight days. Witness reported the assault to Mr. C. S. West on the next morning, and told her husband as soon as he returned, on the fifth day after it occurred. T. F. Briscoe testified that one Menzel and one Whitehead came to his house subsequent to the assault, and wanted to compromise the matter, and asked him how much money would hush the matter up. Witness told them that he would compromise on the witness stand. Billy Barbee offered once to compromise the matter, and said that he came to witness from the defendant. One Davis, testifying for the defense, said that he offered once to pay Briscoe to drop the prosecution against defendant, but did it on his own responsibility, and without consulting the defendant. By one or more witnesses it was proved that defendant was a frequent visitor to Briscoe's house prior to the assault. Witnesses, however, could not say that Mr. Briscoe was absent on those occasions.

Beale & Autry, for appellant. *Asst. Atty. Gen. Davidson*, for the State.

WILLSON, J. There is in the record a bill of exceptions, reserved by defendant, which recites as follows: "T. F. Briscoe was allowed by the court, over objections by the defendant, to testify as follows: 'John Barbee, with Menzel, came in a buggy to my house on Sunday evening after the assault, and wanted to compromise the matter. I told him to wait till I got on the stand; that was the only way I would compromise. John and Billy Barbee came again to my house last May, and Billy Barbee asked me how much money it would take to compromise. He said he came there for the defendant.'" The defendant was not present when these overtures for a compromise were made. Defendant objected to this evidence upon the ground that it was hearsay. In an explanation appended to the bill of exceptions, the trial judge gives as a reason for admitting said testimony that a part of the conversations between the witness Briscoe and John and Billy Barbee had been drawn out by the defendant on the cross-examination of said witness, and that, on re-examination of the witness by the state, it was competent to prove the whole of said conversations; and he refers to the statement of facts in support of his ruling. Upon examination of the statement of facts, it does not appear that any portion of said conversations were drawn out by the defendant. On the contrary, said statement shows that the only conversations, or parts of conversations, testified to by the witness Briscoe, were drawn out by the prosecution on the re-examination of said witness.

We are of opinion that this testimony was inadmissible. It was purely hearsay. It was not shown that defendant had authorized John or Billy Barbee to make said statements, or any other statements, or to take any action whatever in relation to the transaction in which he was involved. He is in no way, by the evidence, connected with the acts and declarations of said parties, and cannot be held responsible therefor, and should not be prejudiced thereby. *Langford v. State*, 9 Tex. App. 287; *Tyler v. State*, 11 Tex. App. 388; *Washington v. State*, 17 Tex. App. 197; *State v. Favors*, 20 Tex. App. 155.

That this illegal evidence was calculated to prejudice the rights of the defendant there can be no question. The witness Briscoe, with whom the said conversations were had, was the husband of the woman alleged to have been

assaulted, and the efforts of John and Billy Barbee to compromise the matter, as they stated, by authority of the defendant, with the representative of the injured party, would strongly tend to produce in the minds of the jury the belief that the defendant was guilty of the charge. It amounted almost to a confession of guilt.

There is but one objection that we perceive to the charge of the court. It should have instructed the jury that they were the exclusive judges of the facts proved, and of the weight to be given to the testimony. Code Crim. Proc. art. 728; *Wilbanks v. State*, 10 Tex. App. 642. Because of the error of the admission of illegal evidence, and the error mentioned in the charge of the court, the judgment is reversed, and the cause is remanded.

In view of another trial of this cause, we deem it not improper to remark that while the evidence may be sufficient to support a conviction for an aggravated assault and battery, it leaves our minds in doubt as to the intent of the defendant in making the assault,—whether his intent was to accomplish carnal knowledge of the woman by *force* or by *persuasion*. We are inclined to the opinion that the evidence in this particular is insufficient, but we refrain from so deciding.

The judgment is reversed, and the cause is remanded.

SPEARMAN v. STATE.¹

(Court of Appeals of Texas. March 18, 1887.)

1. ASSAULT TO MURDER—AGGRAVATED ASSAULT—MUTUAL COMBAT.

A homicide committed in mutual combat would not be reduced to manslaughter, under the Code of this state, unless it was committed under the influence of sudden passion arising from an adequate cause; and therefore, if death did not ensue, the offense would not be mitigated from an assault with intent to murder to aggravated assault. Note the distinction taken in the opinion between manslaughter under the Code of this state and manslaughter at common law and in some of the other states.

2. SAME—SELF-DEFENSE—CHARGE.

The trial court instructed the jury to the effect that, to constitute justification on the ground of self-defense, the act must have been done "in fact in self-defense, and not merely colorably so." Held erroneous, because subversive of the right of self-defense resulting from reasonable expectation or fear of death, or serious bodily injury, and because it absolved the jury from their duty to view the circumstances from the standpoint of the defendant at the time.

Appeal from district court, Hunt county.

This conviction was for an assault upon W. B. Howard with intent to murder him. A term of two years in the penitentiary was the penalty assessed against the appellant.

The statement of facts discloses that the defendant and Howard, the prosecuting witness, met on the streets of the village of Kingston, and proceeded to shoot at each other with pistols. The testimony for the state shows positively that defendant fired the first shot, and fired it before Howard got his pistol drawn. On the other hand, the testimony for the defense shows as positively that Howard fired the first shot. The defense proved also that a week or two before the shooting Howard warned a citizen to keep his little son off of the street, as a "shooting scrape" between himself and defendant was imminent, and liable to occur at any time.

Mr. Terhune, for appellant. *Asst. Atty. Gen. Davidson*, for the State.

WILLSON, J. In his charge to the jury the learned trial judge, upon the subject of mutual combat, charged as follows: "When two parties arm themselves, and voluntarily engage in a combat with each other, with deadly

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weapons, knowing that such combat will or may probably produce the death of either or both of them, then neither of such parties could claim the benefit of the law of self-defense; but, if they both intended to kill, both may be guilty of assault with intent to murder." And, in another paragraph of the charge, as follows: "But if the defendant voluntarily engaged in a combat with W. B. Howard, with deadly weapons, knowing that it would or might probably result in the death of W. B. Howard or of himself, or in some serious bodily injury which might probably result in the death of Howard or himself, * * * he could not avail himself of the privilege of self-defense, no matter to what extent of danger he may have been reduced in the combat, and no matter which party struck the first blow, or fired, or attempted to fire, the first shot, and in such case the defendant would be guilty of assault with intent to murder."

The above-quoted paragraphs of the charge were excepted to by the defendant, and he submits the proposition that, "where a combat is mutually waged with deadly weapons, on equal terms, where death does not ensue, the offense is aggravated assault," and not assault with intent to murder. In support of this proposition he cites *King's Case*, 4 Tex. App. 56; *Wilson's Case*, Id. 644; *Sanchez's Case*, 24 Cal. 17; and *Crowey's Case*, 56 Cal. 36.

We concede that these cases support the proposition stated, and we concede the correctness of the decisions, when considered with reference to the rule at common law, and without regard to our statute of manslaughter. But, when viewed with reference to our statute of manslaughter, these decisions, in our opinion, cannot be held to be the law of this state, without material qualification. To reduce a homicide from murder to manslaughter, under the law of this state, the homicide must not only be committed under the immediate influence of sudden passion, but that sudden passion *must arise from an adequate cause*; and this *adequate cause* is defined to be "such as would commonly produce a degree of anger, rage, resentment, or terror, in a person of ordinary temper, sufficient to render the mind incapable of cool reflection." Pen. Code, arts. 592-595. Now, unless this *adequate cause* existed, the homicide would not be reduced to manslaughter, although it may have been the result of sudden passion on the part of the slayer. At common law, adequate cause was not required to reduce the homicide to manslaughter, but only that it was committed under the influence of sudden passion, without malice aforethought. Thus it will be seen there is a very material difference between manslaughter at common law and that offense as defined by our Code. We think that the true doctrine, under our statute, is that announced by this court in *Crist v. State*, 21 Tex. App. 361, as follows: "When parties mutually engage in a combat with deadly weapons, under circumstances which would not reduce to manslaughter if either party is killed, the party killing would be guilty of murder, and the fact that the combat is mutual would not, *ipso facto*, reduce to manslaughter." In other words, a homicide committed in mutual combat would not be reduced to manslaughter, unless it was committed under the influence of sudden passion, arising from an adequate cause. This being our view of the law, and the charge of the court being in harmony with this view, and applicable to the facts of the case, we hold it to be correct.

Several objections are urged by appellant's counsel to the court's charge upon the issue of self-defense. We shall consider but one of these objections. Among other rules governing self-defense, the court gave the following: "Homicide, to be justifiable, must be in fact in self-defense, and not merely colorably so." This was excepted to at the time it was given. In *Babb's Case*, 8 Tex. App. 178, an instruction, in almost the very language as the above, was held erroneous, because it destroyed all that portion of the charge which permitted the defendant to invoke the right of self-defense against reasonable apprehensions and expectations of death, or some serious bodily injury. In the case before us we think the clause of the charge above quoted was well

calculated to cause the jury to overlook and disregard that well-settled principle of the law of self-defense, that one who commits a homicide is justified in so doing if he acts upon reasonable appearances of danger of death or serious bodily injury to himself, which reasonable appearances are to be considered and determined from his standpoint. It matters not, in such case, whether the danger was real; whether it in fact existed, or whether it was merely *colorable*. If from the defendant's standpoint, taking into consideration all the circumstances of the case, it would reasonably appear to him that he was in danger of death or serious bodily injury from Howard, he had the right to kill him, although in fact such danger did not exist. Each juror must place himself in the position of the defendant, and determine, from all the facts as they appeared to him at the time, whether his apprehension or fear of death or serious bodily harm was reasonable; and, if so, they must acquit. *Marnoch v. State*, 7 Tex. App. 275; *Jones v. State*, 17 Tex. App. 612; *Jordan v. State*, 11 Tex. App. 447; 21 Tex. App. 240; *Bell v. State*, 20 Tex. App. 450; *Horbach v. State*, 43 Tex. 242.

This important principle of the law of self-defense is not clearly explained in any portion of the charge of the court, and even if it had been, as was said in *Babb's Case*, it would have been destroyed by the clause complained of and above quoted. Because of this error in the charge, the judgment must be reversed and the cause remanded. In other matters complained of by defendant we perceive no errors. Reversed and remanded.

BROWN v. STATE.¹

(Court of Appeals of Texas. March 16, 1887.)

1. CONTINUANCE—ABSENT WITNESS—NEW TRIAL.

The wrongful refusal of a continuance to secure absent evidence is cause for new trial, but a continuance cannot be held to have been wrongfully refused when part of the absent evidence was secured from another source, and the remainder was immaterial.

2. CRIMINAL PRACTICE—VENUE—EMBEZZLEMENT.

Embezzlement, like theft, may be prosecuted in any county through or into which the property was transported by the accused, and the fact of transportation may, like any other fact, be proved by circumstantial evidence. See the opinion for circumstantial evidence held sufficient to prove the venue in the county of the forum, which was a different county from that in which the embezzled property was received by the accused.

3. SAME.

"Property," as defined in article 732, Penal Code, includes any and every article commonly known and designated as personal property. "Money" is "property," within the meaning of article 219 of the Code of Criminal Procedure, by which the venue of prosecutions for embezzlement is regulated.

4. SAME—CASE STATED.

Appellant's principal lived in B. county, whence he directed his business throughout the state, and in that county employed appellant as traveling agent. Appellant sold goods in R. county, and received the money for the same in the said R. county. Thence he returned to B. county, and, in liquidating with his principal, his embezzlement of the money he received in R. county was disclosed. Held, that at common law, and without reference to our Code, the proper court of B. county had jurisdiction of the offense, inasmuch as the Code, if it does not provide for such jurisdiction, does not exclude it.

Appeal from district court, Bosque county.

This conviction was had in Bosque county, Texas, and was for the embezzlement of \$62 in money, the property of S. E. Moss. The penalty assessed against the appellant was a term of two years in the penitentiary.

The proof showed that Moss, who owned the right to erect the patented

¹ Reported by Messrs. Jackson & Jackson, official reporters of the Texas court of appeals.

"copper-covered lightning rod" in Texas, lived in Bosque county; that he then employed defendant as traveling agent; that appellant, acting as his agent, went to Calvert in Robertson county, and erected a rod for one Coleman, and received in payment therefor the sum of \$62; that he then returned to Bosque county, and had a settlement with Moss; in which settlement he denied that he ever received any money from Coleman.

O. L. Lookett, for appellant. *Asst. Atty. Gen. Davidson*, for the State.

WILLSON, J. It was not error to overrule the exceptions to the indictment. Said indictment contains all the allegations essential in charging the offense of embezzlement by an agent. Willson, Crim. Forms, 507-509, and authorities cited.

No error was committed in overruling defendant's application for continuance. One of the absent witnesses named in said application appeared and testified on the trial. The facts expected to be proved by the witnesses Abrams and Kennedy were wholly immaterial. As to the facts expected to be proved by the witness Brown, they were proved by the state's witness Moss, and were not disputed.

It is ingeniously and earnestly contended by counsel for defendant that the venue of the offense is not shown to be in Bosque county. It is shown by the evidence that the money charged to have been embezzled by defendant was received by him in Robertson county on the twenty-first of December, 1886. On the next day a witness saw him with a roll of paper money in Calvert, Robinson county. The money which defendant had received was paper money to the amount of \$60, and silver money to the amount of \$2. The witness Bennett, who saw the defendant with the roll of paper money, traveled and remained with him until the afternoon of the twenty-fifth of said December, when the defendant got on the train at Temple to go to Morgan, in Bosque county. This witness is quite positive that, up to the time the defendant took the train at Temple, he had not disposed of any of the paper money. Defendant arrived at Morgan on the said twenty-fifth of December, and on the morning of the next day had a settlement with Moss, his principal, and positively denied to Moss that he had collected any money for him from any one. It was stipulated in the contract of his employment, as the agent of Moss, that he should account to Moss at Morgan, Bosque county, for all notes and money received by him by virtue of his said agency.

Do these facts sufficiently establish the venue of the offense in Bosque, the county of the prosecution? We are of the opinion they do. Article 219 of the Code of Criminal Procedure provides as follows: "The offense of embezzlement may be prosecuted in any county in which the offender may have taken or received the property, or through or into which he may have undertaken to transport it." It is contended by counsel for defendant that the word "property," used in the above article, does not mean "money" when considered with reference to the statute defining embezzlement. We cannot agree to this view of the law. The word "property" is declared to include any and every article commonly known and designated as personal property. Pen. Code, art. 789. "Money" certainly is commonly known and designated as "personal property." This is also its legal definition, when used in relation to the crime of theft, a crime to which the crime of embezzlement is closely allied. Pen. Code, art. 782. We are of the opinion that the transportation of money, through or into a county, has the same effect with reference to the venue of the offense that the transportation of any other personal property would have. If, then, in this case, the defendant undertook to and did transport the money into Bosque county, the prosecution was properly maintained in that county. *Cole v. State*, 16 Tex. App. 461; *Reed v. State*, Id. 586; *Cohen v. State*, 20 Tex. App. 224. We think the evidence sufficiently shows that the defendant undertook to carry, and did carry, the money

into Bosque county. Venue, like any other matter, may be proved by circumstantial evidence.

If, however, there should be error in this view of the question, there is another view of it which, in our opinion, fixes the venue beyond any doubt in Bosque county. It was in Bosque county that it first appeared the defendant had embezzled the money. He then denied that he had received it. He may not have conceived the fraudulent intent of appropriating it to his own use until the very moment when he denied having received it. At common law, and without reference to our statute, these facts gave jurisdiction to Bosque county, and our statute, while it does not embrace, does not exclude jurisdiction in such case. 2 Russ. Crimes, (9th Amer. Ed.) 470, 471; 1 Bish. Crim. Pr. §§ 41-61, and note; 2 Bish. Crim. Pr. § 326.

We have carefully considered other supposed errors complained of by counsel for defendant, but in our opinion there is no material error shown in the record, and the questions presented which we do not discuss are of no general importance. The judgment is affirmed.

DAVIS v. STATE.¹

(Court of Appeals of Texas. March 16, 1887.)

1. LARCENY—EVIDENCE—VARIANCE.

The prosecution being for the larceny of a "horse," the state was permitted to prove that the animal stolen was a mare. *Held* no variance.

2. CRIMINAL PRACTICE—EVIDENCE—HARMLESS ERROR.

That the state was allowed, in the cross-examination of the defendant's wife, to elicit testimony not germane to her evidence in chief, is not reversible error, unless the objectionable testimony was calculated to prejudice the defendant's rights.

3. SAME—OTHER CRIME—INSTRUCTIONS.

The trial court having admitted proof of the larceny of other animals in the same neighborhood, and at the same time the animal described in the indictment was stolen, omitted to instruct the jury for what purpose such evidence was alone admissible,—to prove the *intent* with which the animal alleged was taken. *Held* error, notwithstanding the omission was not excepted to, nor sought to be supplied by special charge.

Appeal from district court, Navarro county.

This conviction was for the theft of a horse, and the penalty imposed was a term of nine years in the penitentiary. As usual in cases of circumstantial evidence, the statement of facts is prolix and complicated; but, for all practical purposes, the opinion of the court sufficiently indicates the facts germane to the rulings.

Beale & Autry, for the appellant. *Asst. Atty. Gen. Davidson*, for the State.

HURT, J. Appellant, Simon Davis, was indicted jointly with J. C. Davis and G. W. Jones for the theft of a horse, the property of Fount Brown. Upon the trial the parties severed, and appellant was tried alone. There was a verdict of guilty, and a judgment thereon, from which appeal is taken.

The state was permitted to prove, over objection, that the animal stolen was a mare. It is urged that allegation and proof of the descriptive character of the property are variant. To this we do not agree.

The district attorney, on cross-examination of Tennessee Davis, appellant's wife, proved, over his objection, that appellant's mule and mare came up to his house after dark. His counsel urges that, as the witness was the wife of the defendant on trial, the cross-examination must be germane to the matter brought out in the examination in chief; and that there was nothing in it to authorize proof of the facts named. Abstractly considered, these positions

¹ Reported by Messrs. Jackson & Jackson, official reporters of the Texas court of appeals.

may be correct; but reversal does not of consequence follow, unless the fact proved was in some way calculated to prejudice his rights. Looking, therefore, to all the facts in evidence, we cannot perceive how such injury could result.

There was evidence introduced by the state showing, or tending to show, that other horses were stolen at the same time and from the same neighborhood from which the mare was stolen. The charge of the court, however, fails to instruct the jury for what purposes such testimony could be used; and this omission was brought to notice on motion for new trial. Under the facts of this case, we are of opinion that this was reversible error. For conviction the state relied upon circumstantial evidence alone; and, while the omission was neither excepted to at the time, nor was the proper charge requested, we must yet look to the whole record in passing upon injury *vel non*. Thus looking, it is evident that such testimony was calculated to sensibly prejudice the case; for it would require but slight evidence, when aided by this testimony, to satisfy the jury that appellant was guilty of the theft of the mare. For this error in the charge of the court the judgment must be reversed, and the cause remanded.

MAY v. STATE.¹

(Court of Appeals of Texas. February 16, 1887.)

1. CRIMINAL PRACTICE—EVIDENCE.

A defendant is not entitled to the exclusion from evidence of an answer prejudicial to his interests, if the same was elicited by him from the witness.

2. MURDER—INSTRUCTIONS.

A person unlawfully attacked is not bound to retreat in order to avoid the necessity of killing his assailant, when the attack is such as produces a reasonable expectation or fear of death, or some serious bodily injury; and in many cases it is the imperative duty of the trial court to so instruct the jury. Such an instruction, however, was unnecessary, and would have been irrelevant in this case, inasmuch as the evidence adduced to show self-defense affirmed that the defendant was in full retreat when he fired the fatal shot.

Appeal from district court, Falls county.

The appellant was convicted in the second degree for the murder of D. Daffin, and was awarded a term of 75 years in the penitentiary.

It was fully proved, and not controverted, that the deceased was shot, and almost instantly killed, at a hay camp in Falls county, Texas, on the day alleged in the indictment. It was shown that when the body was first viewed by the witnesses, other than those who were present at the time of the killing, an open pocket-knife lay loosely (not grasped) in the right hand, which rested on the breast. It was proved for the state, in substance, that the deceased, the only white man in the hay camp, was the foreman of the hay-cutters. A few minutes before the shooting, he ordered the defendant to assist another hand to catch some mules, and bring them into camp. The defendant replied that he had no rope, and, "By G—d, did not have to make one." The deceased walked towards the defendant, who secured the pistol of another party then lying in the tent near by. Deceased and defendant, the former having nothing in his hands, then confronted each other for some minutes, neither uttering a word, when the defendant suddenly threw up the pistol, fired, and killed the deceased. He then stooped over the body of deceased, took deceased's knife from his pocket, and deliberately cut his own shirt in two places, and placed the open knife loosely in the right hand of the deceased. Defendant then retired with one of the hay-cutters to a point some distance from the

¹Reported by Messrs. Jackson & Jackson, official reporters of the Texas court of appeals.

tent, and the two conversed in under-tones for some time. When they returned to the tent they detailed a statement which each of the hay-cutters present should make concerning the killing, which said statement was in fact afterwards made by all of the parties upon the examining trial, and by two of them upon this trial. This testimony was elicited from Frisby Henderson, one of the parties present, who detailed the statement agreed upon. The statement, as foreshadowed by Henderson, corresponds, in substance, with the narratives of the witnesses for the defense, the substance of which is stated in the opinion.

W. Shelton, for appellant. *Asst. Atty. Gen. Burts*, for the State.

HURT, J. Appellant presents this appeal from a judgment of conviction for the offense of murder of the second degree, confinement in the penitentiary for 75 years being assessed by the verdict. By a bill of exceptions, and explanation thereto by the judge, it appears that, in answer to a question by appellant's counsel a witness testified that defendant stated to him that deceased had cut his shirt in two places on the side, showing the cuts, and the witness further testified that in his opinion the cuts could not have been made without cutting the body of the defendant. On the next morning the counsel for the defendant moved to exclude this portion of the evidence with regard to the opinion of the witness. This motion was refused, and exception was taken thereto. In this there was no error. If the opinion of the witness was responsive to a question from defendant, he will not be permitted to speculate as to what the answer will be, and, if against his interest, have the answer excluded.

In justification of the killing, appellant relied upon self-defense. The evidence in support of this defense is substantially as follows: Early in the morning of the homicide, Daffin (deceased) came to the hay tent, the parties being all engaged in hay-making. As soon as he arrived at the tent, he ordered Alf Nelson to go and catch the mules, which were grazing some distance away. Nelson had started off, when deceased ordered May (appellant) to go and help Nelson catch the mules. Their failure to find a rope so infuriated deceased that he immediately said to May, "You God damned son of a bitch, I'll make you make a rope," and ran to the wagon, and assaulted May with a knife, cutting his shirt in two places before he could get out of his reach. May fled around the tent, Daffin pursuing and cutting at him with his knife. As May ran by the tent, he snatched a pistol from the side of the tent, and, while in a stooping position, he presented the pistol around his left arm, without rising, and fired back as he ran. The ball took effect in the body of deceased, causing him to stop, step back a few steps, and sit down. Death ensued in about 10 minutes. Appellant requested the court to instruct the jury that he was not bound to retreat, etc. This was refused, and this ruling is assigned as error. While the law, under no circumstances, requires the party assaulted to retreat, and in very many cases it is the imperative duty of the court to so instruct, yet in some cases it is not necessary, and in these the refusal is not error. It is the duty of the court to charge the law applicable to the facts of the case, and there is no fact in this case requiring a charge upon the subject of retreating; for, if the jury believed the witnesses who made the case of self-defense, evidently the appellant was retreating at the very instant he fired the fatal shot; and, if the law required him to retreat, he was, according to the testimony of those witnesses, in full and perfect compliance with the law. In cases in which there is no retreat, it might be beneficial to a defendant to have an instruction given that he is not required to retreat; but, when he has retreated, no possible benefit can accrue to him from such instruction. In fact, when the proof is evident (as in this case, if appellant's witnesses are to be credited) that the accused did retreat, and was in full retreat when he fired, a charge that the law does not require him to

retreat could not be pertinent to any issue in the case, and there would be no legitimate purpose which such a charge could subserve.

The other assignments of error are not deemed well taken. No error appearing in the record, the judgment is affirmed.

OWENS v. MISSOURI PAC. RY. CO.

(*Supreme Court of Texas. April 22, 1887.*)

1. DAMAGES—FLOODING LAND—MEASURE OF.

In an action against a railroad company to recover damages for injuries to plaintiff's land alleged to have been caused by an embankment erected by the defendant, it is not error to instruct the jury that the measure of damages is "the difference between the value of the plaintiff's land before the construction of said embankment and the value of the same immediately after said damage, if any was caused by said defendant.

2. NEW TRIAL—VERDICT—EVIDENCE.

In an action against a railroad company to recover damages alleged to have been caused by the erection of an embankment by the defendant, where a verdict has been rendered for the plaintiff for a small amount, it will not be set aside because the evidence would have sustained a verdict for a much larger sum; and it cannot be said that the jury found against the evidence upon the question of damages, where certain witnesses certified that the standing of the water on the land in question was wholly caused by the embankment of defendant, while other witnesses testified that the embankment did not affect the flow of the waters from it.

3. APPEAL—OBJECTIONS MUST BE RAISED BELOW.

It is not error for the court, upon the jury reporting that they cannot agree, to say to the jury that there has been a mistrial at a former term in the cause, and that the business of the court, and the interests of the country, made it important for them to agree, if it could be done; and any exception to such action of the trial court, in order to be considered upon appeal, must be taken at the time, and a bill of exceptions prepared, tendered to, and signed by the judge, after having been submitted to the opposing attorney as required by statute. The mere statement of the judge, of these facts in the record, although written by him and signed officially, cannot be received as its substitute.

4. RAILROAD COMPANIES—CONSTRUCTION—FLOW OF WATER.

In an action against a railroad company for damages alleged to have been caused by the erection of an embankment, it is not error to instruct the jury that the defendant was not bound to construct sluices and water-ways in places where the water did not naturally flow out, an instruction having previously been given that, if the work of the defendant caused the overflow, the plaintiff was entitled to recover; and such instruction would not prevent the jury from considering the question of the obstruction of the outlets of the pond which covered the land in question.

5. TRIAL—VERDICT—COMPROMISE VERDICT.

It is not error for the jury to return a verdict which is a result of a compromise between the members of the jury.

Appeal from McLennan county.

Clark & Dyer and Herring & Kelley, for appellant. *Foster & Wilkinson*, for appellee.

GAINES, J. This suit was brought by appellant against appellee to recover damages to appellant's land, alleged to have been caused by an embankment erected by appellee. Appellant obtained in the court below a verdict and judgment for \$100; and because, as he claims, the damages are insufficient, he now appeals to this court. That after the construction of appellee's road and embankment the land of appellant was overflowed and greatly depreciated in value there can be no doubt. But the stress of the case was upon the issue whether the continuous overflow which was proved, was the result of the embankment, or was caused by an unusual succession of heavy rains. Incident to this was the further question: If the overflow was affected at all by the embankment, to what extent was it increased by that obstruction? A large number of witnesses were examined upon these questions by both par-

ties, and the evidence is conflicting. It was peculiarly within the province of the jury to weigh the evidence, under these circumstances, and to determine the issues. Their verdict cannot be disturbed unless for errors in the proceedings of the court.

We will therefore consider the assignments in order. The first and second are presented together, and are as follows: "(1) The court erred in the fifth paragraph of the charge to the jury, wherein the measure of damages is stated to be 'the difference, if any, between the value of plaintiff's land before the construction of said embankment and the value of the same immediately after said damage, if any, was caused by said defendant.' (2) The court erred in not giving to the jury the special charge as to the measure of damages, which would have corrected the error complained of in the preceding assignment, which charge was as follows: 'If the jury should find, under charges heretofore given, that the plaintiff has suffered damages by the erection and maintenance of said railway embankment for which he would otherwise be entitled to recover of the Missouri Pacific Railway Company, under the law and evidence, by reason of said embankment being the original cause of the injury, the fact, if it be a fact, that in the present condition of the pond, and the ground adjacent thereto, the removal of the embankment originally erected would not cause the water to flow off, cannot diminish, impair, or defeat the right of the plaintiff to recover. If the jury find for the plaintiff, they will find for him such damages as have been caused by the defendant to this time, and the measure of damages is the difference in value of the land at the erection of the embankment and its present value, in the absence of any evidence that the value of said land has been changed or diminished by other causes.'"

It is to be noted that the second assignment is not sustained by the record. What is called therein the special charge was embraced in two separate instructions asked by the appellant. The record shows that so much of the instruction quoted as is embraced in the first sentence was asked as a separate charge, and was given. That which is embraced in the second sentence was separately requested also, but was refused. Ordinarily the measure of damages resulting from overflows caused by the construction of embankments is the loss resulting from each successive flood; but in this case it was alleged that the value of the land was permanently impaired by the destruction of a valuable pasture, and the damages claimed were the deterioration in the price of the property. So far as the record discloses, no question was made upon either side as to this being the proper measure of plaintiff's recovery, if he were entitled to recover at all. The appellant's proposition, under the assignment, is that the portion of the charge complained of in the first assignment "took from the jury the consideration of damage that may have resulted to plaintiff by reason of *debris* being deposited in the water-ways, outlets, and sluices of the pond, while the land was for a long time flooded, which damage would not have resulted immediately after the overflow, but would have been the result of continuous deposit of sediment after the lapse of time from the thirteenth of December, 1881, until July, 1883, and later."

We do not think the instruction obnoxious to the objection made to it in this proposition. It does not charge the jury that the measure of damages is the difference in the value of the land before the embankment was made and its value immediately after the first overflow that followed, but that it is the difference in value before the construction was made and immediately after the damage that resulted from defendant's act. This, we think, clearly means the difference between the value immediately before the erection and its value after all the damage caused by it had been done. This was correct, and, in our judgment, as applicable to the evidence adduced, was not calculated to mislead the jury. The fifth special charge asked by appellant had been substantially given in the instruction we have had under consideration, and therefore it was not error to refuse it.

The fifth assignment of error complains of the action of the court in telling the jury, when they reported they could not agree, that there had been a mistrial at a former term in this cause, and that the business of the court, and the interests of the country, made it important for them to agree, if it could be done. But to this action of the court no exception was taken at the time, and no bill of exceptions prepared, tendered to, and signed by the judge, after having been submitted by him to the opposing attorneys, as the statute requires. There appears in the record a statement of the fact that the judge used the language to the jury which is complained of in the assignment, and under the circumstances therein set forth; but we think this cannot be considered. In order to subject the action of the trial court to reversion on appeal, it must be excepted to at the time. The office of a bill of exceptions is to show the proceedings of the court which do not otherwise appear of record, and the mode of its authentication being provided by law, the mere statement of the judge, although written by him and signed officially, cannot be received as its substitute.

The fifth and sixth assignments of error are submitted with the same statement, and may be considered together. They are as follows: "(4) The verdict of the jury is manifestly a compromise verdict, and is contrary to law, and not warranted by the evidence. (5) The verdict is contrary to law and evidence in this: It finds one hundred dollars damages for plaintiff, *thereby admitting his cause of action as alleged*, when there was no conflict of evidence as to the measure of damage; and the very least amount of damages, as shown by the evidence, without anything at all to the contrary, is \$13,000. So the jury should have found a verdict, under the law and evidence, for this amount; and in this, the verdict is entirely without and not supported by any evidence, and is manifestly contrary to the law as charged by the court."

The evidence would doubtless have warranted a verdict for plaintiff for damages to a much greater amount than that found by the jury. It would also have sustained a verdict for the defendant. There were witnesses who testified that the standing of the water over the land, and the consequent destruction of the pasture, were wholly caused by defendant's embankment. There were about as many who gave evidence that they had known the land for many years, and that the embankment did not affect the flow of the waters from it. There were still others from whose testimony the jury were warranted in concluding that the embankment did somewhat affect the drainage of the land, but that the damage was in the main to be attributed to natural causes, and that the construction of the work contributed to it only to a very slight extent. A number of witnesses having sworn that the overflow was caused by the embankment, and others equally credible having sworn that it was not, it is not surprising that the jury concluded that the truth lay between the two extremes, and found that the work did affect the floods, but only to a very limited degree. Such being the case, we cannot say that the jury found against the evidence upon the question of damages.

The objection that the finding of the jury is a compromise verdict is not well taken. We presume that but few verdicts are returned giving damages for a tort in which the amount is not the result of a compromise between the members of the jury.

The sixth assignment of error is that "the court erred in the last paragraph of its charge to the jury, which is as follows: 'You are further instructed that the law does not require the construction of sluices or culverts for the drainage of land, except that which naturally lays so that the water thereon will be naturally drained by the construction of such culverts or sluices; and if the jury find from the evidence that the water standing on Dry pond, at its present height, has no natural connection with or flow to the embankment at the north end of the railroad through plaintiff's lands, the defendant would not, in such cases, be required to construct a culvert or sluice under such em-

bankment through plaintiff's land, at said north end, for the drainage of the water standing in said Dry pond at that point; unless you also find that said Dry pond is disconnected with said embankment at said point by the accumulation of *debris* between said Dry pond and said embankment, caused by the construction of the same, thus preventing the natural flow of said water to said drainage, if any. Record, 200."

This charge is not liable to the criticism made upon it in the proposition under the assignment. It is clearly not upon the weight of the evidence, nor do we see that it was calculated to mislead the jury. It does not exclude from the consideration of the jury the question of the obstruction of the outlets in the southern portion of the pond, as appellant complains. The jury are merely told, in effect, that, if the water did not naturally flow out at the north end, defendant was not bound to construct water-ways there, except in case *debris* thrown up by the embankment had dammed the natural outlet at that point. The jury had already been instructed, in substance, that, if the work caused the overflow, plaintiff was entitled to recover, and the instruction now under consideration did not preclude them from finding that there may have been an outlet at the southern part of the pond which the embankment had obstructed.

We find no error in the judgment, and it is affirmed.

WALET v. HASKINS and others.

(Supreme Court of Texas. June 3, 1887.)

1. LIMITATION OF ACTIONS—TRESPASS TO TRY TITLE—EXCUSE FOR DELAY.

In 1857, W. brought suit in Texas against B. & R., for cutting timber off his lands. The attorneys whom W. had retained abandoned the suit. Two years later he employed other attorneys, who, upon leaving the state, dropped the case. In May, 1867, judgment by default went against W., who then lived in Louisiana, for costs, and the land in controversy was sold and bought in by H. W. came to Texas in 1877, and went into possession, but was ejected by H. in 1881. In the mean time he had paid taxes on the land, through an agent, and had corresponded with the clerk and sheriff of the county to no effect, to get information about the suit. He had no communication with his agent about the case. He then, in 1881, brought trespass to try title against the widow and sole heir of H. Held, that the suit was barred, and that there was nothing in the circumstances set out to excuse the delay.

2. CLOUD ON TITLE—POSSESSION.

A suit to remove cloud on title may be brought when the plaintiff is in possession, as well as when he is out.

Appeal from district court, Karnes county.

Trespass to try title, brought in 1881, by Walet, appellant, against A. L. Haskins, the widow, and Lulu Haskins, the infant daughter, of R. F. Haskins, deceased, to recover 1,896 acres of land out of the "Francis J. Haskins league and labor survey," in Karnes county, Texas. The petition alleges ownership and possession in the plaintiff, and an ouster by the defendants in 1881, and contains the averments usual in this form of action. The defendants filed a general demurrer and special exceptions, and answered, by general denial, not guilty, stale demand, and limitation of three, five, and ten years. There was put in evidence an agreement in which the Haskinses "acknowledged and recognized the plaintiff's title to the land in controversy, deraigned from the sovereignty of the soil by regular chain of title and transfer through the grant to Francis J. Haskins, by the deed of administrator to Peter McGreal, Peter McGreal's deed to R. J. Towns, R. J. Towns' deed to plaintiff, as alleged in the plaintiff's petition, and that the defendants' claim to the land is alone based upon the sheriff's deed from S. J. Davis, sheriff of Karnes county, to R. F. Haskins, * * * now on file, and dated May 17, 1867." There was a verdict and judgment for the plaintiff. The defendant thereupon appealed, and the supreme court (63 Tex. 213) reversed the district court, and remanded the cause.

McLeary & Barnard, for appellant. *John A. & N. O. Green and Lawton & Browne*, for appellee.

WILLIE, C. J. This suit was before this court on a former occasion, and is reported in 63 Tex. 213. The case was then reversed in favor of the present appellees, because the court below ruled out the sheriff's deed under which the appellees claimed, and because certain testimony as to the payment of taxes by Mrs. Haskins was excluded, and because the court refused to charge the jury that 10 years would bar a suit to cancel a sheriff's deed. It was held that the plaintiff could not recover in the state of case then presented to this court, whether his action was to be treated as one of trespass to try title, or as a suit in equity to cancel a deed, and remove clouds from title. If an action of trespass to try title, he could not recover, because he was collaterally attacking a sheriff's deed which was not void, but, under the proof, voidable. If a suit to remove the cloud caused by the deed, he could not succeed, because more than 10 years had elapsed since the right to sue accrued, and no excuse for the delay had been alleged and proved. When the cause was remanded, Walet amended his petition to meet the decision of this court upon the question of stale demand, alleging certain reasons and excuses for not commencing his suit at an earlier day. Upon a demurrer to the amended petition, the court below held these excuses insufficient, and, the plaintiff refusing further to amend, the cause was dismissed. From this judgment of dismissal the present appeal is taken.

It is admitted by the appellant that he has no ground for reversal unless his petition has alleged some sufficient excuse for his delay in bringing the action, all other questions having been settled by the former decision. As to this matter, the petition shows that before and down to the seventh day of May, 1867, the plaintiff was the owner of the land in controversy. On that day it was sold under an execution against the plaintiff in favor of H. H. Brockman *et al.*, and was purchased by the ancestor of the appellees. Facts are alleged in the petition tending to show that this sale was voidable at the suit of the plaintiff. This suit was commenced in 1881, more than 10 years after the adoption of our state constitution. As reasons why it was not begun earlier, the plaintiff stated that, at the time the judgment under which the execution sale took place was rendered, he resided in Louisiana, and that he did not know that the judgment had been rendered against him, nor that the land had been levied on and sold to Haskins till some time in the year 1887. It seems that Walet had, in 1857, brought suit against Brockman & Ruckman for damages for cutting timber off of this land; but that two years afterwards his attorney abandoned the suit, and he employed another firm of lawyers to take charge of it; that this firm, having also abandoned the cause and removed to California in 1866, as the plaintiff learned a long time afterwards, it was dismissed for want of prosecution, and the execution under which the land was sold was for the costs adjudged against the plaintiff upon the dismissal of the suit. The plaintiff alleged that he had diligently inquired and corresponded with the clerk and sheriff of Karnes county, where the land lay, and other persons, concerning the result of said suit, from the end of the war down to 1877, without avail. He came to Texas in February of that year, and took possession of the land, and held it till ejected by the appellees, in 1881. He had paid taxes on the land all the time through his agents, and had received no intimation that any other person claimed it. When the appellant came to Texas, in 1877, he soon ascertained from the records of Karnes county all about the sale of his land; but was told by an attorney, whom he proposed to employ, to have the sheriff's deed canceled, that he could do nothing towards this without the original title papers. The plaintiff then details with great particularity his search for his deeds among the papers of the attorneys, who had been previously employed by him in refer-

ence to the land, which shows considerable diligence in attempting to find them. After a search of several years they were found in the possession of the widow of one of these attorneys, in 1881, and this suit was immediately commenced.

The above are substantially the excuses offered by Walet for not bringing this suit within proper time, and we think that the bare statement of them is enough to show that they are insufficient. While it is shown that the attorneys last employed to represent him in his suit against Brockman *et al.* abandoned his cause without his knowledge, it appears that he had agents who paid the taxes on this land, and who must have known the condition of the title. It further appears, too, that the entire proceedings under which the appellees claim title were on record in Karnes county, and open to inspection. The plaintiff was chargeable with notice of what occurred in court in reference to a suit which he himself had instituted and prosecuted for years. His absence from the state did not relieve him from the necessity of following up his case. If he trusted it to attorneys who abandoned the suit, it was his misfortune, and the appellees should not suffer for this misplaced confidence on his part. The very fact that his frequent letters, making inquiry about the suit, met with no answer, was a circumstance tending to make him suspect that all was not right in reference to the litigation. It is not shown that he wrote to the parties who were paying taxes for him, but it is shown that, notwithstanding he received no answers from his attorneys and the clerks and other parties to whom he did write, he rested quietly for the space of many years, content that the case should take care of itself, and aware of the almost certainty that, under the circumstances, it would be dismissed. When he did, after the lapse of 10 years, come to Texas to look after this land, his only diligence was in looking up his title deeds, for whose possession by him there was no special necessity. He could have brought this suit as well without as with them. He could doubtless have proved their contents by other evidence, at least it is not shown that he could not; but, if he could not have done so, there was no necessity for him to offer in the case a single title paper. The deed which he seeks to cancel was one conveying his own title to Haskins. The latter claimed under him, and there was no necessity for his establishing his own title in this proceeding. Yet the appellant spent almost four years in a search for papers which could not profit his case in the least. Nothing is alleged throughout the entire petition tending to show that the appellees or their ancestor threw any obstacle in the way of the plaintiff's commencing suit, or did anything towards concealing their claim, or the evidence that would overthrow it. "Equity always refuses relief to stale demands. When a party has slept upon his rights for a great length of time, nothing can call forth this court into activity but conscience, good faith, and reasonable diligence; laches and neglect are always discountenanced." *Smith v. Clay*, 3 Brown, Ch. 640.

The reasons for this salutary rule are well illustrated in the present case. The grounds upon which Walet sought to set aside the deed to Haskins were inadequacy of price, accompanied by unfairness in making the sale. Any circumstances tending to show that the land sold for a reasonable price, or that the sale was fairly made, would usually rest only within the knowledge of witnesses who might die or remove beyond the jurisdiction of the court, and the purchaser be deprived of their testimony should the delay in bringing the suit be unreasonable. It certainly was against equity and good conscience to allow him, when he was charged with notice of the deed that clouded his title, and was apparently in possession of all the evidence he could ever obtain to set aside the deed, and the courts of the country were open to him, to wait till sufficient time had expired to bar his suit, and the evidence of his adversary had been probably lost by the lapse of years, and then institute a suit to clear his title of this adverse claim. The fact that he took pos-

session of the land in 1877 does not affect the case. A suit to remove clouds may be brought when the plaintiff is in possession as well as when he is not. The fact that he is in possession does not, in our state, give him any better standing in court than if he had been ousted by the opposite party. *Thomson v. Locke*, 1 S. W. Rep. 112. The equitable defense of lapse of time affects him as much in the one case as in the other, in a suit of this character. His possession gives notice to the opposing claimant that he claims the land; but not that he will assert the claim by a suit to cancel an interfering deed. It is evidence rather of an intention to act on the defensive in a suit at law than to proceed as a complainant in a court of equity. Time continued to run in favor of the appellees as well after Walet's possession as before, so far as the suit to cancel the deed was concerned; and, more than 11 years having elapsed from the acceptance of the constitution to the commencement of the suit, the action was barred, and the court correctly sustained the demurrer.

The judgment is affirmed.

BOMAR v. PARKER and others.

(*Supreme Court of Texas. June 7, 1887.*)

1. JUDGMENT—ON DEMURRER—CONCLUSIVENESS.

The ruling in *Hughes v. Lane*, 25 Tex. 356, that a judgment upon demurrer is not conclusive, was not necessary to the decision of that case, and cannot be maintained either upon principle or authority.

2. SAME—GROUNDS OF DECISION—SUBSTANCE OR FORM—PRESUMPTION.

Where a petition has been twice held bad, and two trial amendments have been filed, it must be presumed, upon the plaintiff's filing a third amended petition, that his counsel made good all former deficiencies pointed out by the court; and, where that petition has been dismissed on demurrer, it is reasonable to conclude that the judge did not dismiss it on account of the generality of the allegations, or other matter of form, but because he was of opinion that the facts stated did not show a meritorious cause of action. Such a dismissal, not set aside, is therefore *res adjudicata*.

3. SAME—ORIGINAL PROCEEDING FOR NEW TRIAL.

A party who institutes an original action for a new trial, on equitable grounds, occupies no better position than one who makes his motion during the term at which the judgment is rendered, and he should be held to the diligence of prosecuting his action to a final determination. If a demurrer to his petition is sustained, and he fails to either amend or appeal, he is debarred of a second action.

4. EQUITY PLEADING—AMENDMENT AFTER DISMISSAL.

When a complainant has declined to amend upon a demurrer to his bill being sustained, and the bill has then been dismissed, the suit is at an end, and no leave to amend can be granted.

5. EQUITY PRACTICE—DISMISSAL WITHOUT PREJUDICE—MOTION.

When a demurrer to the bill has been sustained, and the court is about to dismiss the suit because the complainant declines to amend, a motion for a dismissal without prejudice is then in order; but such a motion comes too late after the decree of absolute dismissal has been entered.

6. JUDGMENT—FORMER DECISION IN SAME CASE.

The supreme court of Texas is not absolutely bound by its former adjudication, though rendered upon a previous appeal in the same case; but it is only in exceptional cases that a former ruling will be departed from upon the same question when presented a second time in the same case.

Appeal from district court, Grayson county.

Suit by J. L. Spencer against Bomar, appellant, and Parker and others, appellees, to set aside an agreed judgment in the case of *Lary et al. v. Blunkley et al.*, to which Bomar and Spencer were parties defendant. That was an action of trespass to try title, begun November 11, 1875, by George Lary and others, the appellants in *Parker v. Spencer*, 61 Tex. 155, and appellees here, except Joseph Bledsoe, H. O. Head, W. W. Taylor, R. L. Parker, and H. F. O'Neal. The land in controversy was one-third of a league, located and patented under certificate No. 515, issued to the heirs of Sherrod Dunman for one league and labor. The claim of the plaintiffs was that they were entitled,

as descendants of Amy Dunman, the wife of Sherrod by a former marriage. Spencer and Bomar claimed each 508 acres of the tract. An agreed judgment was rendered May 23, 1878. The remaining facts appear in the following opinions of WATTS, J., commissioner of appeals, and WILLIE, C. J., as reported in 61 Tex. 155 *et seq.*:

"WATTS, J., C. A. After the consent decree was entered in the case of *George Lary et al. v. C. C. Binckley et al.*, the appellee Bomar brought suit in the district court of Grayson county against all the other parties to that decree, in which he sought to have the same vacated, and the cause tried upon its merits. The grounds upon which he sought the relief were these: That his attorneys were not authorized to make the compromise, and consent to the decree; that certain testimony taken by deposition by plaintiffs in that case was false, in this: that it was therein shown that Riley Dunman, the son, died after the death of his father, Sherrod Dunman; that R. L. Parker, who took the depositions, was interested in the result of the suit; and that the plaintiffs and their attorneys knew at the time, and before the entry of the decree, that the evidence was false, and that Parker was interested, and concealed these facts from his attorneys, who, not knowing of the falsity of the evidence or Parker's interest in the subject-matter of the controversy, were thereby deceived, and, by the plaintiffs therein urging a trial, his attorneys were induced to make the compromise, and consent to the decree; that in fact Riley Dunman died before his father, Sherrod Dunman, which fact he could establish by evidence discovered since said decree was rendered; also that Parker, who took and superintended the taking of said depositions, was interested with the plaintiffs in the result of that suit, which he nor his attorneys knew, or could have known, by any reasonable diligence, until some time after the decree was rendered; and that there was a mistake in the decree as to the description of the land adjudged to Spencer, his vendee.

"On September 22, 1879, general and special exceptions were sustained to Bomar's original and amended petitions, and judgment was rendered dismissing his case, dissolving an injunction theretofore granted in his behalf, and judgment for costs of the suit. To that judgment Bomar excepted, and gave notice of appeal, but no appeal was perfected. In his cross-bill in this case he sought to have the consent decree vacated, and the cause tried on its merits upon the same grounds that he asserted in his suit. To this cross-bill he appended as exhibits all the pleadings and judgment in the case brought by him, and also therein stated the history and result of that case. Appellants excepted specially to the cross-bill of Bomar, on the ground that it appeared from the same that, as to him, the matters therein set up were *res adjudicata*. This exception was overruled, and exceptions saved to the ruling.

"In accordance with the previous decisions in this state, the judgment against Bomar, dismissing his petition, etc., must be considered as a final judgment, from which an appeal could have been taken. *Hanks v. Thompson*, 5 Tex. 6; *West v. Bagby*, 12 Tex. 34; *Bradshaw v. Davis*, Id. 344; *Ha-good v. Grimes*, 24 Tex. 16.

"A judgment on demurrer may be as conclusive as a former adjudication as would a judgment on the facts; but, to have that effect, it must clearly appear that the demurrer went to the merits of the action or defense; otherwise it would be presumed that the objection was to the form, and not to the merits. Wells, Res. Adj. § 446. Here there were general and special exceptions taken, and all sustained, to Bomar's petition and amendments; and, upon further amendment, curing in part the objection pointed out by the special exceptions, the general and special exceptions were again renewed, and were all sustained. An examination of the pleadings in that case very clearly and distinctly shows that the court, in passing upon the demurrers, considered them as going to the merits of the case, and by the ruling held

that there was no cause of action stated in the petition and amendments. Now, as to the correctness of that ruling, we have nothing to say; for that judgment is final and conclusive, as between the parties thereto, until it is reversed, vacated, or set aside. This clearly appears from Bomar's cross-bill and attached exhibits, and the court below should have sustained the special exceptions taken to the same. As to the appellee Bomar this disposes of the case, but as to appellee Spencer other questions are presented for determination. In the consideration of this branch of the case very many of the objections urged will be pretermitted, as immaterial errors in no way affecting the result.

"In response to special issues, the jury found that Spencer was not represented by any authorized attorney in the suit wherein the consent decree was rendered, and that he had not been served with process, and that the party who had accepted service for him did so without authority, and the attorneys who appeared for him were not authorized by him to make such appearance, or to represent him in the suit. There is sufficient evidence in the record to sustain that finding, and to the admissibility of which no objections were made. As he had not been made a party to the suit by any of the modes known to the law, he would not be bound by the judgment. But he had the option either to have it vacated by direct proceedings, or else to treat it as void in any collateral proceeding where rights might be asserted against him by reason of the same.

"It clearly appears that, after the death of Sherrod Dunman, there was an agreement between Mrs. Amy Dunman and his sister, Mrs. McFarland, by which the certificate, though not issued, was partitioned between them, and by which the latter was to have one-third of the certificate. This is also affirmed by the special finding of the jury. It matters not whether the agreement was verbal or in writing, for, as appears from the evidence and finding of the jury, the parties acted in pursuance of the same. Mrs. McFarland, with the consent of her husband, sold her one-third interest in the certificate to Duncan, and, as shown by the evidence and affirmed by the verdict, Mrs. Amy Dunman knew of that sale, and acquiesced in the sale; and it is not shown that she ever thereafter asserted any claim whatever to that interest in the certificate. The evidence sustains the findings of the jury to the effect that Duncan sold that interest in the certificate to Pulliam, and Pulliam to Larkin, and that the latter located the same upon the land in controversy, and procured the issuance of the patent therefor to the heirs of Sherrod Dunman.

"It also appears from the evidence, as affirmed by the jury, that Everts purchased the land from Larkin in 1852, and went into the actual possession at once under recorded deed, and in 1854 sold and conveyed the same to the Bomars. The conveyance was duly recorded, and they went into the immediate actual possession, and that possession was continued until 1864.

"It is objected that the deed from Everts to the Bomars was an escrow from 1854 to 1856, and therefore there was no connective and continuous holding under deed or deeds duly recorded. The conveyance was made and recorded, and placed with an attorney, to be delivered when the Bomars paid the balance of the purchase money, which became due in 1856. This purchase money was paid when it became due in 1856, and the deed was delivered. During the interim the Bomars were in the actual possession of the land, cultivating, using, and enjoying the same, paying the taxes, and claiming the same openly, notoriously, and adversely to appellants and all the world. Undoubtedly, when the money was paid and the deed was fully delivered, that delivery related back to the date when the Bomars purchased and went into possession.

"It is also urged that the court erred in admitting, as evidence, a certified copy of the Sherrod Dunman certificate, with the transfer by W. H. Pulliam to Larkin of one-third interest in the same, indorsed or written on the orig-

inal certificate. This certified copy was from the general land-office, and it appeared from the certificate of the commissioner that the original certificate, with the transfer written thereon, was on file in that office. The objection was to the transfer, upon the ground that the patent had not issued to the assignee, and therefore the transfer was not an archive in the land-office. Under the statutes in force prior to the act entitled 'An act to better protect the papers, records, and files in the general land-office,' approved June 2, 1873, the doctrine contended for by appellants was well established. But it is provided by the fourth section of that act that "no transfer or deed that may be a link in any chain of title to any certificate on file in the general land-office shall be withdrawn by any one; but the commissioner shall, on demand, deliver to the interested party certified copies, which shall have the same force and effect as the originals." It has been held by recent decisions that the effect of that provision was to make all transfers to certificates on file in the general land-office, and coming within its terms, archives.

"Here the transfer was nearly 40 years old at the time of the trial. If the original had been produced from the proper source, it would have been admissible as an ancient document. It appears, from the certificate of the commissioner, that the original was in the proper custody; hence, by the express terms of the statute, the certified copy had the same force and effect as would have been accorded to the original had it been produced. This certificate was located on the land in 1841, and but a short time after the transfer had been written on it; and it will be presumed that it had remained on file in the general land-office since that date, as the evidence of the right of Larkin and those claiming under him.

"Objections were urged to the admissibility of a transcript from the district court of Red River county, in a suit by Pulliam against Duncan for specific performance of a bond, to make the latter a title to one-third of the Sherrod Dunman certificate. It is claimed that the petition shows that it was filed in the county court, then called a court of quarter sessions, and that the judgment was rendered in the district court, and that there is no order of transfer shown to have been made. It appears, however, that the petition was filed in the district court, March 29, 1839, and that the decree was rendered by that court, October 6, 1840. By the act of January 26, 1839, the civil jurisdiction of the county courts was greatly reduced, and all process theretofore issued out of that court, in cases involving \$100 and upwards, was required to be returned to the district court. Hart. Dig. art. 267. Doubtless, under that legislation, the petition was filed in the district court, and no order of transfer seems to have been contemplated.

"After the parties had announced ready upon the merits, and had gone into trial, the court, over the objection of the appellants, permitted the appellees to amend their pleadings. The statute provides that pleadings may be amended before the parties announce themselves ready for trial, "and not thereafter." Rev. St. art. 1192.

"In *Whitehead v. Foley*, 28 Tex. 10, it was held that a general rule is prescribed by that statute to the effect that, after announcement, the parties are not entitled, as a matter of right, to amend their pleadings, but that it is in the power of the court to allow such amendments after that time as might become necessary to attain the ends of justice.

"Appellants claim that the court erred in admitting as evidence certain recitals in the petition filed in the cause of *Pulliam v. Duncan*, and also recitals in the bond for title, which was the basis of that suit. It seems that these recitals were admitted upon the theory that they tended to show that McFarland consented in writing to the sale of the one-third interest in the certificate to Duncan. It does not appear to us that such recitals were admissible for that purpose; but, from an examination of the record, it appears that the error was immaterial, and that no injury resulted to appellants therefrom. The

sale of a land certificate, or the right thereto, has never been required to be evidenced by a written transfer. A verbal sale is sufficient. *Randon v. Barton*, 4 Tex. 292; *Cox v. Bray*, 28 Tex. 247; *Johnson v. Newman*, 43 Tex. 640; *Stone v. Brown*, 54 Tex. 334.

"In 1838 Mrs. McFarland could sell and dispose of her interest in or right to the certificate, with the assent of her husband, and it was not necessary that such assent should be in writing; and after so great a lapse of time, and no adverse right having been asserted by him or his heirs, his assent and acquiescence will be presumed, and especially so where, as in this case, he was aware of the sale. *Harvey v. Hill*, 7 Tex. 591; *Poor v. Boyce*, 12 Tex. 448.

"It appears from the finding of the jury, in response to special issue No. 23, that Nancy McFarland and her husband, William McFarland, sold a third interest in the certificate to Duncan, in 1837 or 1838, and that Amy Dunman assented to and ratified the sale. This finding is sustained by the evidence of Janes and others, and there was no conflict of evidence upon that issue; so that the other issue propounded as to McFarland's assent to the sale to Duncan was immaterial, and any error respecting that issue could not have affected the result. The jury also found that Sherrod Dunman had no child or children living at the time of his death, but that Riley Dunman died before his father. While there is a conflict of evidence upon that point, the finding of the jury, being sustained by the evidence, is conclusive. Therefore the appellants could not successfully assert any claim or right to the land as the heirs of Riley Dunman. And as Mrs. Amy Dunman had agreed to the partition between her and Mrs. McFarland, and had assented to and acquiesced in the sale of the one-third interest in the certificate by the latter to Duncan, she thereafter had no such right to or interest in that part of the certificate as would descend to her children at the time she died. Those who had acquired that interest had the right to locate the certificate to that extent. *Farris v. Gilbert*, 50 Tex. 356. From the issuance of the certificate, March 27, 1838, until the institution of the suit of *George Lary v. C. C. Binkley*, the appellees, and those under whom they claim, have openly asserted their right to that interest in the certificate, and the land located by virtue of it; and, during that long period of 37 years, no effort was made by the appellants to repel the hostile assertion of right. If they ever had any interest in that part of the certificate, which they did not, still they have slept too long upon their rights, and would not, at this late day, be heard to assert them. *League v. Rogan*, 1 Tex. Law Rev. 226.

"Every fact necessary to the complete bar of five years' limitation appears from the finding of the jury. When Martha Lary married, her disability of minor age was removed, and that of coverture could not be tacked, so as to save the running of the statute. It also appears that there was a mistake in the consent decree. In that decree it is recited that Spencer is to have his land, but, in the description following, the error is made of dividing the land east and west, instead of north and south, and it is not contended by any one, except Taylor, but what he had the right to have that mistake corrected. As to Taylor, who claims to have been an innocent purchaser for value and without notice, the jury found that he was not a purchaser in good faith, and for a valuable consideration. This finding is not, as claimed, without support. There is evidence of notice, and, besides, Spencer's deed from Bomar, containing a correct description of the land, was on record in the county long before Taylor's purchase. Every fact necessary to the establishment of Spencer's right to the land claimed by him is affirmed by the jury in response to special issues submitted, and the errors complained about are entirely immaterial, and could in no event change the result. Our conclusion is therefore that the judgment as to appellee Bomar ought to be reversed, and that the supreme court ought to render such judgment as to him as ought to have been rendered by the court below,—that is, the appellants' exceptions be sustained

to the cross-bill of said Bomar, and that he recover nothing by reason thereof, and that he pay the cost occasioned by the same; and as to appellee Spencer that the judgment, as rendered in the court below, be in all things affirmed.

"WILLIE, C. J. Above report of commissioners of appeals examined, their opinion adopted, and the judgment affirmed as to Spencer; but in view of the fact that the appellee Bomar, upon exceptions being sustained to his cross-bill, is entitled to amend the same, if he so chooses, the cause will be reversed as to him, and remanded, in order that he may obtain leave to amend should he choose to apply for such leave; otherwise that said cross-bill be dismissed, and the said Bomar recover nothing by reason thereof. Reversed and remanded."

When the case got back to the district court, Bomar filed an amended cross-bill, which was thrown out on demurrer, and he thereupon took this appeal. *W. W. Wilkins*, for appellant.

To be a bar to this suit, the judgment relied on as an estoppel must have been rendered on the merits, which was not the case, for the merits of appellant's cause of action were neither presented in said former suit, nor decided by said judgment. The petition in the former suit showed that the land in controversy was located by virtue of a certificate issued to the heirs of Sherrod Dunman, who died before the issuance of the certificate. As a basis of appellant's title, in one respect, a partition of this certificate was alleged in the following language: "That, after the death of Sherrod Dunman, in about 1836 or 1837, there was a partition of the certificate, due from the republic of Texas to Sherrod Dunman, for one league and labor of land, between Amy Dunman and Nancy McFarland, being a sister of Sherrod Dunman and his heir at law, the said Wm. McFarland being the husband of Nancy McFarland, in which partition the said Nancy McFarland and her husband received as their interest one-third of said certificate;" which are all the allegations contained in the appellant's pleading in the former suit on the subject of the partition; and to these allegations appellees demurred specially. See statement under second proposition. The only allegations of appellant in the pleading in the former suit tending to connect appellant's title with that of Nancy McFarland were as follows: "And further shows, in this connection, that he is the *bona fide* purchaser of the above-described land, for a valuable consideration, from and under Nancy McFarland and her husband, heirs at law of Sherrod Dunman." Again: "That if his [appellant's] attorneys had known they could have proved by the witness H. S. Janes that Nancy McFarland and Wm. McFarland had transferred the certificate to A. D. Duncan, from whom plaintiff can deraign a perfect chain of transfer to said land, they would not have compromised said case." The only other allegation in appellant's said pleading in the former suit, on the subject of his title to the land in dispute, is the general allegation that he is the legal and equitable owner of the land. Again: "That plaintiff claimed and owned the land described in his amended original petition from and under the heirs at law of Sherrod Dunman."

The appellees demurred specially to the allegations respecting title to the land in appellant's pleading.

The appellant pleaded, as if in answer to the suit of appellees, the two-years statute of limitation; also the three, five, and ten years periods of limitation.

On the subject of estoppel, the appellant alleged that the other two-thirds of the Dunman certificate were located and patented in Bowie county, and that the plaintiffs in the suit in which the agreed judgment was rendered had appropriated the same to the exclusion of Nancy McFarland, and that they were therefore estopped from claiming the land located in Grayson county. He also alleged an outstanding title in Nancy McFarland, or the heirs at law of Sherrod Dunman.

The appellant, by proper averment in his first amended original answer and cross-petition in this cause, shows a valid partition of the Dunman certificate by which Nancy McFarland received one-third of same. And if, in fact, there was no partition, he shows by sufficient allegations that others, claiming from the same source, are estopped from disputing the title of Nancy McFarland and her assigns to the one-third of the said certificate, which it is alleged she claimed and held possession and disposed of. By proper allegations he shows valid transfers of said one-third of said certificate, and the land located under it, from Nancy McFarland down to himself.

He properly shows that any claim by persons deraining title from Sherrod Dunman is stale. He shows by proper averment that he, and those under whom he claimed, had acquired title to the one-third of said certificate, and the land located under it, by the two, three, five, and ten years periods of limitation.

On the questions of diligence by himself and attorneys in preparing his defense in this suit in which the agreed judgment was rendered; the fraudulent means by which the judgment was procured; the want of authority in his attorneys to agree to the judgment; the facts which prevented his being present at the trial, and the steps taken afterwards to set aside the said judgment and other matters,—the allegations are substantially the same in appellant's former suit as in this one on his part, except in this suit it is alleged that appellant was a necessary witness in the suit in which the agreed judgment was rendered, and it was not so alleged in his former suit.

Hare, Head & Hare, for appellees.

GAINES, J. This cause was before this court on a former appeal, and is reported under the title of *Parker v. Spencer*, 61 Tex. 155. The judgment then appealed from was affirmed as to appellee Spencer, but reversed as to the present appellant, upon the ground that the court erred in overruling the exceptions of his co-defendants in the court below to his cross-bill against them. The ground of the demurrer was that the cross-bill showed upon its face that there had been a former adjudication of the cause of action therein stated. The cause was remanded to allow Bomar, the present appellant, to amend. An amended cross-bill having been filed in the court, on the second trial a demurrer to this was sustained, and the bill dismissed, and from that judgment this appeal is taken. The cross-bill was in the nature of an original action, on equitable grounds, for a new trial of a certain suit of *Lary et al. v. Binckley et al.*, in the same court, in which Bomar was a party defendant, and sought to set aside a judgment rendered in that suit, and to retry the case. It set up that the present appellant, who was plaintiff in the cross-bill, had brought a previous action to set aside the judgment, and that his suit had been dismissed on demurrer, and made a transcript of the proceedings in this latter suit a part of the pleading. We do not see that appellant's amended cross-bill upon the last trial makes a better case than his original pleading, which was held insufficient upon the former appeal. The only additional averments to which our attention has been called, or which we have been able to discover in the amendment, are that appellant's attorney, who represented him in the second suit, after the demurrer had been sustained, and he had declined to amend, and the petition had been dismissed, intended to apply to the court for leave to amend and to continue, or to have the entry of dismissal made without prejudice, but was prevented by the absence of the special judge who presided on the trial of the cause. It is clear that, after he had declined to amend, and the petition had been dismissed, the suit was determined, and no leave to amend could have been granted. On the other hand, even if it had been proper for the court to have made the dismissal without prejudice, this should have been done when the demurrer was overruled; and it was negligence not to have made known his wishes to the court at that time. Be-

sides, it was not averred that any motion to reform the judgment had been filed. It was merely alleged that the attorney was on the watch for the special judge, who was to come back to sign the minutes of his proceedings, and that the latter returned at night, and performed this duty without the counsel's knowledge. This shows an utter lack of diligence, and it is apparent that these averments do not substantially amend appellant's statement of the cause of action set up in his original cross-bill.

We have, then, to pass upon the same question which was before the court upon the former appeal. This court has held that it is not absolutely bound by its former adjudication, though rendered upon a previous appeal in the same case; but it is expressly decided that only in exceptional cases will a former ruling be departed from upon the same question, when presented a second time in the same case. *State v. Wiggall*, 2 Tex. Law Rev. 138; *Frankland v. Cassaday*, 62 Tex. 418; *Burns v. Leabetter*, 56 Tex. 282. Unless very clearly erroneous, the ruling made upon the first appeal should be deemed the law of the case in all subsequent proceedings. But it is insisted in argument that the former decision in this case is erroneous upon two grounds: *First*, because it is in conflict with *Hughes v. Lane*, 25 Tex. 356, in which the court say that a judgment upon demurrer is not conclusive; and, *second*, because the record shows that the demurrers, which were general and special, may have been sustained on account of defects in the petition not affecting the merits of the cause of action. The proposition laid down in *Hughes v. Lane*, and relied on by appellant, was not necessary to the decision of that case, and cannot be maintained, either upon principle or authority. A general demurrer admits the facts alleged in the petition, and there is no good reason why a final judgment sustaining it should not be as conclusive of the same cause of action as if the plaintiff had proved these facts, and a judgment had been then rendered against him. His facts being admitted, he is not prejudiced by not being permitted to prove them. Why, then, should not the judgment be as conclusive of the litigation in the one case as in the other? A satisfactory answer has not and cannot be given to this question. We accordingly find that the doctrine announced in the former appeal in this case is sustained by the great weight of authority. Wells, Res Adj. § 446 *et seq.*; Bigelow, Estop. 33, 34; Freem. Judgm. § 267,—and cases cited by these authors; *Dixon v. Zadek*, 59 Tex. 529; *Gould v. Railroad*, 91 U. S. 533. See, also, the following more recent cases: *Felt v. Turnure*, 48 Iowa, 397; *State v. Krug*, 94 Ind. 366; *Parkes v. Clift*, 9 Lea. 524; *Phillips v. Wormley*, 58 Miss. 398; *City of Los Angeles v. Mellus*, 58 Cal. 16.

This brings us to the question, does the record show that the general demurrer was sustained? In determining this we must look, we think, to the whole record of the proceedings upon the trial. When the case was called, defendants interposed a general demurrer and special exceptions to the petition, which were sustained, and plaintiff filed a trial amendment, which was held bad upon exceptions. He thereupon filed, by leave of court, a second trial amendment, and to the petition as amended a general demurrer and special exceptions were again filed. The record then shows that "the defendants' demurrers to plaintiff's pleadings, after the filing of his second trial amendment," were again sustained, and that plaintiff declined further to amend, and that judgment was rendered for defendants. In the former opinion it is said: "An examination of the pleadings in that case very clearly and distinctly shows that the court, in passing upon the demurrers, considered them as going to the merits of the case, and by the ruling held that there was no cause of action stated in the petition and amendments." This is stating the proposition pretty strongly, but we cannot say the conclusion is incorrect. We think it a usual and proper practice for the trial judge, in sustaining exceptions to pleadings, to indicate the grounds of the insufficiency, so that the pleader may supply at least all formal defects. The curing of in-

sufficiencies in matters of form is a leading object in our liberal statute allowing amendments. The petition having been but twice held bad, and two trial amendments having been filed, we think it reasonable to conclude the counsel made good all former deficiencies pointed out by the court, and that the judge did not dismiss the petition on account of the generality of the allegations or other matter of form, but because he was of opinion that the facts stated did not show a meritorious cause of action.

It follows from what we have said that unless we depart from the rule laid down in *Frankland v. Cassaday*, *supra*, we must adhere to the former decision in this case, and the judgment must be affirmed. It seems to us, however, that there is another objection to appellant's cross-bill which is fatal to his case. It is an original action, it is true, but one to which attaches the substantial conditions of a motion for new trial. Such a suit cannot be maintained without showing that the complainant has been prevented from making his motion during the term at which the judgment sought to be set aside was rendered. Hence, if the motion be made and abandoned, it is fatal to a new suit, when brought for the same purpose. We think, therefore that a party who institutes an original action for a new trial occupies no better position than one who makes his motion during the term at which the judgment is rendered, and that he should be held to the diligence of prosecuting his action to a final determination. If a demurrer to his petition be sustained, and he fail either to amend or appeal, he should be held debarred of a second action. Since he can only maintain his suit by showing that he has been guilty of no laches on the former trial, or in making his motion to set aside the judgment, none should be tolerated after the suit for a new trial is brought. We have found no authority upon the point, and the question is of such rare occurrence it is probable that none exists; but in the following cases an analogous principle seems to have been maintained: *Smith v. Whitmore*, 1 Hem. & M. 576; *Jones v. Bennett*, 1 Brennis, Por. Cas. 411.

We find no error in the judgment, and it is affirmed.

COUNTY OF CALDWELL v. CROCKET and others.

(Supreme Court of Texas. May 24, 1887.)

1. SCHOOLS—TEACHERS—COMPENSATION.

The Texas act of April 2, 1883, recognizes the validity of claims of teachers in the public schools, which have been audited and allowed by the boards under the acts of August 7, 1876, and April 22, 1879, each entitled "An act to ascertain the amount due teachers for services rendered in public schools from September 1, 1873, to January 1, 1876, and to provide for the payment of the same," and makes it absolutely the duty of the several counties to pay them.

2. SAME—ASSIGNMENT OF CLAIM.

Recovery can be had on such claims against the county by persons to whom the teachers assigned them, as well as by the teachers themselves. The purpose of the several acts is not to provide bounties, but to secure rights growing out of services rendered, and it is a matter of indifference to the state in whose hands the claims may be.

3. SAME—ACTION—PETITION.

It is not necessary in a suit by the assignee of such claims, so audited, to define in the petition, when the claims are due from different school-districts in the county, the several districts, and to allege how much is due from each of them.

4. SAME—COUNTIES—SATISFACTION OF CLAIM—PAYMENT TO TREASURER.

The fact that the county had collected, and placed in the hands of its treasurer, a sum sufficient to pay the claims sued on, does not operate as a payment of them, or relieve the county from the obligation to raise more money to pay them, if that placed with the treasurer for that purpose was by him appropriated to some other purpose.

5. SAME—TREASURER'S SURETY.

The fact that the county treasurer, who had defaulted, turned over special school funds to one of the sureties on his general bond, is not sufficient of itself to fix lia-

bility on that surety, and to defeat a suit against the county by that surety and others not sureties, as assignees of school claims audited under the acts of 1876 and 1879.

6. SAME—CONSTITUTIONAL LAW.

These acts are not unconstitutional as being retroactive in character, and creating a demand where none existed before. The constitution of 1876 expressly provides (article 16, § 36,) that "the legislature shall, at its first session, provide for the payment or funding, as they may deem best, of the amounts found to be justly due to the teachers in the public schools by the state, for service rendered prior to the first day of July, 1873, and for the payment by the school-districts in the state of amounts justly due teachers of public schools by such district to January, 1876."

7. LIMITATION OF ACTIONS—RUNNING OF STATUTE—CLAIMS AGAINST COUNTIES.

Under Rev. St. Tex. art. 677, providing that "no county shall be sued unless the claim upon which such suit is founded, shall have first been presented to the county commissioners' court for allowance, and such court shall have neglected or refused to audit and allow the same," the statute of limitations begins to run as to such claims, duly presented, only from the date of the rejection of the claim.

8. CONSTITUTIONAL LAW—MUNICIPAL CORPORATIONS—OUTLAWED DEBT.

It is competent for the legislature of a state to require one of its municipal subdivisions, viz., a county, to pay a just debt after the lapse of such time as would bar it by limitation.

9. APPEAL—ASSIGNMENT OF ERROR—DEFINITENESS.

Where the exceptions are 15 in number, and relate to different matters, an assignment of error that "the court erred in overruling defendant's * * * special exceptions" is too general, under rules 23-27 of the Texas supreme court.

10. JURY—RIGHT TO TRIAL BY—HARMLESS ERROR.

The refusal of the trial court to grant a jury in a civil case is not a sufficient ground for reversing the judgment, if, under the evidence, none other could have been rendered.¹

11. APPEAL—BILL OF EXCEPTIONS—NECESSITY OF.

Where there are no bills of exceptions relating to the rulings of the trial court in admitting and rejecting evidence, except such as are found in the statement of facts filed after the close of the term at which the case was tried, the assignments of error will not be considered.

12. PLEADING—CONSTRUCTION—DEMURRER.

Under rule 17 of the Texas supreme court, upon general demurrer, "any reasonable intendment arising upon the pleading excepted to must be indulged in favor of its sufficiency."

Appeal from district court, Caldwell county.

This is a suit instituted by Crocket and others, appellees, against the county of Caldwell, appellant, on a large number of school claims against several school-districts of Caldwell county, Texas.

Stringfellow & McNeal and *A. M. Jackson, Jr.*, for appellant.

The first assignment of error is that the court erred in overruling defendant's general demurrer and special exceptions.

In a suit against a county, predicated upon a number of school vouchers, it is necessary that the petition, in order to show a cause of action, should state that the claims sued on were executed (issued) and delivered by the county to the parties named therein, and should identify the claims sued on either by setting them out *in hæc verba*, or by appropriate descriptive averments, and should show the amount due on the claims. A petition failing in any of these respects is bad on general demurrer.

The petition alleges "that petitioners are the legal owners and holders of the several school claims due by said county, a list of which said claims is hereto attached, marked 'Exhibit A,' and made a part of this petition." The so-called Exhibit A shows 87 of these claims. There is not an allegation in the petition that a single one of these claims was issued by Caldwell county. There is not in the petition a single averment descriptive of a single one of

¹ As to the right of trial by jury, and its waiver, see *Biggs v. Lloyd*, (Cal.) 11 Pac. Rep. 831, and note; *Lewis v. Klotz*, (La.) 1 South. Rep. 539; *Central & M. R. Co. v. Morris*, (Tex.) 3 S. W. Rep. 457; *East Tennessee, V. & G. R. Co. v. Martin*, (Tenn.) 2 S. W. Rep. 381.

these claims. The petition does not even show that a single one of these claims was issued between September 1, 1873, and January 1, 1876, though the dates are shown in the exhibit. In the fourteenth paragraph of plaintiff's petition, it is alleged "that there is now due them from said county, upon said several claims set out in Exhibit A, the aggregate sum of fifteen hundred and thirty-two 52-100 dollars," etc. In the twentieth paragraph the averment is "that said county of Caldwell is justly indebted and liable to pay to them said sum of fifteen hundred and thirty-two 52-100 dollars, with 8 per cent. interest per annum from the date of the auditing of said claims, less credits indorsed thereon, as balance due upon the several claims in the aggregate set out and mentioned in said Exhibit A." The aggregate set out in the exhibit is \$1,582.52. *Pool v. Sanford*, 52 Tex. 621; *Seligson v. Hobby*, 51 Tex. 147; *Burks v. Watson*, 48 Tex. 107; *Wood v. Evans*, 43 Tex. 175; *Hanks v. Enloe*, 33 Tex. 624; *Thompson v. Eanes*, 32 Tex. 190; *Swisher v. Hancock*, 31 Tex. 262; *Beal v. Batte*, Id. 371; *Goodlett v. Stamps*, 29 Tex. 121; *Moody v. Bengel*, 28 Tex. 547; *Parr v. Nolen*, Id. 798; *Gray v. Osborne*, 24 Tex. 157; *Sneed v. Moodie*, Id. 159; *Lipscomb v. Bryan*, 22 Tex. 609; *Malone v. Craig*, Id. 610; *Jennings v. Moss*, 4 Tex. 452; *Frazier v. Todd*, Id. 462.

While an exhibit attached to a petition may be looked to in aid of its allegations, the exhibit will not supply material allegations omitted by the petition. *Pool v. Sanford*, 52 Tex. 621, above cited; *Burks v. Watson*, 48 Tex. 107, above cited; *Thompson v. Eanes*, 32 Tex. 194, above cited; and the following additional authorities: *Parr v. Nolen*, 28 Tex. 798; Rules of Court No. 19, 47 Tex. 620.

To maintain an action against a county, under authority of the acts of August 7, 1876, April 22, 1879, and April 2, 1888, it is necessary that the plaintiff should, in his petition, show that the claims upon which he declares, were issued by the county to the teacher therein named, for services rendered by the teacher in teaching public schools in said county between September 1, 1873, and January 1, 1876.

The petition does not give the date of the issuance of a single claim sued on, nor does it show that they were issued between September 1, 1873, and January 1, 1876. It does not show that they were issued to the persons therein named for services rendered by them as teachers in the public schools of said county between September 1, 1873, and January 1, 1876. The exhibit attached to the petition (if it can be looked to at all, which we deny) does show the dates of the issuance of the claims, but it does not show that they were issued for services rendered in teaching public schools in Caldwell county between September 1, 1873, and January 1, 1876. Act August 7, 1876; Act April 22, 1879; Act April 2, 1888.

This assignment of error also complains of the action of the court in overruling the special exceptions of the defendant to plaintiff's petition. Among them is the tenth. It is not alleged that the county of Caldwell was never divided into school-districts, and it does not appear from said petition by what district, if any, said claims are due.

The allegations of the petition show the demands to be against the several school-districts of Caldwell county. The allegations of the petition do show that the county had been divided into districts, and under the law each claim is a demand against the district by which it was issued, and not against the county at large. *Campbell v. Polk Co.*, 49 Mo. 214; *Kingsberry v. Pettis Co.*, 48 Mo. 207, 208.

Nix, Storey & Storey, for appellees.

STAYTON, J. There is no express averment in the petition that the claims sued on were for the services of teachers between September 1, 1873, and January 1, 1876, but the reasonable intendments, from the facts alleged, are

that such was the character of the claims made the basis of the action. There was no special demurrer reaching this question, and in its absence, upon general demurrer, "any reasonable intendment arising upon the pleading excepted to must be indulged in favor of its sufficiency." Rule 17. The petition alleges that the claims sued on were approved by the auditorial board under the act of August 7, 1876, whose action was opposed by the county commissioners' court.

The act of April 2, 1883, provides "that the county commissioners' courts of the several counties in this state are authorized and required, in cases where any part of claims audited as valid, under an act of the legislature approved August 7, 1876, * * * or under the act approved April 2, 1879, * * * remains unpaid, to cause to be issued, in favor of the holder of such claim, a warrant upon the county treasurer, against the school-district owing such claim, for the amount due upon each claim." Gen. Laws 1883, p. 41. A subsequent section of this act provides how money shall be raised to meet such claims in case there be not enough in the treasury of a county to pay them. This act recognizes the validity of claims audited and allowed by the boards under the former laws, and makes it absolutely the duty of the several counties to pay them.

Had the petition alleged nothing more than that the plaintiffs were the owners and holders of the several claims made exhibit to the petition, and that these had been audited by the former boards, and that they were unpaid, the petition would have stated a good cause of action, alleging, as it did, that the county commissioners' court had refused to pay them, or provide for their payment. The petition alleged much more than this. The act of April 2, 1883, did not contemplate that the claims should be again audited, but did contemplate that the audit already made should be deemed sufficient evidence of the validity of the claims. However, it was not necessary for the petition to allege all the facts which it might have been necessary to allege had it been necessary for the plaintiffs to exhibit their right, had the claims not already been audited.

The first assignment of error is that "the court erred in overruling defendant's general demurrer and special exceptions." There were fifteen special exceptions, relating to different matters, and, under well-established rules, the assignment is too general to require further consideration. Rules 23-27. The matters, under this assignment, pointed out in the brief of counsel, have no merit. The sums claimed by the plaintiffs may be, and doubtless are, due from different school-districts in the county, but it was not necessary that the petition should define these several districts, and allege how much was due from each one of them. These are matters which it must be presumed that the records of the county show; and the act of April 2, 1883, points out how the money shall be raised if it becomes necessary to levy a tax for that purpose.

It is urged that the claims were barred by the statute of limitations. The claims were recognized as valid claims by the county commissioners' court, through its order approving the report of the auditorial board, and directing the payment of them, and so continued until that court rejected the claims, but a short time before this action was brought, and no action could legally have been brought on them until they were thus disallowed. Rev. St. art. 677. If this, however, had been otherwise, we see no reason to doubt the power of the legislature, over one of the municipal subdivisions of the state, to require the payment of any just debt after the lapse of such time as would bar it by limitation. Dill. Mun. Corp. 57-76. Such would have been the effect of the act of April 2, 1883, had the claims been barred. The court held that the county was estopped from denying the validity of the claims. Whether this was the effect of the order of the county commissioners' court approving the report of the auditorial board, and directing the payment of the claims, is unimpor-

tant, for the act of April 2, 1883, established the validity of all claims which had been approved by the board, and made it unnecessary for the plaintiffs to show more than that the claims had been approved by the boards created under the acts referred to in that act.

The defendant's pleading, on the matter now under consideration, consisted of mere legal conclusions, and stated no facts tending to show that the claims were invalid; and the demurrer to so much of the answer would have been properly sustained on this ground had it not been true that the act of April 2, 1883, in effect, declared valid all such claims as had been approved by the auditorial boards. If Caldwell county had collected and placed in the hands of its treasurer a sum sufficient to pay the claims sued on, this did not operate a payment of them, or relieve the county from the obligation to raise more money to pay them if that placed in the hands of the treasurer for that purpose was by him appropriated to some other purpose; and for this reason the court did not err in sustaining a demurrer to the eighth paragraph of the defendant's answer.

The ninth paragraph of the defendant's answer¹ did not state such facts as would make the plaintiffs responsible for any funds which the county treasurer may have placed in the bank of Harbert, Blanks & Co. The presumption is that the county was secured by the bonds required of the county treasurer; and if it desired to hold the bank, in which he may have made deposits, responsible for moneys deposited, it was necessary that facts should have been stated which would fix such responsibility. If the treasurer, in settlement with one of the sureties on his general bond to the county, had turned over to him school funds, this of itself would not be sufficient to fix liability on that person, and much less would it be so to fix liability on the plaintiffs, one only of whom was such surety.

There are many assignments based on the rulings of the court below in admitting and rejecting evidence. There are no bills of exception relating to these rulings, other than such as we find in the statement of facts filed after the close of the term at which this cause was tried. These cannot be considered. Moreover, the rulings of the court in so far cannot be reviewed.

We are of the opinion that, under the facts stated in the bill of exceptions, the appellant was entitled to have a trial by jury; but the refusal of the court to grant this is not sufficient reason for reversing the judgment if, under the evidence, none other could have been rendered. The statement of facts is not made up, as is usual, of the substance of the evidence of witnesses, and of documentary evidence offered, but consists of admissions that given facts were "proved." The facts thus admitted to have been proved, were such as

¹The ninth and tenth answers are in substance as follows: "That in 1874-75-76, Harbert, Blanks & Co. (plaintiffs herein) were owners of a bank of discount and deposit in Caldwell county, Texas; that one or more of the members of said firm were sureties on the general official bond of the treasurer of said county, and became such bondsmen with the express understanding that all moneys in the hands of said treasurer should be placed and kept on deposit in said bank; that all the moneys were so deposited, including this special school fund, as well as the private funds of the treasurer; that the bank received the money in *solida* and paid it out indiscriminately on drafts, etc.; that afterwards—the date not known—J. F. Gallagher, county treasurer, on whose general official bond one or more of the plaintiffs were sureties, and while this special school fund was on deposit in said bank, and when there were no general funds belonging to the county in the treasury, was found to be a defaulter to the amount of about \$10,000; that the sureties on his general bond, the plaintiff Story being one of them, compromised with the county in respect to its *general* fund, and funds covered by the *general* bond, and then took into their possession, and appropriated to their own use all the moneys of said Gallagher, including the school funds in his hands as a special deposit for the benefit of teachers as aforesaid,—all of which was done with the knowledge and consent of the plaintiffs; and that they have never accounted for this school fund, either to Caldwell county, its commissioners' court, or to the teachers interested in this fund. Defendant then, in said answer, called for an itemized account of said money, and prayed that, unless an account and statement be made, plaintiffs be not allowed to recover."

to require a judgment for the plaintiffs. On them no other judgment than that entered could have been given. The admission of facts proved ought to be given the same weight as though, upon special issues, these facts had been found by a jury.

Though there was error in denying a jury, it did not operate to the injury of the defendant.

Whether the court erred in the fifth conclusion of fact is unimportant; for if the county of Caldwell, after the claims sued upon were audited, did levy and collect a sufficient tax to pay them, this did not operate as a payment.

The first and second conclusions of fact found by the court seem to be sustained by the facts admitted to have been proved.

It is urged that the act of August 7, 1876, was for the benefit of teachers only, and that persons to whom teachers had transferred their claims were not entitled to the benefit of its provisions, or to the benefits of the subsequent laws to which we have referred, and that the audit of the claims in favor of the appellants was unauthorized. This is too narrow a view of the question; and were there not that, in any of these laws, which shows that they were intended for the benefit of any holders of claims originally due to teachers for services between September 1, 1873, and January 1, 1876, we would be slow to come to the conclusion that the legislature contemplated giving relief only to such teachers as had been able to hold their claims for several years, and to deny it to persons who, by their purchase, had enabled teachers to realize on claims which the counties had failed to provide for as they should have done. The purpose of the statutes was not to provide bounties, but to secure rights growing out of services rendered, and it was a matter of indifference to the state in whose hands the claims might be. The statutes; however, are not silent upon this subject. The act of April 2, 1883, declares that the county commissioners' court shall cause "to be issued, in *favor of the holder of such claims*, a warrant on the county treasurer." The second section of that act, in relation to claims that had not been audited by the former boards, provided that "*the holder of such claim may present the same to the commissioners' court of such county, who shall audit the same, and issue a warrant therefor, as provided in section 1 of this act.*"

It is urged that the acts of August 7, 1876, April 22, 1879, and April 2, 1883, are unconstitutional, in that they are retroactive in character, and create demands where none before existed. That the constitution commanded the legislature to pass these laws, is a sufficient answer to this claim. Const. art. 16, § 36. What the constitution commands, cannot be unconstitutional. These laws, however, did not create demands where none before existed. They simply provided a means by which the validity of claims could be determined, and at the same time provided the manner in which money to pay them should be raised. As before said, there can be no constitutional objection to the power of the legislature to require a municipal subdivision of the state, such as a county, to provide for and pay any just claim against it, after the lapse of such time as would ordinarily bar the claim. That in favor of and against counties limitation will run, in the absence of some statute to the contrary, does not affect the question. The power of the state to recognize and pay a claim against itself after the lapse of any period of time cannot be questioned on any constitutional ground; and the power of the legislature over counties in reference to such matters as only affect them as municipal subdivisions of the state through which local affairs are conducted, is just as broad. As we have before said, however, the claims made the basis of this action were not barred by any time elapsing after the adoption of the present constitution of this state, which required that such claims should be paid.

There is no error in the judgment, and it will be affirmed.

LEACH v. WILSON Co.

(Supreme Court of Texas. May 27, 1887.)

1. COUNTIES—ACTION ON WARRANT—INSTRUCTION.

The plaintiff sued a county on a warrant issued in pursuance of an order of the county commissioners reciting that it was in payment of a balance due certain contractors for building a court-house. The warrant was indorsed in blank by one of the contractors, but he testified that he had no recollection whatever of the warrant, and that his firm had been paid for the court-house from other sources, by the conveyance of land from a judgment debtor of the county. There was other evidence strongly suggestive of fraud in the issuance of the warrant. The plaintiff's theory was that there was a balance coming to the judgment debtor of the county on the conveyance of his land to the contractor, and that the warrant was issued in settlement of that balance. *Held*, that an instruction to the jury to the effect that, if the contractors had been paid for the court-house outside of the warrant, they should find for the defendant, leaving out of view the theory of plaintiff, was erroneous.

2. LIMITATION OF ACTIONS—RUNNING OF STATUTE—ORDER OF COURT.

A county commissioner's court passed an order that all warrants not registered under a certain act of the legislature should not be paid. *Held*, in an action brought more than four years after such order on a warrant issued before the order, that, in the absence of any knowledge on the part of the plaintiff from any source of the order, the statute of limitations was not set in operation against him.

Appeal from district court, Wilson county.

Lawhon & Browne, for appellant. *Burges, Dibrell & Polly*, for appellee.

GAINES, J. This is an action brought by appellant to recover of Wilson county the sum of \$730, evidenced by a warrant drawn upon its county treasurer in favor of Maverick & Kroeger, dated June 1, 1872, and indorsed by them in blank. The warrant was issued in obedience to an order of the commissioners' court of the county made on the twenty-eighth day of May, 1872, which order recites that the warrant is for a balance due Maverick & Kroeger on a contract for building a court-house. The main defense set up in the court below was that Maverick & Kroeger had been paid the full amount due them for constructing the building, and that, therefore, the warrant was without consideration and void. This defense presented the vital issue upon the trial, and upon the truth or falsity of the theory set up in its support the determination of the case rightfully depended.

Kroeger, of the firm of Maverick & Kroeger, testified, in substance, that he had no recollection of the warrant in controversy, and that, when he first heard of it, he would have sworn that he had never seen it; but that the indorsement on it was in his handwriting. He further testified that Maverick & Kroeger were paid in full the amount due on their contract; that the last installment was paid by a conveyance to them, by Salvador Flores, of a tract of land valued at \$1,500, and two warrants on the treasury, one for \$80 and the other for \$60; and that, as he understood at the time, the county had a judgment against Flores, who was to pay it by the conveyance of the land. He also swore he never owned the warrant, and never traded it. A witness who was a member of the commissioners' court at the time of the transaction testified, in effect, that he knew of no judgment against Flores, but did know of a judgment against his two brothers, which was paid in some way, but was afterwards refunded in county scrip. He also stated that, at the time the order was passed for issuing the warrant in question, Longworth, who it seems was a member of the court, stated that the debt had been paid, but that the warrant was to be issued as a voucher for the county treasurer. The witness also said "that Longworth was running the court pretty much in his own way." Appellant testified that he bought the warrant of Longworth, and paid him therefor \$460. Kroeger testified very positively to his handwriting on the back of the warrant, and that he would not have been a party to any transaction to defraud the county.

These facts tend very strongly to show that the warrant was without consideration and fraudulent. Yet they do not prove beyond controversy that it may not have issued in consummation of a legitimate transaction. It may have been that it was indorsed to Flores in payment of a balance due on the land after extinguishing the judgment owed by him or his brothers; and that Kroeger, having received the land in payment of his firm's claim, indorsed the warrant to him, and forgot that part of the transaction. Under this state of case, appellant was entitled to have his theory of the transaction distinctly presented in the charge to the jury. But the court, at the request of appellee's counsel, instructed the jury, in effect, that if Maverick & Kroeger were paid for the work on the court-house to find in favor of defendant. By this charge the jury were warranted in returning a verdict for appellee, although they may have found that the draft was issued to some third party in consideration of an advance by him of the means to pay Maverick & Kroeger. This charge is assigned as error, and we think the assignment well taken. However strong the evidence in support of the theory that the draft was fraudulently issued, the appellant was entitled to have the jury distinctly instructed that he was entitled to a verdict if the draft was issued to be used in paying Flores for the land conveyed to the contractors, although they may have been fully paid in the transaction. It is probable that the learned judge in the court below only meant to charge that if the court-house debt had been discharged when the draft was issued, and if, in the transaction, no other obligation had been assumed by the county for the payment of which the draft was drawn, then to find for the county. But the charge is clearly capable of the construction which we have stated above, and was therefore calculated to mislead.

The charge of the court with reference to the statute of limitations is also assigned as error. The claim sued on was not registered under the act of May 1, 1874, and in 1876 the commissioners' court passed an order in effect directing the county treasurer to pay no claim which had not been registered under that law. The court charged the jury, in substance, that the statute of limitations would bar a recovery by plaintiff if such an order had been passed more than four years before the bringing of this suit. We are of opinion that, if the passage of the order had been made known to the plaintiff by any means, such order and notice would have set in operation the statute of limitations. But the record does not show that appellant had knowledge of the action of the court from any source. The court had allowed the claim, and issued the warrant, and he had only to look to the treasurer for its payment. The holder of the claim was not bound to watch the proceedings of the court, or to take notice of any further orders with reference to it. The injustice of debarring his right of action by virtue of a proceeding of which he had no notice is apparent. A trustee cannot, by an act unknown to the beneficiary, so repudiate his trust as to set the statute of limitations to running against him. The act of repudiation must be brought to the notice of the *cestui que trust*. Neither can a county, by an *ex parte* order of the commissioners' court, not brought home to the holder of its warrants, set the statute to running against them. We think, therefore, that the court erred in the charge under consideration.

For the errors in the charges of the court which have been pointed out, the judgment will be reversed, and the cause remanded.

MILLHENNY and others v. MILLER.

(Supreme Court of Texas. May 27, 1887.)

1. ASSIGNMENT FOR BENEFIT OF CREDITORS—STATUTORY ASSIGNMENT—CONSTRUCTION.

When an instrument shows an intention to make an assignment in compliance with Acts Tex. 1879, c. 53, and the amendments thereto,—relating to assignments

for the benefit of creditors, and containing the provision that such an assignment shall be construed to pass all the insolvent's real and personal estate not exempt, whether specified therein or not,—the only indication that the assignment is a partial one being that it does not state that all the insolvent's property subject to the payment of debts is included, he will be presumed to have intended to convey all such property.¹

2. SAME—REQUISITES.

A deed of assignment by an insolvent debtor need not specify the proportion of debt which must be paid before he is entitled to a release.

Appeal from Bell county.

Dupree & McCutchan and Geo. W. Tyler, for appellants. *Harris & Saunders*, for appellee.

STAYTON, J. The assignment in this case, from the provisions contained in the deed through which it was made, was intended to be in compliance with the act of March 24, 1879, and the amendments thereto; and, while it does not in terms declare that the property enumerated in it is all that the assignee owned at the time, except such as was exempt from forced sale, yet, looking to the whole instrument, we are of the opinion that it must be considered a statutory assignment. There is nothing which restricts its operation upon all the property owned by the assignor, and being intended as a statutory assignment, by operation of the statute, it passed all of the assignor's property subject to forced sale.

The statute provides "that every assignment made by an insolvent debtor, or in contemplation of insolvency, for the benefit of his creditors, shall provide, except as herein otherwise provided, for a distribution of all his real and personal estate other than that which is by law exempt from execution, among all his creditors in proportion to their respective claims, and, however made or expressed, shall have the effect aforesaid, and shall be construed to pass all such estate, whether specified therein or not."

No question is made as to the insolvency of the assignor, and that he made an assignment for the benefit of his creditors cannot be denied. The object of the statute, when such an assignment is made, is to compel a distribution of the proceeds of all the assignor's estate, real and personal, subject to the payment of debts, among his creditors under its provisions, and the express provision that such an assignment "*shall be construed to pass all such estate, whether specified therein or not,*" must be given the effect which its terms require. It was held, in *Donoho v. Fish*, 58 Tex. 167, that an assignment made by partners, which only purported to convey the partnership property, and was otherwise restrictive upon its face, could not be aided by the statute, and thus made to pass title to the real and personal property owned in separate right by each of the partners; for this would be to make a contract which the partners never intended to make. When, however, an instrument on its face shows an intention to make an assignment under the statute, if there is nothing in it save the fact that the assignor, after enumerating property conveyed, does not state that this is all of his property subject to the payment of debts, from which an inference may be drawn that he intended to make only a partial assignment, then he will be presumed to have intended to convey what the statute declares his conveyance shall be construed to pass, and thus will the law aid the imperfect instrument. The court below did not err in admitting in evidence the deed of assignment. The law fixes the proportion of debt which must be paid before the insolvent can become entitled to a release, and it is not necessary that this be stipulated in the deed of assignment.

There is no error in the judgment, and it will be affirmed.

¹See *Aulman v. Aulman*, (Iowa,) 32 N. W. Rep. 240; *Bonns v. Carter*, (Neb.) 31 N. W. Rep. 381, and note; *Seibert v. Milligan*, (Ind.) 10 N. E. Rep. 929; *Ellenberger v. Milligan*, Id. 933.

McILHENNY and others v. CRADDOCK.*(Supreme Court of Texas. May 27, 1887.)***ASSIGNMENT FOR BENEFIT OF CREDITORS—VALIDITY—STATUTORY PROVISION.**

Under the Texas act of March 24, 1879, and amendments, providing that creditors under a deed of assignment for their benefit shall not be required to give a release of their claims unless they receive a dividend of one-third the amount thereof, a deed of assignment is not rendered invalid by reason of a stipulation contained in it that the accepting creditors shall execute releases of their claims without making a dividend of one-third a condition precedent. Such condition is implied.¹

Appeal from Bell county.

This was an action to determine the right of property to goods levied on under attachment. On February 16, 1884, W. J. Wheat, formerly a member of the firm of Lockhart & Wheat, conveyed the property in controversy to W. A. Craddock in trust for the benefit of his creditors, and Craddock duly qualified and took possession of the property. Afterwards McIlhenny & Co. and Eikel & Brenstedt levied on the assigned property under attachments against the assignor and the firm of Lockhart & Wheat, claiming that the assignment was void. On the trial of this action the assignee offered, as evidence of his title, the deed of assignment, which was objected to on the ground, among others, that it contained a stipulation for a release by the accepting creditors, without providing, as a condition precedent to such release, that the creditors should receive under the assignment a dividend of 33½ per cent. of their claims. The admission of this deed of assignment is the only question raised on appeal.

Dupree & McCuchan and Geo. W. Tyler, for appellant. W. S. Holman, for appellee.

STAYTON, J. It is urged that the court erred in admitting in evidence the deed of assignment. The grounds of objection relate, not to the manner of its execution, but to the effect of the instrument itself. The instrument was made for the benefit of all the creditors of the assignor who would consent to take under it. In connection with the schedule, which is a part of it, it professes to pass all the property owned by the assignor, except such as was exempt from forced sale. It appointed and conveyed to a qualified assignee, and, by fair construction, evidenced the intention of its maker to make an assignment under the act of March 24, 1879, and the amendments thereto. This we think constituted a valid assignment under the statute; and, if the instrument was wanting in any respect in the fullness required by the statute, it was in relation to matter which the statute declares shall not invalidate an assignment. The assignee had qualified and was in possession when the appellants caused the property illegally to be seized. It is urged that the assignment is void because it stipulated for releases by such creditors as might consent to take under it, and does not make the right to such releases dependent upon the receipt by accepting creditors of one-third of the amount due them. It was not necessary that the deed of assignment should have contained such a provision, for that is regulated by the law itself. If a creditor, under such an assignment, consents to take and receives less than one-third of the amount due to him, he is under no obligation to execute a release.

There is no error in the judgment, and it will be affirmed.

¹An assignment for the benefit of creditors which exacts releases of accepting creditors is not valid, unless all the property exempt from execution is conveyed. *Cleveland v. Battle*, (Tex.) 3 S. W. Rep. 681. See, also, *Collier v. Davis*, (Ark.) 1 S. W. Rep. 684; *McReynolds v. Dedman*, Id. 552, and note; *Aylesworth v. Dean*, (Cal.) 12 Pac. Rep. 241.

TEXAS & P. RY. CO. and others v. MANGUM.

(Supreme Court of Texas. May 27, 1887.)

1. NEGLIGENCE—CONDITION OF PREMISES—WHO LIABLE.

G. leased ground from a railroad company adjoining its depot, and erected and maintained thereon an eating-house, to which the company's employes and passengers frequently resorted for refreshments. In an action against G. and the company for injuries caused by a defective platform erected by G. in front of the eating-house, and on the leased premises, held that, in the absence of evidence that the eating-house was managed or controlled by the company, the mere fact that it owned the ground upon which it was erected, and that the company's interests were subserved by having such eating-house near its depot, imposed no duty upon the company to keep in repair or well lighted the platform upon which the injury occurred, or a passage-way leading to it from the depot.

2. VENUE—TRANSITORY ACTION—IMPROPER PARTIES.

Rev. St. Tex. art. 1198, subd. 4, providing that, "when there are two or more defendants residing in different counties, suit may be brought in any county where any one of the defendants resides," means, simply, that if one who is a *proper* or *necessary* party defendant resides in the county in which suit is brought, then other defendants who reside in other counties may be joined with him. Under this provision, a defendant residing in another county is entitled, under plea in abatement, to an instruction presenting the question of the liability of the defendant residing in the county where action is brought.

Appeal from Tarrant county.

W. H. Pope and Davis, Beall & Rogers, for appellants. *Furman & Stedman* and *Stine & Stine*, for appellee.

STAYTON, J. This action was brought by the appellee to recover from the railway company, and its co-defendant, Ginocchio, on account of an injury alleged to have been received by him by reason of a defective door-step which was placed at the entrance of an eating-house owned and kept by Ginocchio. The house in which Ginocchio was keeping a hotel or restaurant was on ground leased to him by the railway company for the period of 20 years, with a view to have thereon a house erected for the accommodation of the traveling public; and the house was erected by Ginocchio under plans furnished by the company, which are not claimed to have been in any way defective. The house belonged to Ginocchio, who erected it at his own expense. The lease contained provisions which gave the company the right to purchase the house, and terminate the lease, if Ginocchio failed to keep a first-class establishment of the kind contemplated. The land leased was contiguous to the platform of the railway company, and only 38 feet distant from its track. In front of the house of Ginocchio was a small platform erected by him, which connected with the platform erected by the company. It becoming necessary to elevate the house erected by Ginocchio, this was done; and, to furnish a step from the platform erected by Ginocchio to the house, he caused a piece of timber about 10 by 12 inches thick, and extending in front of several doors, to be placed on the platform erected by himself. It is claimed that this was placed so far from the house as to leave a space between it and the house so wide that the plaintiff's foot, in leaving the house, came between the step and the house, and that thus his leg was broken. It is not averred that any part of the platform erected by the company was defective, nor that the platform erected by Ginocchio was defective otherwise than as the step may be considered a part of the platform, nor that the injury resulted from any other cause than the defective step and the want of proper lights. The petition contains many general averments of negligence on the part of the railway company, without specification of the facts which constitute such negligence further than that the railway platform was not well lighted; but the inference is sought to be drawn from the terms of the lease that it was the duty of the company to cause the leased premises to be kept in safe condition.

The plaintiff had come to the company's depot, in the night, to take passage on the expected train, and, while waiting, entered the restaurant. It is further alleged that it was necessary for persons coming to take the train to use the platform erected by Ginocchio as well as that erected by the company, but there is no evidence that this was so.

It is alleged that, after the lease was made, Ginocchio, in accordance with specifications furnished by the company, built a good and substantial house, in which he kept a first-class hotel and restaurant, which was intended by the company, and was used by Ginocchio, "as an accommodation and convenience to the traveling public, and especially to the passengers of said company who were soon to take passage on, or had just departed from, the trains of said company at said city of Fort Worth; that the traveling public, and particularly the passengers of said company, commonly and frequently resorted to said restaurant, eating-house, and hotel at and before and subsequent to said December 5, 1888, which fact was well known to said Ginocchio and to said company, its agents and servants; that the object and design of said railway company in leasing said land to said Ginocchio, to have said building erected thereon as aforesaid, was to make the use of said building for the purposes mentioned a valuable auxiliary to its business as a common carrier of freights and passengers, and the purpose of said Ginocchio was his private gain; and by the use of said building for the purposes mentioned the object of both parties has been effected." Ginocchio was alleged to be a resident of Harrison county, Texas, and the railway company to have its road and an agency in Tarrant county. Ginocchio filed a sworn plea in abatement, in which he set up the continuous residence of himself in Harrison county; and, further, that the railway company had no interest whatever in the business conducted by him on the ground which he had leased from it, but "that he leased the ground upon which the building is erected, and was erected at the time plaintiff claims to have received his injuries, in which said building said lunch-stand, eating-house, and drinking saloon was then and is now kept, from the said railroad company, for the purpose of carrying on said business for his own benefit, and not for the benefit and profit of said railway company, and that said railway company has no interest in or concern in the same, except to collect the rent for said ground as aforesaid." The plea was sufficient to raise the question whether the plaintiff sought improperly to join Ginocchio as a defendant in an action brought in a county other than that of his residence.

This is not an action founded on some crime, offense, or trespass committed by Ginocchio, which would authorize it to be brought in the county where the crime, offense, or trespass was committed, under the eighth subdivision of article 1198 of the Revised Statutes. The fourth subdivision of that article provides that, "when there are two or more defendants residing in different counties, suit may be brought in any county where any one of the defendants resides." This, however, does not mean that an inhabitant of this state may be sued in a county other than that of his residence whenever a plaintiff, without sufficient ground, may join with him as a defendant some person who may be a resident of the county in which the action is brought. It means, simply, that if one who is a proper or necessary party defendant resides in the county in which the action is brought, that then other defendants may be joined with him who reside in other counties. It is very generally held that a corporation is an inhabitant of the state under whose law it is incorporated, and that it has a residence wherever it conducts its ordinary business. *Railway Co. v. Letson*, 2 How. 497; *Conros v. Insurance Co.*, 10 How. Pr. 403; *Baldwin v. Railroad Co.*, 5 Iowa, 519; *Richardson v. Railroad Co.*, 8 Iowa, 268; *Pond v. Railroad Co.*, 17 How. Pr. 544; *Belden v. Railroad Co.*, 15 How. Pr. 18; *Glaize v. Railroad Co.*, 1 Strob. 72. If, however, the statute which provides that "the public office of a railroad corporation shall be considered the domicile of such corporation" were held

to fix the residence of such a corporation, under the laws regulating venue to which we have referred, then, as the plea does not negative the fact that the public office of the railway company was in Tarrant county, for the purposes of the plea, it would have to be presumed that this was the residence of the corporation. Conceding, for the purposes of this case, that the residence of the railway company was in Tarrant county, then, if there was no common obligation resting on it and Ginocchio to keep in proper condition, and well lighted, the entrance into the restaurant, the latter should not have been made a party defendant to an action brought in a county other than that of his residence. A charge was asked by Ginocchio which would have presented this question, but the court refused to give it, and this was error which will require a reversal of the judgment, unless the charge given by the court sufficiently presented the same question.

There was some evidence tending to show that the improvements erected by Ginocchio extended a few inches further towards the railway track than, under lease, they ought to; but it must be held that the railway company conceded that the lease covered all the ground which Ginocchio was permitted to build upon and exclusively occupy. There is also evidence tending to show that, at times, freight may have been temporarily placed on the platform erected by Ginocchio, but there is no evidence to show that the railway company controlled, or had the right to control, the place at which the injury occurred.

The only instruction bearing on the question of common liability which the court gave, was as follows: "You are further instructed that if you believe from the evidence that the defendant Ginocchio erected said house under said lease, and that, at the time of the alleged injury, the same was being used as an eating-house for the accommodation of the employes of the defendant railroad, or for persons traveling over this said road, that it then became the duty of the defendant the Texas & Pacific Railway Company to keep in safe condition all portions of their platform leading to or lying between their road and the leased premises, and to keep the same sufficiently lighted to enable persons to pass safely; and if you believe from the [evidence] that the said Ginocchio, his agents or employes, negligently or unskillfully placed said piece of timber on the platform used or controlled by the Texas & Pacific Railway Company, and that the said company permitted the said Ginocchio to so place the same on any part of the platform owned or controlled by said Texas & Pacific Railway Company, and that, by reason of said piece of timber being carelessly and unskillfully placed, the plaintiff, without any fault or carelessness on his part, was injured, then you should find for the plaintiff against both said defendants."

This charge did not correctly present the question which defendant Ginocchio, under his plea, was entitled to have passed upon; and, besides, was in some respects erroneous and misleading. It assumes, if the house of Ginocchio was used as an eating-house by the traveling public and employes of the company, that it was its duty to keep in good repair and well lighted the passage-way between its road and the leased premises, and so, notwithstanding a part of the way may have been under the exclusive control of Ginocchio under the lease. The fact that Ginocchio leased the ground from the railway company, and that the buildings erected by him on it were used as an eating-house, at which, on account of its nearness to the railway depot, travelers and its employes frequently took their meals, did not impose upon the railway company any duty to keep in repair or well lighted the passage-way to the house, any more than would such duty have been imposed had the house been erected on ground owned by Ginocchio. Those who entered the eating-house did so under the implied invitation given them by its keeper and owner, and not upon any invitation extended to them by the railway company; and in such case the tenant, and not the landlord, would be liable for any injury resulting

from defects in the rented premises. *Shear. & B. Neg. 503; Thomp. Neg. 317; Marshall v. Heard, 59 Tex. 267.* There was nothing in the contract to lease which could change this general rule. There is no evidence that any part of the platform which it was the duty of the railway to keep in repair was not in good condition, or that the injury resulted from any defect in a platform. Nor is it shown that the injury resulted from the want of any light which it was the duty of the company to keep.

The platform erected by Ginocchio on which the step alleged to have been defective was placed, was, in a restricted sense, owned, as was the land on which it was placed, by the company; but this would not render the landlord liable for injuries resulting from defects in it, or in the step placed on it by the lessee during the lease. The charge, however, informed the jury that the company would be liable if it permitted the lessee to negligently or unskillfully place the step on any part of the platform owned or controlled by it.

There is no evidence that the company controlled, or had the right to control, the place where the step was, so long as the lease continued. If the charge given by the court had correctly presented the question of joint liability, the failure to give the charge asked by the lessee would be unimportant, the jury having found such liability to exist; but this finding may have resulted from the erroneous and misleading charge given. The first part of the charge of the court, which had reference to the facts which would relieve the company from liability, was in the main correct, but it left the jury to determine what would be acts of negligence on the part of the company; and from subsequent parts of the charge, which we have considered, they would have been justified in finding that negligence on the part of the company existed where facts to justify such a conclusion did not exist. The charges asked by the railway company would have presented the law, applicable to the case made by the evidence, clearly; and while repetitions contained in the several charges asked, may have rendered it improper to give them all, some of the distinct charges asked should have been given. For the errors noticed the judgment of the district court will have to be reversed, and it becomes unnecessary to consider other assignments of error.

It is ordered that the judgment of the district court be reversed, and the cause remanded.

SOWELL and another v. JONES and another.

(Supreme Court of Texas. May 27, 1887.)

1. JUDGMENT—VALIDITY—SETTING ASIDE.

A., B., and C., claiming title separately to several tracts of land, sued jointly to recover them from defendants. On appeal, the supreme court remanded the case for misjoinder of plaintiffs. Pending the appeal, defendants compromised with A. and B., and received a deed to the tracts claimed by them. C. alone appeared when the case was again called in the trial court, dismissed the suit as to A. and B., and obtained judgment for the tract claimed by her. Afterwards A. and B. appeared, and, without notice to the defendant, obtained leave to amend their original petition, and took judgment for the tracts compromised pending appeal. In a suit to set aside this judgment, *held* that, as the original action had been dismissed as to A. and B., they were out of it for all purposes, and could only proceed by a new suit, and the service of process upon defendants.

2. SAME—LACHES.

Diligence can hardly be expected of a defendant in preventing judgment in a suit of the pendency of which he has had no legal notice.

3. SAME—DEFENSE.

In a suit to set aside a judgment obtained without notice, and for a new trial, the petition shows a meritorious defense where it alleges ownership of the land in controversy.

Appeal from Comanche county.

T. L. Hutchinson, for appellants. Lindsey & Hutchinson, for appellees.

WILLIE, C. J. The petition filed below by the appellants alleged that they were seized and possessed of a tract of land in Comanche county, consisting of 160 acres; that Moses Jones, father of the appellees, and one Dinah Pope, had, some years before, sued the appellants for this land, in conjunction with other tracts, and obtained a judgment therefor, which judgment, after the lapse of eight years, was reversed by the supreme court. Pending the appeal, the appellants compromised the suit with two of the appellees, Ada Jones and Cordey Jones, through their guardian, D. A. Sinclair, (Moses Jones having departed this life,) received from the latter a deed therefor, and paid a valuable consideration for the land. Before the appeal was decided, the appellants moved to a place 100 miles distant from Comanche county, and were living there when the mandate was returned. Relying upon the compromise, they did not appear when the case was called for trial in the district court. Dinah Pope, one of the plaintiffs in the original case, who had not compromised, dismissed her co-plaintiffs from the cause, and took judgment against the appellants for the land claimed by her. Appellants took no legal steps to set aside this judgment. At the next term of the court the appellees, Ada Jones and Cordey Jones, acting through their next friend, the other appellee, Agnes Lockhart, came into court, and, amending their petition, without any notice to appellants, took judgment against them for the land in controversy in this suit. The object of the petition was to set aside this judgment, and obtain a new trial. It seems from the allegations of the petition that in the original suit against the appellants the plaintiffs claimed each separate tracts of land, and obtained judgment therefor, and that one of the grounds of the reversal by the supreme court was this misjoinder of parties. The judgment taken by Dinah Pope, after the cause was remanded, was for the tract claimed by her in the original petition; and the judgment subsequently taken by the appellees was for the tract claimed by them, which is the land in controversy in this suit. There were allegations in the petition to the effect that the plaintiff was prevented from giving attention to the cause after it returned from the supreme court, by reason of the death or absence of his former attorneys; and that he was denied the privilege of pleading to the cause when the amendment of appellees was made, and final judgment taken by them. The court sustained a general demurrer to the petition, and dismissed it, upon the appellants declining to amend, and from this action an appeal is taken to this court.

The above statement makes it apparent that, when Dinah Pope dismissed her co-plaintiffs from the cause, she was left as sole plaintiff, and the controversy was between herself and the appellants alone. The appellees were chargeable with notice of what was done by her, and must be treated as having stood by and acquiesced in the dismissal. They were therefore as effectively out of court as if they had themselves entered a *nolle prosequi*, and there was no suit existing between them and the appellant in regard to the land now in controversy. The dismissal doubtless took place for the purpose of meeting the decision of the supreme court on the question of misjoinder, and of redeeming the contest from one between several plaintiffs and the defendants about different tracts of land, held by the former under distinct titles, to a controversy between one plaintiff and the defendants about the title to land which this plaintiff alone claimed in opposition to the defendants. This was a legitimate amendment, of which the defendants were bound to take notice, and there is no complaint of it in this court. But, to authorize the cause to proceed under such an amendment, it was necessary that it should be entirely cleared of the other plaintiffs. They could not be considered as out of the cause for the purpose of allowing a co-plaintiff to take judgment, and in it for the purpose of amending and taking judgment themselves. If out at all, they were out for all purposes, and could not, in future, recover upon the cause of action on which they originally sued, without bringing a new suit, and serv-

ing process upon the defendants. Otherwise a number of plaintiffs misjoined in a suit could, by taking separate judgments, accomplish that which they are forbidden to do in a single judgment rendered in favor of all of them; that is, by violating a provision of law, *i. e.*, taking two final judgments in the same case, cure the previous violation of another provision.

The previous dismissal and judgment taken, put an end to the suit as effectually as if Moses Jones and his heirs had never been in it at all, but it had been commenced by that plaintiff only who obtained the judgment. We think, therefore, that the appellees had no right to make the amendment by which they came again into the cause, but should have begun a new suit for the recovery of the judgment they obtained against the appellants. But it is said that the petition shows no diligence on the part of the appellants to prevent the judgment of which they complain. Diligence in preventing judgment in a suit of the pendency of which he has no legal notice can hardly be expected of a defendant; but the petition does show that the amendment was made after the cause was called for trial, and that an attorney immediately offered to plead for the appellants if time to prepare an answer should be allowed, but this privilege was denied. This was all the diligence that could have been used under the circumstances. It is said, too, that the petition does not show a meritorious defense to the suit, or that a new trial would probably result in a different judgment. It does allege that the appellants were the owners of the land in controversy. This fact, if proved, would have entitled the appellants to a judgment. It shows, further, a compromise between the appellants and the guardian of the appellees, by which the land was purchased by the latter from the former for a valuable consideration, duly paid. If this money went to the benefit of the minor plaintiffs, they could not repudiate the compromise without returning it, and this payment, under the circumstances, would form a meritorious defense to the suit. But the allegation of ownership was in itself sufficient to show such defense, independent of all question as to the compromise. We think the petition was sufficient, as against the demurrer urged to it, and the court erred in sustaining the demurrer and dismissing the suit, and for this error the judgment will be reversed, and the cause remanded.

YOE and another v. MONTGOMERY.

(Supreme Court of Texas. May 27, 1887.)

1. EXECUTION—SALE—TRUST.

It is the settled law of Texas that a creditor claiming a lien by virtue of the record of a judgment or levy of an execution against a husband having the apparent title to land cannot be protected against a resulting trust in favor of the wife, and a purchaser at the execution sale will take nothing, as against the wife's equity, if he have notice of the same before making the purchase.

2. SAME—EVIDENCE—INSTRUCTION.

In an action to recover land claimed as the separate property of a married woman against a purchaser at execution sale under judgment against her husband, the court charged, in effect, that the testimony tracing the wife's property into the purchase of the land in controversy must be clear and conclusive. *Held*, that this was as favorable to the defendants as they had a right to ask.

3. TRIAL—VERDICT—SUFFICIENCY.

In an action involving a married woman's separate title to land sold under execution against her husband, the verdict of the jury was as follows: "We, the jury, find from the evidence that the land in controversy was and remained Mrs. T. A. Cady's individual property until conveyed by her to the plaintiff. We find for plaintiff." *Held* sufficiently definite and certain.

4. APPEAL—ASSIGNMENTS OF ERROR—REVIEW.

The supreme court of Texas will not review testimony upon an assignment of error which goes no farther than to state that the verdict is not supported by sufficient evidence.

5. SAME.

In Texas an assignment of error that "the court erred in overruling appellant's eleven special exceptions to the appellee's petition" is in violation of the rules governing appeals, and will not be considered.

6. SAME—EXCEPTIONS—STATEMENT.

Exceptions incorporated in a statement of facts filed after the adjournment of the term at which the case was tried, cannot be considered on appeal.

Appeal from district court, San Saba county.

S. W. Yoe and Sidon Harris, for appellants. *McGinnis, Walters, Burleson & Towns*, for appellee.

WILLIE, C. J. The appellee, alleging himself to be the owner of certain lands in San Saba county, sought in this suit to remove from his title the cloud caused by an execution sale of said lands as the property of one H. J. Cady, and to cancel the deeds made by the sheriff to the appellants, who became purchasers of the land at said sale. The appellee claimed to have bought the lands from Cady and wife previous to said sale, and that they were at the time the separate property of Mrs. Cady. He also charged that the appellants had notice of these facts on the day of sale, and at and before they bid for the property. The reply of the appellants was to the effect that the lands were not, at the date of the judgment under which the sale was made, the property of Mrs. Cady, but subject to the debts of her husband, and that, at the time the judgment was rendered, the appellants had no notice of Mrs. Cady's claim. These are the only allegations of the pleadings necessary to be set forth. A general demurrer and several special exceptions to the petition were overruled by the court.

The first assignment of error questions the correctness of the ruling below upon the general demurrer; but neither the assignment, nor the proposition under it, points out wherein the petition showed no cause of action against the appellants. Some objections are set forth in the statement under the assignment, but they do not seem to be such as can be taken advantage of, if at all, under a general demurrer. It is not necessary, in a suit to remove clouds from title, to allege eviction, or a trespass by the defendant upon the premises. The indefinite manner in which some of the allegations are made should have been the subject of special exceptions, and every reasonable intendment must be indulged in favor of the petition upon a general demurrer.

The second assignment is: "The court erred in overruling appellants' eleven special exceptions to the appellee's petition." It has been so often held that such an assignment is in violation of the rules that it will be unnecessary for us to do more than to say that it cannot be considered; and hence none of the propositions under it claim our attention. *International & G. N. R. Co. v. Leak*, 64 Tex. 654; *Keowne v. Love*, 65 Tex. 152.

The third assignment is to the action of the court in admitting certain deeds and title papers offered by the plaintiff, but no bills of exception were saved to the ruling of the court in this respect. It is said in the statement of facts that these documents were objected to, but for what reasons does not appear. Moreover, the statement of facts was filed, by order of court, after the adjournment of the term; and, if the exceptions were properly incorporated in it, they could not be considered. *Railroad Co. v. Eddins*, 60 Tex. 656; *Caldwell Co. v. Crockett*, ante, 607, (present term.)

The assignments which challenge the correctness of the court's charge to the jury are not well taken. The charge was certainly as favorable to the appellants as could have been asked. The court reiterated the requirement that the testimony tracing the wife's property into the purchase of the lands must be clear and conclusive. This was really the turning point in the case, and the court gave the appellants all the advantages to which they were entitled under the evidence.

It is the settled law of this state that a creditor claiming a mere statutory lien by the record of a judgment, or the levy of an execution against the husband in whom the apparent title is vested, cannot be protected, by reason of this lien, against a resulting trust in favor of the wife, though he have no notice, at the time of the execution, of such a trust; and a purchaser of the property at the subsequent execution sale will take nothing, as against the wife's equity, if he have notice of the same before making the purchase. *McKamey v. Thorp*, 61 Tex. 648; *Parker v. Coop*, 60 Tex. 111. The appellants, therefore, were not protected against Mrs. Cady's equity by reason of the record of an abstract of the judgment under which they bought, and it having been clearly shown, and not disputed, but admitted, by the appellant's pleadings, that public notice of this adverse claim was given on the day of sale, before any bids for the property were offered, they must be deemed purchasers with full knowledge of the right conveyed by Mrs. Cady to the appellee. The only question, then, before the jury was as to whether the land in controversy was the separate property of Mrs. Cady or not at the time the appellee purchased from her; and the court properly so stated to the jury. As to the verbal criticisms upon the language used by the district judge in submitting his instructions, they do not demand attention. These instructions were given in the form usually observed by district judges, and we cannot, after a close examination of them, find that they gave undue prominence to the plaintiff's testimony, or assumed or proved any fact about which there was the least doubt under the evidence.

The principal and only material question in the case was as to whether the land in controversy was purchased with Mrs. Cady's separate means. The appellants have filed an able and exhaustive argument in which they have attempted to show that Mrs. Cady's money was not traced into the purchase of the lands by satisfactory proof. But under the rules of this court, and repeated decisions to that effect, we are forbidden to consider the question because it is not raised by a proper assignment of error. The assignment is: "The verdict of the jury is fatally vague, uncertain, indefinite, and unmeaning, is clearly contrary to law, and is not supported by sufficient evidence in this case to justify and sustain it." The verdict is: "We, the jury, find from the evidence that the land in controversy was and remained Mrs. T. A. Cady's individual property until conveyed by her to plaintiff. We find for plaintiff." If there is anything vague about this, we are unable to discover it. The verdict decides the very issue before the jury. There was no conflict in the evidence as to notice to the appellants before their purchase, nor anything proved to show that the conveyance to plaintiff was not *bona fide*. These matters were not properly in issue before the jury, and there was no necessity that they should make a special finding in reference to them. This court has uniformly refused to enter into the investigation of testimony upon an assignment which goes no further than to state that the verdict is not supported by sufficient evidence. The assignment should state in what respect the evidence does not support the verdict, the particulars in which it is insufficient, and not require the court to examine the whole statement of facts to see if it cannot discover some defect which the party complaining has not thought proper to call to its attention. *Randall v. Carlisle*, 59 Tex. 70; *Railway Co. v. Shafer*, 54 Tex. 641; *Railway Co. v. McNamara*, 59 Tex. 255. This disposes of the eleventh, twelfth, thirteenth, and fourteenth assignments of error.

No bill of exceptions having been taken to the action of the court in allowing plaintiff's counsel to use improper language, the fifteenth assignment cannot be considered.

As the jury did not find any attorney's fees against the appellants, they were not damaged by the admission of evidence to that matter.

There is no error in the judgment, and it is affirmed.

JOHNSON v. ROBINSON and others.

(Supreme Court of Texas. May 31, 1887.)

1. ASSIGNMENT FOR BENEFIT OF CREDITORS—WHAT IS—VALIDITY.

Where a firm, through one partner, conveyed its whole stock of merchandise in trust, first, to defray the expenses of such trust, next to pay a debt due to the trustees, and, third, to distribute the surplus *pro rata* among its other creditors, held, that such conveyance was an assignment, and not a mortgage; but that, since it did not show that the assignors were insolvent, it was not a general assignment within the scope of the Texas statutes relating to assignments for benefit of creditors, which in terms relate only to assignments by an insolvent debtor, or made in contemplation of insolvency, and was therefore not invalid for failing to comply with the statute.

2. PARTNERSHIP—POWER OF PARTNER—ASSIGNMENT OF ASSETS.

Though one partner cannot, without the authority of his copartners, make a general assignment, he can, in their absence, assign a part of the firm's assets in payment of a particular debt, and direct the distribution of the surplus among its other creditors.

3. FRAUDULENT CONVEYANCES—ASSIGNMENT—THREAT.

The fact that a creditor may have threatened to attach a firm's property in order to force an assignment, does not invalidate such assignment to him of assets to pay his claim.

4. APPEAL—ASSIGNMENT OF ERROR.

Where no assignment of error is made as to the effect of certain parol evidence produced on the validity of an instrument, the appellate court cannot consider such effect.

Appeal from Cooke county.

Roberts & Bidleman, Barrett & Daugherty, and Stuart & Bailey, for appellants. *Davis & Garnett*, for appellee.

GAINES, J. On the thirteenth day of March, 1884, E. N. Stone & Co., by E. N. Stone, a member of the firm, executed to J. M. Robinson & Co. an instrument conveying to them a stock of goods, and authorizing them to sell the property, and to apply the proceeds, first, to the payment of the expenses of the trust, and then to the discharge of a debt due by the assignors to the trustees, and to distribute the balance, if any, among their other creditors *pro rata*, if any. Certain creditors of Stone & Co. sued out attachments against their property, and caused them to be levied by appellant, who was sheriff of the county, upon the goods conveyed. Appellees brought this suit against the appellant to recover the value of the property so taken, and annexed a copy of the conveyance to their petition, and made it a part thereof. Appellant demurred to the petition on the ground that the conveyance was void upon its face, and conveyed no right to appellees to the property, as against the creditors of Stone & Co. The demurrer was overruled, and the ruling of the court excepted to, and is now assigned as error. The question of the validity of the instrument under which appellees claim is also raised by an assignment complaining of the judgment of the court, and is the only serious question in the case.

It is contended, on behalf of appellees, that the instrument is a mortgage, and not an assignment, but we think it cannot be so held. A mortgage, being merely intended as a security for debt, gives, under our system at least, merely a lien upon the property, with or without a power of sale, leaves an equity of redemption in the mortgagor, and the surplus, if any, after the payment of the debt, within the reach of creditors by due process of law. An assignment, on the other hand, conveys to the assignee the entire estate of the assignor in the property, to be disposed of by the trustee in such manner as the assignor may have lawfully directed. The mortgagor may vacate the mortgage at any time by a payment of the debt; but by an assignment the property passes beyond the control of the assignor in any event. It is true that, should a surplus remain after paying the debts, a trust would result in

favor of the assignor, and the assignee would hold it for his benefit. But this is a result not contemplated by these conveyances. Tested by this distinction, the conveyance under consideration is not a mortgage. If it had provided that, upon the payment of the debt of appellees, it should be void, or had provided that, after a sale of a sufficiency of the property to pay that debt, the balance should be returned to the debtors, the construction claimed by appellees would be correct. But the conveyance contains no condition of defeasance, and passes the property absolutely to appellees to be administered according to the purposes of the trust therein created, first, to pay the debt of appellees, and then to distribute the balance of the net proceeds among the other creditors. This is an absolute transfer of the property to be sold, and the proceeds applied to the payment of debts, and not merely a conditional transfer for the purpose of securing debts, and defeasible upon condition of their payment. It may be that, if nothing had been said as to the disposition of the balance which should remain after paying the debt due appellees, the object of the conveyance being merely to secure a prompt settlement of that obligation, the law would have implied a defeasance, and the instrument would have been treated as a mortgage. *Stiles v. Hill*, 62 Tex. 429; *Waterman v. Silberberg*, 2 S. W. Rep. 578. But the surplus is by the instrument placed at the disposal of the trustees in the event there should be no other creditors, and hence we think it must be considered an assignment.

But, treating the instrument as an assignment, the question recurs, is it void upon its face? It is clearly not in compliance with the act of March 24, 1879, in reference to assignments for the benefit of creditors, and the act of April 7, 1883, amendatory thereof. It does not convey all the property of the assignors, nor is it accompanied by the inventory provided for in the second section of the original act. These, however, do not render it void. See sections 1, 20. And it has been held by this court that the attempt to give preferences, though of no effect under the act, does not invalidate the assignment itself. *Fant v. Elsbury*, 2 S. W. Rep. 866. The amendatory law, however, requires that the assignee shall be a resident of the state, (Laws 1883, p. 46,) and the assignees in this case are shown by the face of the conveyance to be residents of the state of Kentucky. Whether or not this would avoid an assignment to which the statute applies, is a question we are not called upon to decide. The act, by its terms, relates only to assignments by an insolvent debtor, or made in contemplation of insolvency. See section 1; *Blum v. Welborne*, 58 Tex. 161. The instrument in question does not show upon its face that the assignors were either insolvent or contemplating insolvency. We must infer that they were embarrassed, and we may suspect that their assets were not sufficient to pay their debts. But there is nothing upon the face of the paper which necessarily leads to that conclusion. We are of opinion, therefore, that the assignment is one which does not come within the scope of the statute, and that its validity must be determined by the principles of the common law. *Hampton v. Morris*, 2 Metc. (Ky.) 336; *Morgenthau v. Harris*, 12 Cal. 245. It is held that a solvent debtor may make an assignment for the benefit of his creditors, (*Ogden v. Peters*, 21 N. Y. 23,) though by some courts such conveyances have been held to manifest an intent to hinder or delay creditors, and decided to be void; however that may be, as applied to an assignment of all the debtor's property, we do not think the reason applicable to the present case. Here the assignment does not purport to be of all the property of the assignors; and it is apparent that the main motive of the assignor is to secure the payment of a certain debt due to preferred creditors, and that the provision for a distribution of any surplus among the creditors generally is a mere incident of the principal object. Accordingly we find, in the case of *Morgenthau v. Harris*, *supra*, the supreme court of California hold an assignment in substance the same as the one before us, "not in contravention of their statute, which prohibits assignments by insolvent debtors for the bene-

fit of creditors," and valid at common law. See, also, *Hurst v. Jones*, 10 Lea, 8.

It is generally held that one partner cannot, without the authority or consent of his co-partner, make a general assignment. An exception is recognized when one partner has the entire management of the business, or the other is absent so as to be beyond the reach of prompt communication. In this case it appears that the partner who did not sign was absent from the state at the time of the transaction. The power of one partner, however, to mortgage the firm property, or to sell it for the payment of the partnership debts, must be conceded. He can also transfer it directly to a partnership creditor in discharge of the obligation. No reason is seen, therefore, why one, his partner being absent, and the payment of a partnership debt being pressed, may not assign a part of the firm assets to pay a particular debt, and provide, at the same time, for the distribution among the other creditors of any surplus of the assigned property which may remain after the payment of the preferred obligation. So far as the record discloses, the absent partner has acquiesced in the assignment under consideration.

In regard to the fourth assignment of error, we will say that the fact that appellees may have threatened to attach the property in order to induce the assignment does not make the assignment void. We have been cited to no authority in support of appellant's proposition upon this point, and we feel authorized to infer that none can be found.

There is no assignment of error which submits the proposition that the evidence puts a different aspect upon the instrument in controversy from that shown upon its face. We are not called upon, therefore, to consider it in the light of the parol testimony which was adduced upon the trial.

We find no error in the judgment, and it is affirmed.

TEXAS & P. RY. CO. v. RICHARDS.

(*Supreme Court of Texas. May 30, 1887.*)

CONFLICT OF LAWS—STATUTES—EXTRATERRITORIAL OPERATION.

A statute of one state, by which a right of action for personal injuries survives, will not be enforced by the courts of another state, where the common law, by which such cause of action dies with the person, is unchanged.¹

Appeal from Grayson county.

Brown & Gunter, for appellant. *G. G. Randall, W. W. Wilkins*, and *Woods & Cunningham*, for appellee.

STAYTON, J. This action was brought by Grace Richards, a minor, through her next friend, to recover damages for an injury done to her father in the state of Louisiana, from which, in that state, he died within a few hours after he received the hurt. The action is brought to recover such damages as the father of the plaintiff might have recovered had his death not resulted from the injury, and not to recover damages for injury resulting to the plaintiff from the death of her father, which, under the statutes of this and many of the other states, may be recovered by those sustaining given relations to a person whose death results from the negligent or wrongful act of another. The statute in force in the state of Louisiana at the time the father of the plaintiff was injured and died was pleaded, and was as follows: "Every act whatever of man, that causes damage to another, obliges him by whose fault it happened to repair it. The right of this action shall survive, in case of death, in favor of the minor children and widow of deceased, or either of them, and, in default of these, to the surviving father and mother, or either

¹ See *Davis v. New York & N. E. R. Co.*, (Mass.) 9 N. E. Rep. 815, and note; *Spearman v. Ward*, (Pa.) 8 Atl. Rep. 430; *Griswold v. Golding*, (Ky.) 3 S. W. Rep. 535.

of them, for the space of one year from the death. Every person is responsible for the damage he occasions, not merely by his acts, but by his negligence, his imprudence, or want of skill. We are responsible not only for the damages occasioned by our own act, but that which is caused by the act of persons for whom we are answerable, or other things we have in custody." It is alleged that this provision of the Louisiana law applies to corporations, and of this there can be no reasonable doubt. It is further alleged that the persons in whose favor the cause of action survives, under the statute, may recover such damages as the person injured might have recovered had death not ensued, and none other.

There can be no doubt of the correctness of this construction of the Louisiana statute. That statute does not give a cause of action to the person immediately injured where none existed before; and the first clause simply asserts a rule well recognized, we may say, by the laws of all civilized nations, under which the injured person would be given relief by the courts of any country having jurisdiction over the person of the offending party. The second clause of the statute, however, makes this cause of action to survive the death of the injured person, and subrogates the persons sustaining the relationships named to the right which the injured person had during his life to enforce that cause of action. This is illustrated by the decisions made before and since the second clause of the statute was added. *Hubgh v. Railroad Co.*, 6 La. Ann. 495; *Hermann v. Railroad Co.*, 11 La. Ann. 22; *Earhart v. Railroad Co.*, 17 La. Ann. 244; *Frank v. Railroad Co.*, 20 La. Ann. 26; *Van Amburg v. Railroad Co.*, 37 La. Ann. 651. The sole right the appellee has to enforce the cause of action which accrued to her father is based on the statute of Louisiana. That statute confers a right which before its passage did not exist even in that state, as may be seen by an examination of the cases to which we have referred. As that statute cannot be operative here, can the right which it gives be enforced in this state?

There are three classes of cases in which the question may arise as to whether a right given solely by the statutes of one state will be enforced in the courts of another. (1) Cases in which a right given by the statute of one state is sought to be enforced in the court of another, in which laws exist giving a like right under the same facts; and in this class of cases, while there is some conflict of decision, it seems to be generally held that courts of the latter state will recognize and enforce the right given by the statutes of another state. *Dennick v. Railroad Co.*, 103 U. S. 17; *Boyce v. Railroad Co.*, 63 Iowa, 72, 18 N. W. Rep. 673; *Leonard v. Navigation Co.*, 84 N. Y. 48. The facts of the case before us do not bring it within this rule, and it becomes necessary to consider what, if any, qualifications ought to be made to it. (2) When facts transpire in a state whose laws give no right of action upon them, and an action based on those facts is brought in another state under whose laws a right of action would exist had the facts transpired within its jurisdiction. In this class of cases it is held that no action can be maintained. Within this class fall the following cases: *Willis v. Railroad Co.*, 61 Tex. 432; *Whitford v. Railroad Co.*, 23 N. Y. 465; *Needham v. Railroad Co.*, 38 Vt. 295; *State v. Railroad Co.*, 45 Md. 41; *Le Forest v. Tolman*, 117 Mass. 109. (3) Cases in which a right of action given by the statutes of one state is sought to be enforced in a state whose laws deny the right given by the statutes of another; and in this class of cases it would seem necessarily to follow that the courts of the state in which the action is brought would be compelled to follow the law of the state in which it sits, whose laws only it has the power to enforce. This would seem to be true whether the law of such state affected the right or only the remedy.

Under the statutes of Louisiana the cause of action which the father of appellee had, survived to her for the period of one year. That she seeks to assert a right of action which existed before her father's death renders it none

the less, as to her, a right conferred by the statutes of Louisiana, and without which she could not have maintained an action even in that state. In this state the common law is in force in so far as not inconsistent with the constitution and laws of this state. Rev. St. art. 3128. Under the common law, as well as the civil law, the cause of action which the appellee now seeks to assert would not survive her father's death, and there is no statute in this state changing this rule. *Watson v. Loop*, 12 Tex. 12; *Taney v. Edwards*, 27 Tex. 224; *Gibbs v. Belcher*, 30 Tex. 81. The rule of the common law upon the question under consideration is as imperative here as though it had been expressly enacted by statute; and it denies to the appellee the right to assert and maintain the claim set up in her petition.

We know of no rule of law which would authorize a court of this state to give effect to the laws of another state conferring such right as is claimed in this case, when the laws of this state declare that the same facts, transpiring here, as are made the basis of the appellee's claim, could confer no right whatever to the relief sought. The most liberal state comity cannot, in reference to such a matter as that before us, require our state to enforce the laws of another when in conflict with its own law. The appellant questioned the right of the appellee to maintain this action by demurrer and by plea, and the demurrer was overruled, and a charge refused which would have properly submitted the defense urged by the plea. We are of opinion that this was error which requires the reversal of the judgment, and as no cause of action, which the courts of this state can enforce, can be set up by any legitimate amendment, it will be unnecessary to remand the cause.

The judgment will therefore be reversed, and the cause dismissed, the appellant to recover all costs incurred in this court and the court below. It is so ordered.

THOMSON v. HOUSTON & T. C. RY. CO.

(*Supreme Court of Texas. May 31, 1887.*)

1. PUBLIC LANDS—SURVEY AND LOCATION—PRIORITY OF CLAIMS.

In 1874, plaintiff appropriated certain tracts of land in Texas by virtue of certificates which he delivered to the deputy-surveyor for location. The deputy prepared field-notes based upon information obtained by surveys made before the certificates issued. These field-notes were approved and certified by the county surveyor, and returned, together with the certificates, to the general land-office, but were not properly recorded in the office of the county surveyor. A copy of them, with a statement for whom surveyed, and by virtue of what certificate, was retained in his office. The records of the general land-offices showed that the survey was made before the certificates were issued. Held that, under the Texas law in force in 1874, the fact that the surveys were made prior to the issuance of the certificates did not invalidate the claim, and that plaintiff's equitable title was good as against the state and one who had subsequently located the same tracts with notice of plaintiff's claim.

2. SAME—ACTION—JUDGMENT.

Case reversed and remanded on the ground that no survey was shown to have been made and returned to the general land-office by virtue of one of the certificates upon which plaintiff recovered judgment.

Appeal from Travis county.

Rector, Moore & Thomson, for appellant. *Prendergast & Hewlett*, for the Houston & T. C. Ry. Co., appellee.

STAYTON, J. This is an action of trespass to try title, brought by the appellee to recover several tracts of land situated in Wharton county, which it claims under the following facts:

(1) Between the tenth of November and the seventh of December, 1874, one Turnbull, who was appointed deputy-surveyor of Wharton county some time in the month of November of that year, who, however, did not qualify by giving bond until December 19th of that year, without actually surveying the

several tracts of land, ran such lines as enabled him to correctly make out field-notes of the several tracts of land now in controversy.

(2) At the time Turnbull did this work, the appellee owned certificates which had been located on other land which had been surveyed, and the field-notes thereof, with the certificates, were then in the general land-office; but, by reason of the fact that the lands then covered by the certificates were covered by older locations or grants, the appellee was entitled to receive certified copies of the certificates, and to locate them on other land.

(3) On the sixteenth December, 1874, certified copies of the certificates issued and were delivered to Turnbull, who, after this, returned to Wharton county, and on December 26th made out field-notes of the several tracts in controversy, and applied to them the copies of certificates which he then had, but the field-notes of the several tracts bore dates of the times at which Turnbull, by running some lines, probably acquired information by which, without actual survey, he could make out correct field-notes of the several tracts, and give the connections with older grants or surveys.

(4) The field-notes, with the certificates of the appellee applied to them, were approved and certified by the county surveyor, and these, with the copies of certificates, were returned to the general land-office on December 31, 1874, and it is not claimed that these field-notes were not correct.

(5) The county surveyor of Wharton county did not properly record the field-notes in his office at the time he approved and certified the originals that were sent to the general land-office, but he retained in his office copies of the field-notes of the several tracts, with a declaration to each for whom surveyed, and by virtue of what certificate, which were signed by Turnbull, but not by the county surveyor. These matters seem to have been entered into a book that was kept in the surveyor's office, which the evidence tends to show was furnished by Turnbull. A copy of what appeared in the book as to one tract of the land is admitted to be the same in form and completeness as appears as to all, except as to the number of the certificate and the field-notes to which applied, and the copy as to one tract found in the record is as follows:

"SURVEY No. 31.

"*The State of Texas, Wharton County.* Field-notes of a survey of 640 acres of land made for the Houston & Texas Central Railway Company, it being the quantity to which it is entitled by virtue of certificate No. 284, issued by the commissioner of the general land-office on the _____ day of _____, 18—; said survey No. 31, in _____ county, Texas, situate on the waters of _____, a tributary of the Rio Grande, about _____ miles from _____. Beginning at the N. E. corner of the Andrea Dunlap and the S. W. corner of the Wm. J. Wickam survey; thence east, 1,900 varas, to corner; thence south, 1,900 varas, to corner; thence W., 1,900 varas, to corner; thence north, 1,900 varas, to beginning.

"I, _____ deputy-surveyor, do hereby certify that the foregoing survey was made on the ground according to law, and that the limits, boundaries, and corners, with the marks, natural and artificial, are truly described in the foregoing plat and field-notes.

"GEO. W. TURNBULL, Deputy-Surveyor, _____ District."

(6) There is evidence from which an inference might be drawn that Turnbull was the agent of the appellee at the time he did the several acts before referred to.

(7) There was nothing in the field-notes filed in the general land-office to show any irregularity in the manner of making the surveys, but the dates at which the surveys were stated to have been made showed, when examined in connection with the copies of certificates filed with them, that the latter were issued after the surveys were made, and on the back of each of the files in the land-office the following indorsement was made by one of the clerks in that

office: "Illegal; copy of the certificate issued December 16, 1874; survey made prior to the issuance of the certificate."

(8) The field-notes filed in the general land-office, with the other papers in the several files, were seen and read by the appellant before he took any steps to appropriate the land, as was everything relating to the lands in the office of the surveyor of Wharton county.

(9) With such notice of the appellee's claim as the appellant thus acquired on November 7, 1881, he caused the land claimed by the appellee to be located by virtue of valid land certificates which he owned, and, under his locations, surveys were made, which, with his certificates, were returned to the general land-office within the time prescribed by law.

The cause was tried without a jury, and a judgment rendered in favor of the appellee.

It is urged that the facts shown by the plaintiff do not show title, legal or equitable, as against the state or the defendant. If the facts show that the plaintiff, within the spirit of the law, caused the land which it claims to be surveyed by virtue of valid land certificates on part of the public vacant domain, as against the state it has equitable title, and this cannot be defeated by the subsequently attempted appropriation of the same land by the defendant if he had notice of the prior appropriation by the plaintiff. That the land was vacant at the time the plaintiff attempted to appropriate it cannot be denied by the defendant, who asserts that such was its character long afterwards. That the certificates of which copies issued on December 16, 1874, were valid, and owned by the plaintiff, are admitted facts. The question then arises whether such steps were taken in the county of Wharton as severed the land from the public domain, and appropriated it by virtue of the certificates owned by the plaintiff. That the deputy-surveyor, if such he was, at the time he ran lines sufficient to enable him to make correct field-notes of the several tracts to which the plaintiff's certificates were afterwards applied, had no authority to make surveys by virtue of the plaintiff's certificates, is too clear; for at that time the certificates were in the general land-office, and applied to other lands.

It did not rest with the county surveyor or his deputy to determine whether the certificates were located upon land held by older right, or whether facts existed which at some future time would entitle the plaintiff to have certified copies of its certificates which it might locate upon other land. At any time, however, after the sixteenth December, 1874, before the end of that year, the plaintiff had the right to appropriate the land in controversy by virtue of the copies of certificates which it held. This it might do either by making what are known as locations in the county surveyor's office, followed by surveys and return of field-notes and certificates to the general land-office within the time prescribed by law, or it might be done by having surveys made by virtue of the certificates, and properly certified and returned to the general land-office; but, under either method, the policy of the law would require that the certificates should be under the control of the county surveyor; and if, without knowing that the certificates were not appropriated to other lands, he had certified field-notes to the general land-office, he would have violated his duty. In this case there is no claim that the field-notes made out and certified by virtue of the copies of certificates owned by the plaintiff were not correct. That the copies of certificates were in the hands of the deputy or county surveyor when the field-notes which were sent to the general land-office were made out, cannot, under the evidence, be questioned.

Might the surveyor or his deputy avail themselves of knowledge which they then had, and from this make out field-notes by virtue of those certificates, whereby the land could be severed from the public domain as fully as though the land had actually been surveyed by virtue of the certificates after the copies were issued? The manner of making surveys was not so specifically pre-

scribed, nor the requirements so exacting, in the year 1874, as are they by the law now in force; and to hold that the designation of land by boundaries and natural or artificial objects, actually ascertained and fixed by running all the lines, was then required to give validity to a survey, by which is meant a description of land for its identification, rather than the actual work done by the surveyor to enable him to give such a description, would be fraught with consequences so grave that nothing short of a statute clearly requiring such a construction would justify it. It has been held that a surveyor might adopt a survey formerly made. *Horton v. Pace*, 9 Tex. 84; *Jones v. Burgett*, 46 Tex. 298; *Lake v. Wafer*, 16 Tex. 570. In the case last cited it was claimed that the survey was made in 1841, and that the certificate was not applied to it until some time in 1844; but it was held that this was unimportant. In *Howard v. Perry*, 7 Tex. 266, it was held that a survey made by a deputy-surveyor for himself became, in contemplation of law, the act of the district surveyor when approved by him. We are of the opinion that the appropriation of the copies of the certificates to the lands described in the field-notes certified by the county surveyor legally appropriated the land, even though the correctness of the field-notes may have been ascertained by the work formerly done by the deputy, or in some other manner than by an actual survey made before or after the copies of certificates issued; while, had the county surveyor approved and certified the field-notes before the copies of certificates issued from the general land-office, his act would have been unauthorized. The fact that the county surveyor did not properly fill up the blanks showing the surveys under the several certificates cannot affect the right of the plaintiff.

The appellant saw in the general land-office the field-notes certified by the county surveyor, and the copies of certificates on which the surveyor declared the land described had been appropriated, and these papers showed that there was a period between the time at which the copies of the certificates issued and the time at which all the papers were filed in the general land-office, during which the certificates might legally be applied to the land, and it thereby severed from the public domain, and he was not at liberty to presume that either the surveyor or his deputy had violated his duty. The certificates of the county surveyor and his deputy, in connection with the papers which they certified, and the copies of the certificates, in effect declared that the lands described in the several field-notes had been appropriated by virtue of these certificates. These papers gave notice of the right of the appellee. It is unnecessary to inquire what effect, as notice of appellee's rights, the records of the surveyor's office which the appellant did cause to be examined, had. If the appellant saw proper to rely upon the opinion of a clerk in the general land-office, evidenced by his indorsements on the several files, while the papers in the files which he inspected gave him notice of facts which would validate the claims of the appellee, that is his misfortune.

There was an agreement of the parties as to the ownership of certificates by each, and among those admitted to be owned by the appellee was one numbered 87, under which it sought to recover a tract of land. There is a further agreement as to the return of field-notes to the general land-office, but this agreement does not expressly admit that field-notes were returned under each of the certificates admitted to belong to the appellee. It was not shown that any survey was made and returned to the general land-office by virtue of certificate No. 87, but judgment was rendered in favor of appellee for 640 acres of land described as survey No. 11 made under that certificate. There is not sufficient evidence to sustain this part of the judgment; but, as the parties may have understood that the agreement rendered it unnecessary to prove that the field-notes were made and returned to the general land-office, we think it more likely to subserve the ends of justice to reverse and remand the cause than to render the judgment here.

We have not thought it necessary in this case to construe article 21, § 14, of the constitution, or article 9921 of the Revised Statutes, under which the appellee claims protection.

The judgment of the district court will be reversed, and the cause remanded. It is so ordered.

PRICE v. SUPREME LODGE KNIGHTS OF HONOR and others.

(Supreme Court of Texas. May 31, 1887.)

LIFE INSURANCE—ASSIGNMENT OF POLICY—VALIDITY.

In Texas the assignment by one of an insurance policy issued upon his own life to his cousin, who lives with him as an adult male member of his family, and is dependent on the insured for employment and support, upon an agreement by the assignee to pay the assessments necessary to keep the policy in force, is void as being to one who has no insurable interest in the life of the insured, and as being against public policy, and the insurance money should be paid to the original beneficiaries.¹

Appeal from Limestone county.

T. J. Gibson and Burrow & Kincaid, for appellant. *Cobb & Farrar and Herring & Kelley*, for appellees.

WILLIE, C. J. This suit was brought by H. K. Price to recover the amount alleged to be due him on a benefit certificate issued by the supreme lodge of the Knights of Honor to Thomas C. Harper, who had died a member of the order. The other defendants were sued with the lodge because they were the beneficiaries named in the certificate, and set up a claim to the amount due upon it, in opposition to the plaintiff. The lodge made no defense to the action other than to ask the court to determine to whom the benefit money should be paid, and offering to pay it to the parties found by the court to be entitled to receive the money.

The original petition alleged that the lodge was engaged in a mutual aid and life insurance business, and that Harper, by becoming a member, had his life insured to the amount of \$2,000, payable to the beneficiaries named by him. The beneficiaries named in the certificate were the defendants, who were the wife and children of Harper. The petition further alleged that it was necessary for Harper to pay certain dues to the lodge, from time to time, to entitle him to a good standing in the order, and his beneficiaries to the insurance money, in case of his death; that Harper paid these charges for a while, but afterwards became so far in arrears that his membership was subject to suspension, and was about to be suspended, and his benefit certificate forfeited; that Harper applied to plaintiff, and offered that if the plaintiff would pay his arrearages, and continue to pay his lodge dues and assessments, he, Harper, would transfer to him his benefit certificate. To this the plaintiff assented, and, with the consent of the lodge, paid up all Harper's arrearages, and kept the certificate alive up to the date of Harper's death, by the payment of all dues and assessments for which he was liable as a member of the order. The appellant complied with his contract by making the payments as agreed, and kept the certificate alive down to the death of Harper. The latter was ready to make the transfer, and the lodge was ready to change the certificate, so as to make it inure to the benefit of the plaintiff; but the certificate could not be found, and was not found till after Harper's death. The dues were received by the lodge from Price, and he was recognized by it as the owner of the certificate. It was further alleged that the constitution and

¹ Respecting the rights of strangers in life insurance policies, see *Lamont v. Hotel Men's Mut. Ben. Ass'n*, 30 Fed. Rep. 817; *Batdorf v. Fehler*, (Pa.) 9 Atl. Rep. 468; *Shugar v. Garman*, (Pa.) 4 Atl. Rep. 60; *Ruth v. Katterman*, (Pa.) 3 Atl. Rep. 835, and note.

laws of the order allowed a member to make any person he might choose the beneficiary of his certificate, whether he held an insurable interest in the life of the member or not; and that it so contracted in the present instance. The plaintiff alleged that he held an insurable interest in the life of Harper as they were cousins, and plaintiff was a member of Harper's family, and in his employment, and dependent on him for employment and support.

General and special demurrers were filed to the plaintiff's pleading by the defendants other than the lodge, and these were sustained by the court below, and the plaintiff refused to amend. The cause was not dismissed; but, it having been agreed that the plaintiff had paid to the lodge \$17.75 in dues, arrearages, and mortuary assessments in behalf of Harper, judgment was rendered for the plaintiff for that amount, and for the defendants for the balance of the \$2,000, less the costs, etc. From that judgment this appeal is taken.

The judge below placed in writing his conclusions of law upon the demurrer, and these show that he held, among other things, that the agreement between Price and Harper was a wagering contract, and that it could not be enforced as against the lodge or the other defendants. In our view of this case, this ruling is all that need be considered in determining the appeal. It is too clear for argument that Price had no such interest in the life of Harper as entitled him to insure it for his own benefit. Indeed, it is not claimed here that the fact that they were cousins, and Price an adult male member of Harper's family, and dependent on him for employment and support, gave him such interest as would support a life policy for his own benefit. But the appellant did not procure a policy on the life of Harper, but was the assignee of one which had been previously issued to Harper himself by the Knights of Honor. The consideration which he gave for the assignment was the payment of the money which was owing or might become due from Harper to the lodge in order to keep alive the certificate it had issued to him. The question, then, is, can a party, having no insurable interest in the life of another, receive an assignment of a policy of insurance issued upon the life of the latter, upon an agreement merely to pay the premiums or assessments necessary to keep the policy in force? This question has met with different answers from different courts of the United States. In our own state, no occasion for its determination has heretofore arisen.

It is almost universally conceded that policies procured by persons having no interest in the life of the insured are void at common law, as against public policy. The policy holder has nothing to lose for which he can claim indemnity; on the contrary, his interest is in the early death of the insured. When that occurs he ceases to pay premiums, and receives the amount of the policy. This creates a temptation to destroy human life, and the common law forbids the contract. These are the grounds upon which such policies are held to be void. Are they applicable to a case where the policy is first taken out by the person whose life is insured, and then transferred by him to one who has no interest in his life? It is pretty generally held that if a person effects insurance upon his own life, and, in pursuance of a previous agreement, immediately, and without consideration, transfers the policy to one who has no interest in his life, but who agrees to pay the premiums upon the policy, it will be void. *Swick v. Insurance Co.*, 2 Dill. 160; *Stevens v. Warren*, 101 Mass. 564; *Mowry v. Insurance Co.*, 9 R. I. 346. And it has been held by the supreme court of the United States that a transfer would not be enforced, under such circumstances, though the insured were indebted to the assignee in a small sum disproportionate to the amount of insurance on his life; but the policy would be deemed security for the debt, and such advances as might afterwards be made on account of it. *Cammack v. Lewis*, 15 Wall. 643.

Is there such difference between the principles upon which these decisions rest, and those applicable to the sale of a policy already procured to an as-

signee having no interest in the assured, as to make the latter lawful, while a policy procured without interest, and an assignment in pursuance of a previous agreement, are held invalid? The supreme court of the United States, in the case of *Warnock v. Davis*, 104 U. S. 775, says that it cannot see any such difference; and, proceeding upon this view, many of the state courts have held such assignments void, or treated the assigned policies as mere securities for the moneys actually advanced by the assignee. *Insurance Co. v. Hazzard*, 41 Ind. 116; *Insurance Co. v. Sefton*, 53 Ind. 380; *Insurance Co. v. Sturges*, 18 Kan. 93; *Gilbert v. Moose*, 104 Pa. St. 74; *Basye v. Adams*, 81 Ky. 368. This, too, is the conclusion to which many eminent text writers have arrived. May, Ins. § 398; Greenh. Pub. Pol. 288.

On the contrary, the courts of several states have held such assignments valid, though the assignee could not have taken out for his own benefit an original policy upon the life of the assignor. *Clark v. Allen*, 11 R. I. 439; *Marcus v. Insurance Co.*, 68 N. Y. 625; *Clark v. Durand*, 12 Wis. 223; *Insurance Co. v. Allen*, 138 Mass. 24. We think those decisions which hold these assignments invalid are based upon the more satisfactory reasoning. When the policy is transferred it becomes the property of the assignee. He is subject to all the obligations imposed by it, and entitled to all its benefits. He becomes the holder of a policy upon the life of a person whose early death will bring him pecuniary advantage. The temptation to bring about this death presents itself as strongly to him as to a party who originally effects insurance for his own benefit upon the life of another. Public policy removes the temptation to take human life, and it cannot matter how that temptation is brought about. If, by reason of a contract between two persons, the one is tempted by pecuniary interest to destroy the other, the form of the contract is of no importance in testing its invalidity. The law looks to the substance of the matter,—the relation which the parties will bear to each other after the contract is executed; and, if its natural effect is to encourage crime, it will be avoided, no matter in what shape it may be presented. Those courts holding a contrary view say that a policy of insurance is a chose in action, and the owner may dispose of it as he pleases. But, when it is asserted that the owner of property may dispose of it at his pleasure, the assertion must be taken with the qualification that he does not thereby violate any provision of law, or contravene public policy.

It is further said that, because a contract is speculation, though human life be the subject of the speculation, it is not necessarily invalid; for instance, it is not unlawful to transfer an annuity, or an estate in remainder after a life-estate. If this reasoning be good, it would validate a policy taken by one having no interest in the life insured, as well as an assignment of a policy to such a person, for it is not unlawful to grant or create an annuity, or an estate in remainder after a life-estate, any more than it is to transfer one of these after it is created. Yet wager policies are almost universally held void, while annuities are sustained. Why this should be it is not necessary to discuss. It is sufficient that no analogy drawn from annuities or life-estates can be used to uphold policies procured in violation of public policy, and hence no such analogy of this kind can sustain an assignment of the same character. The case before us is, if possible, stronger than any to which we have referred. Here there was a bare verbal agreement between Harper and the appellant that the latter should pay the dues and assessments—in other words, the premiums—due and to fall due upon the former's life policy, in consideration of receiving at Harper's death the money due on the policy. It was but little better, if anything, than a parol gift of the certificate, by which the assignee was subrogated to all the rights of the assignor in the certificate. In fact, it was no more than an agreement to convey, which was never executed. While such an agreement might be enforced in a court of equity when made for a valuable consideration and a lawful purpose, it would have but little

standing in such court if made for the purpose of giving the assignee an interest in the death of the assured. It is of no importance that the rules of the Knights of Honor permitted benefit certificates to be transferred to persons having no insurable interest in the life of the member, and that it consented to the assignment made in this case. No action of the lodge could change public policy, or make a contract valid which the interests of society demanded should not be enforced. It certainly could make no agreement violative of law by which the rights of third parties could be injuriously affected. This is not a question between the appellant and the lodge, but between him and parties who are entitled to the insurance money, if the assignment is void. The assignment did not vitiate the policy, but was itself of no effect, and left the insurance money payable to the parties originally designated in the certificate. From these views our conclusion is that the transfer having been made to one having no interest in the life of Thomas C. Harper, and upon no other consideration than the payment of premiums by the transferee, was void, as against public policy, and the insurance money was payable to the original beneficiaries of the certificate. The court did not err in sustaining the special demurrer which reached this point. There is no objection made here to the judgment so far as it allowed the plaintiff below to recover the money advanced by him in the payment of premiums, and his right to this need not be considered.

There is no error in the judgment, and it is affirmed.

TEXAS P. RY. CO. v. DAVIDSON.

(*Supreme Court of Texas. May 31, 1887.*)

1. LIMITATION OF ACTIONS—RUNNING OF STATUTE—AMENDMENT.

In an action against a railroad company to recover for personal injury to the plaintiff, caused by the alleged negligence of the defendant, plaintiff averred her injury to be the fracture of a bone in the left arm; and, afterwards, in an amended petition, filed more than a year after the injury, set forth additional injuries to her head, shoulders, and spine. *Held*, that the additional injuries stated in the amended petition were not to be considered as a new cause of action for the purpose of computing the running of the statute of limitations.

2. CARRIERS—INJURY TO PASSENGER—INSTRUCTION.

In an action for damages against a railroad company caused to the plaintiff by the train starting up while she was attempting to get on, an instruction to the jury that if the averments of the plaintiff were true, including an averment that she had been promised 10 minutes by the conductor in which to check her baggage and the train started before that time expired, then they should find for the plaintiff, is not erroneous as laying too much stress on the time promised her by the conductor.

3. NEGLIGENCE—CONTRIBUTORY—BURDEN OF PROOF.

Where plaintiff sued a railroad company for injuries caused by the negligence of the defendant in allowing a train to start while she was trying to get on, the burden of proof as to contributory negligence on the part of the plaintiff is on the defendant, and does not shift to the plaintiff when it is shown that she had gone close to the train, to be ready to board it; and when notified by a brakeman to get on, and that she would have plenty of time, attempted to do so.¹

¹ An amendment to a complaint asking for increased damages does not make a new action so as to enable the defendant to plead the statute of limitations. *Cooper v. County of Mills, (Iowa), 28 N. W. Rep. 633.* As to the general question of amendments to pleadings as affecting the statute of limitations, see *McCall v. Lee, (Ill.), 11 N. E. Rep. 522*, and note; *Alabama G. S. R. Co. v. Smith, (Ala.), 1 South. Rep. 723*, and note; *Alabama G. S. R. Co. v. Arnold, (Ala.), 2 South. Rep. 337*; *Case v. Blood, (Iowa), 33 N. W. Rep. 144.*

² Contributory negligence is purely a matter of defense. *Thorpe v. Missouri Pac. Ry. Co., (Mo.), 2 S. W. Rep. 3*, and note; *Seymer v. Town of Lake, (Wis.), 29 N. W. Rep. 557*; *Gulf, C. & S. F. R. Co. v. Rediker, (Tex.), 2 S. W. Rep. 513*; *Barry v. Ferkildsen, (Cal.) 13 Pac. Rep. 657.*

4. DAMAGES—EXCESSIVE—PERSONAL INJURIES.

A verdict of \$5,000 damages to a lady 57 years old, who has lost the free use of one of her arms, has had her shoulder and spine injured so as to produce great pain, and whose general health has been rendered bad, will not be set aside as excessive.¹

Appeal from Mitchell county.

J. D. Martin, for appellant. *Fowlkes & Looney*, for appellee.

WILLIE, C. J. This suit was brought by Mrs. Davidson against the appellant; and her original petition alleged substantially as follows: The appellant on twenty-sixth of June, 1888, was the owner of a railroad from Fort Worth to Colorado City, and was engaged in running cars on the same, and transporting passengers for hire as a common carrier; that on that day she arrived at Fort Worth from San Antonio on her way to Colorado City, and purchased from the company's agent at Fort Worth a ticket entitling her to ride upon said cars from the latter place to Colorado City. She was told at Fort Worth, by the conductor of the train upon which she was to be a passenger, that the train would not leave Fort Worth for the space of 10 minutes. So soon as she received this information, she attempted, with the assistance of an employe of the company, and within the time stated, to ascend the steps of the platform; but, while attempting to do so, the cars were put in motion with a sudden jerk, caused by the wrongful act and negligence of the defendant's engineer in charge of the locomotive attached to said train, and the plaintiff was violently thrown from the steps of the car against the ground, causing her serious bodily injury. The injuries complained of were the fracturing of a bone in the left arm, which caused her great trouble, expense, and pain. She had to procure medical aid at an expense of \$500; and the bodily pain occasioned by the injury, and the trouble brought upon her by the loss of the use of her left arm, damaged her in the sum of \$10,000. An amended petition alleged substantially the same cause of action, but set out the facts of the case more fully. It alleged that plaintiff was promised 10 minutes of time to check her baggage at Fort Worth, but, before the time expired, she was instructed by an agent of the company to get on the train, and the agent was assisting her to do so, when she received the fall and injury complained of, by reason of the gross negligence of the appellant's agents and servants. She alleged that her head, shoulder, and spine were seriously wounded; that her ability to attend to her household duties had been seriously impaired; her physical constitution enfeebled; that she had been rendered more liable to disease, and that her ability to resist disease had been permanently impaired; and that she had suffered, and continued to suffer, great physical pain and mental distress. For these she claimed to the amount of \$10,000 damages, and \$500 for medical bill.

The company filed a general demurrer, and specially set up that so much of the petition as alleged injuries to the plaintiff's head, shoulder, and spine, and the mental distress resulting therefrom, was a departure from the special injury alleged in the original petition, and was barred by the statute of limitation; the said injury having occurred more than one year before the filing of the amended petition. "Not guilty" was also pleaded, and contributory negligence on the part of the plaintiff. The court overruled the demurrer and special exception, and upon trial, before a jury, the appellee obtained a verdict for \$5,000. From the judgment rendered on this verdict this appeal is taken.

¹As to excessive damages in actions for injuries to the person, see *Galveston City R. Co. v. Hewitt*, (Tex.) 3 S. W. Rep. 705; *South Covington & C. St. R. Co. v. Ware*, (Ky.) 1 S. W. Rep. 493, and note; *Louisville, N. O. & T. R. Co. v. Thompson*, (Miss.) 1 South. Rep. 840; *Triese v. City of St. Paul*, (Minn.) 32 N. W. Rep. 857; *Schroth v. City of Prescott*, (Wis.) Id. 621; *Fitzgerald v. Dobson*, (Me.) 7 Atl. Rep. 704; *Knapp v. Sioux City & P. Ry. Co.*, (Iowa,) 32 N. W. Rep. 18.

It is complained that the court erred in overruling the special exception setting up the statute of limitation. This question was thoroughly considered, and decided in accordance with the views of the district judge, in the case of *International & G. N. R. Co. v. Irvine*, 64 Tex. 533. In that case there was a much greater departure in the amended petition from the allegations in the original petition, as to the injuries received, than in the present. This court, however, said: "The cause of action was the injury resulting from the alleged negligence of the defendant, time, place, and circumstances of which were stated in the original petition; and the amendment did nothing more than to state more fully than did the original the several results of the injury. The court therefore did not err in overruling exceptions which presented the statute of limitation as a defense." The decision is decisive of the question in the present case.

It is also complained that the court erred in laying too much stress in its charge upon the 10 minutes' time alleged to have been given by the conductor to the plaintiff in which to get her baggage checked. The court had explained to the jury the case made by the plaintiff's petition, in which was an allegation that the conductor at Fort Worth promised her to hold the train 10 minutes to allow her time to check her baggage. It then proceeded to state to the jury that if these averments, restating them, and including the averment as to the 10 minutes, were true, they should find for the plaintiff unless her own negligence contributed to the injury. No more prominence was given to the conductor's promise than to any other fact averred in the petition. Indeed, it was of disadvantage to the plaintiff that her case was made to turn upon a promise to hold the cars for any specified period of time, when she was entitled to recover if the time promised had been less or more, provided she conducted herself as a prudent passenger should have done under the circumstances. We see no objection to the charge on this account.

It is assigned as error that the court charged the jury that the burden of proof of contributory negligence on the part of the plaintiff was upon the defendant. It is not denied that this is correct as an abstract principle, but it is said that the plaintiff's own evidence exposed her to suspicion of contributory negligence, and the burden was upon her to clear up the suspicion. But an examination of the portions of the plaintiff's evidence relied on to create this suspicion does not bear out the appellant's proposition. Mrs. Davidson, and other persons traveling with her, were told by Mr. Newton, in whose charge they were, to remain at a certain place until he could have the baggage checked. This command was given and received under the supposition that 10 minutes would be allowed to have the baggage checked. The party went close to the train so as to be ready to board it; and, when notified by a brakeman to get on, Mrs. Davidson started to do so, when she received the injury. She remained with her companions until directed by the brakeman to get on, and it was natural that she should obey the order coming from an employe of the company; and it was not negligent in her to attempt to do so when she was informed by the brakeman that she had plenty of time in which to get on. According to the plaintiff's evidence, the person giving this order had the appearance of being a brakeman, which was sufficient to influence the conduct of the plaintiff, and it turned out upon the trial that this person, who the plaintiff's witnesses said gave the order, was actually a brakeman upon the train at the time.

During the trial, plaintiff offered her own depositions in evidence. Interrogatories 4, 5, and 6, and the answers to them, were ruled out by the court. The seventh interrogatory and answer was then objected to because the interrogatory was leading, and because it assumed that the witness had already stated certain facts, which facts were contained in her answers that had been suppressed. The first objection is not insisted on in this court. Whether the other would be good or not it is unnecessary for us to decide, as the facts

drawn out of the witness in answer to the seventh interrogatory were abundantly proved by other testimony, and as to them there was no conflict in the evidence. Three other witnesses testified to substantially the same facts, and one of them, Dr. Graves, who was her attending physician, gave evidence to greater injuries than those stated in the appellee's answer to the admitted interrogatory. The witnesses for the appellee proved her case substantially as it was set forth in her petition. A different state of facts was made out by the defendant's witnesses. We cannot perceive that the evidence preponderates in the least in the favor of the defendant. Under such a state of case, we cannot possibly disturb the verdict, as it was correct if the jury believed, as they certainly did, the witnesses of the plaintiff.

Nor can we set it aside for excessive damages. The jury has said that \$5,000 is just compensation for a lady 57 years of age, who has been deprived permanently of the free use of her left arm, has had her power of locomotion affected, who has had one of the bones of her shoulder broken, and her spine so injured as to cause her great pain, whose general health has been rendered bad, and whose system has been placed in such condition as to be more liable to disease, and we have no warrant for saying that they have allowed her too much.

There is no error in the judgment, and it is affirmed.

Ex parte JONES.

(*Supreme Court of Arkansas. April 30, 1887.*)

1. STATUTES—VALIDITY—REPUGNANCE.

An act of a legislature (Arkansas act approved April 4, 1887,) which divides a county into two judicial districts,—an Eastern and Western,—and provides by reference to a prior act for the holding of the terms of the circuit court in said districts, is void where it appears that the days for holding the terms of the court in the Eastern district are the same as those fixed for the Western district.

2. SAME—VOID IN PART.

Where an act indivisible in its nature is void in part, it is void as to all of its provisions.

3. HABEAS CORPUS—NO FORUM FOR TRIAL.

In such a case a person indicted for murder in that part of the county included in the Eastern district before the passage of the act is entitled to a writ of *habeas corpus*, there being no forum for his trial.

Appeal from chancery court, Pulaski county.

Petition for *habeas corpus*.

The appellant *pro se*. *Dan. W. Jones*, Atty. Gen., for the State.

SMITH, J. Jones applied to the Pulaski chancery court for the writ of *habeas corpus*, alleging that he was restrained of his liberty by the sheriff of Cleveland county, under process upon an indictment which charged him with the murder of one Barrett; that said murder, if committed at all, was done in Cleveland county in the year 1886, on the East side of the Saline river; that, after said indictment against petitioner had been returned into court, the legislature, by an act approved April 4, 1887, had divided said county into two judicial districts,—the Eastern and Western,—between which said river was the dividing line; that it was provided in and by said act that courts of justice should be held, for the Eastern district, at Toledo, and for the Western district at Kingsland, and the authority and jurisdiction of each of said courts were expressly limited to the territory respectively embraced therein, but no time was fixed by that act, or by any other law, for holding the circuit court in the Eastern district, by reason whereof it was impossible to try petitioner's case.

As an excuse for applying to the chancellor, it was alleged that the circuit judge of the Tenth circuit, which includes Cleveland county, was absent from

the state. But the writ was refused. It is immaterial whether the allegation that Barrett was killed East of the river be true or false; because, in either event, according to the view we have taken, the petitioner has no forum for his trial, if the act is allowed to stand. At the date of the passage of this act, Toledo was the county-seat of Cleveland county, and the circuit court for the county was to be held there on the second Monday in March and September of each year. See act of March 24, 1885, (Sess. Acts 1885, p. 127.) The act of April 4, 1887, recognizes Toledo as the county-seat, and directs the circuit court for the Eastern district of the county to be held there, "as now provided by law, except as hereafter provided." Section 10 of the same act fixes the terms of the circuit court of the Western district at Kingsland, also on the second Monday of March and September. Now it is a physical impossibility for the circuit judge to be in two different places at the same time. And according to the theory of the constitution of our courts, as explained in *State v. Williams*, 48 Ark. —, 2 S. W. Rep. 843, two circuit courts cannot be going forward in the same circuit at one and the same time; and, as the act of 1887 is the latest expression of the legislative will, it repeals the act of 1885, fixing the time for holding the circuit court in Cleveland county, unless the later act is unconstitutional. *Parker v. Sanders*, 46 Ark. 229. It would follow, then, that no provision has been made for holding a circuit court in the Eastern district of Cleveland county, and the petitioner has been deprived of his constitutional right to a speedy trial by a jury of the county in which the crime was committed. (Const. 1874, art. 2, § 10;) for the act does not authorize a transfer of causes now pending in Cleveland circuit court to the Western district, except upon a petition for change of venue, but expressly provides (section 11) that they shall remain for adjudication, and be tried at Toledo.

So sacred is this right of speedy trial that, under certain circumstances, the failure of the state, for three terms, to bring the accused to trial, entitles him to a discharge. Mansf. Dig. §§ 2191-2194; *Stewart v. State*, 13 Ark. 720. What then shall be said of a statute which practically abolishes or discontinues, for one half of a county, the only court which can try felonies? It is a suspension for an indefinite period of the administration of justice. No grand juries can be impaneled to inquire of offenses committed in Cleveland county east of the Saline river, and no person now under indictment for offenses committed in any part of Cleveland county can be brought to trial. This is such a denial of justice as to render the act inoperative and void. The unconstitutionality of a law does not depend so much upon the intention of the legislature as upon the effect of the law. The act also provides for separate county and probate courts to be held in the two districts, and virtually erects two counties under the name of districts, requiring all of their financial affairs to be kept distinct. Of these provisions we are not called upon in this case to express any opinion. However, in order to prevent future complications, we have no hesitation in saying that, in our judgment, the act is indivisible, and cannot take effect, even in part. Its purpose is to accomplish a single object,—the establishment of two judicial districts in one county; and, that purpose having failed in respect to the circuit court, the whole act necessarily falls to the ground. The provision for separate circuit courts is so interwoven with the remainder of the act that it cannot be presumed the legislature would have enacted one portion without the other. *Cooley*, Const. Lim. *177 et seq.; *Bittle v. Stuart*, 84 Ark. 224.

The circuit court for the county of Cleveland will be held at the place and time designated by law, without regard to the supposed act of April 4, 1887. There is, consequently, no impediment to the petitioner's trial. Affirmed.

MAY v. IVIE, Adm'r.

(Supreme Court of Texas. May 31, 1887.)

1. VENDOR AND VENDEE—ACTION FOR PRICE—DEFENSE—PLEADING.

A vendee of land in possession under a general warranty deed sought to avoid the payment of the purchase money on the ground of failure of title, alleging that his vendor was a married man when he acquired the land, and that his wife had died, leaving children, before the sale. *Held* insufficient; that he should have alleged that the premises were community real estate, and stated the amount, character, and present condition of all the community property of the grantor and his wife, in order to show the children's interest.

2. SAME—DEFECT OF TITLE—KNOWLEDGE OF VENDEE.

A vendee who purchases under a general warranty of title, having knowledge, at the time of his purchase, of a defect in such title, cannot resist the payment of the purchase money on the ground of that defect, even though the vendor have contracted to furnish him a perfect title.

Appeal from Montague county.

C. L. Potter and Rugeley & Huff, for appellant. *Stephens, Matlock & Herbert*, for appellee.

STAYTON, J. Appellee, as administrator of the estate of John Ivie, deceased, brought this action to recover on notes given to the latter by Compton to secure the purchase money for a tract of land, and to foreclose the lien on the land. John Ivie sold the land to Compton, and executed to him a deed with general warranty, reserving, in the face of the deed, a lien. Compton and wife conveyed the land to May by a deed with general warranty, the latter assuming the payment of the notes sued on. As a defense, May alleged that John Ivie was a married man at the time he acquired title to the land, and that his wife died, leaving children, prior to the time the land was sold to Compton. The answer further alleges that there was no administration on the estate of Mrs. Ivie by the husband as survivor or otherwise, but that Compton knew the condition of the title at the time he bought, as did May at the time he bought from Compton; and, to avoid the effect of these facts, the answer alleges that, at the time Compton bought, his vendor "promised said Compton that he [said intestate] would apply to the proper court, and have such orders and decrees entered up as were necessary to ratify and confirm said sale," of all of which May alleges he had knowledge, and that he relied upon it at the time he bought from Compton. These matters are all relied upon to show failure of title to one-half of the land. The court sustained a demurrer to this part of the answer, and this is assigned as error.

There is no clear averment that the land was community property, which would seem to be a proper averment in a case in which one in possession under a deed with general warranty seeks to avoid the payment of a note given for the purchase money of land on the ground of failure of title. The land may have been the separate estate of John Ivie, though bought during marriage, and such a defendant ought not to rely upon the presumption of a fact which he does not allege to be true. If, however the land was community property, and this had been alleged, still the court did not err in sustaining the demurrer.

This case is very similar in its facts to the case of *Brock v. Southwick*, 10 Tex. 65, in which it was held that one who purchases through a deed with general warranty of title, having knowledge of a defect in the title at the time of purchase, cannot resist the payment of the purchase money on the ground of the defect in the title of which he had knowledge. In that case, as in this, it was alleged that the vendor had contracted through another to procure for the vendee a perfect title. The case of *Cooper v. Singleton*, 19 Tex. 262, was also very similar in its facts to the case before us, but in that case this court asserted the same rule as in *Brock v. Southwick*; and, in considering the suf-

ficiency of the answer so far as it set up title in the heirs to community property which had been sold by the father after the death of the mother, this court said: "There has been no administration on the estate of Mrs. Crisp, as is averred, and in a limited sense it is true that her heirs are entitled to one-half of the land. But their interest may be subject to great modifications, and may be altogether excluded. They are entitled only to the half of such portion of the common property as may remain after the payment of the debts of the community. There may be also a large community property in addition to the land in controversy. If such be the fact, the portion of the heirs of the wife may be satisfied out of the other assets; and this, being assigned to the vendor as his share of the common property, would inure to the benefit of his vendee, the defendant. The plea should have averred the condition of the community estate."

This rule is a reasonable one in this class of cases; and, had the appellant and his immediate vendor not had notice of the defect in the title which he now attempts to set up, the demurrer would have been properly sustained for the want of full averments of the amount, character, and condition of the community estate owned by John Ivie and his wife.

There is no error in the judgment, and it will be affirmed.

TORREY and others v. MARTIN.

(Supreme Court of Texas. June 10, 1887.)

1. TENANCY IN COMMON—LIEN FOR IMPROVEMENTS—PURCHASE WITH NOTICE.

The appellee and one Lewis leased several sections of land contiguous to certain tracts owned by them, and inclosed and used in common all said lands. Appellee, at the request of Lewis, paid all the rent of the leased lands and the expense of fencing. With the consent of the appellee, Lewis sold his interest to William Torrey, who contracted to pay to the appellee such sum as was due him from Lewis on account of the matters aforesaid, and who gave his note for an amount which included said sum. Torrey subsequently conveyed his interest to his wife. *Held*, that appellee is entitled to a lien on said leased lands for the money expended in making improvements thereon for and at the request of his co-tenant, and that such lien binds the land in the hands of Mrs. Torrey because she had notice of the terms of the contract between her husband and Lewis.¹

2. APPEAL—OBJECTION NOT RAISED BELOW—COSTS.

A judgment for costs will not be reversed on account of its being too large, when the question is raised for the first time in the supreme court.

Appeal from district court, Taylor county.

Bentley & Bowyer, for appellant. *T. A. Kirkland*, for appellee.

STAYTON, J. The appellee and N. C. Lewis, each owning about 1,000 acres of land, leased several sections of contiguous lands for the term of 10 years, and, in pursuance of their understanding at the time the lease was secured, they inclosed all the land and used it in common. Lewis being unable to pay the rent for the first year, which embraced practically a commission to the agent of the lessor, requested the appellee to pay it, and he did so. Expenses were also incurred in fencing the land, which consisted in labor and material, all of which was paid for by the appellee at the request of Lewis, who promised to repay the sums so expended, stating at the same time that the appellee could hold the pasture as a security for this. They used the pasture in common for some time, after which Lewis sold his interest in it to William Torrey, the husband of Jane G. Torrey. This was done with the consent of the appellee; and, as a part of the consideration which Torrey was to pay to Lewis, he assumed to pay to the appellee such sum as was due to him by Lewis on account of the matters to which we have before referred. At the time the

¹See *Annely v. De Saussure*, (S. C.) 2 S. E. Rep. 6; *Sutton v. Sutton*, (S. C.) 1 S. E. Rep. 24; *Carver v. Coffman*, (Ind.) 10 N. E. Rep. 567.

sale by Lewis to Torrey was consummated, the latter required a statement of the items which made up the indebtedness of Lewis to Martin to be exhibited, which was done, and thereupon he executed a note to Martin for the sum due from Lewis to the latter. The statement made by Martin embraced the matters to which we have already referred and some others. The written agreement on which Torrey acquired the interest of Lewis contained the following clause: "That he [Torrey] will assume and pay off all the indebtedness of the party of the first part [Lewis] now due and owing, or which may have been due and owing, on the said above-mentioned partition fence, and on said lease, promptly and without fail." After Lewis conveyed to Torrey, the latter conveyed to his wife in consideration of a credit of \$4,000 which he received on a debt due by him to her and, as appears from some of the evidence, on the further consideration that his wife would assume and pay what was due to Lewis on the sale made to her husband. This action was brought by Martin against Torrey and his wife on the note executed to him by Torrey on account of expenditures made in improving the property while it was held in common by Martin and Lewis, and to foreclose a lien which he claimed on the leased property. A judgment was rendered in his favor against William Torrey for the full amount of the note executed by him, and a lien established and ordered to be enforced against the leased lands in the hands of Mrs. Torrey in so far only as the sums advanced by Martin, as before stated, and for the purposes before stated, formed a part of the consideration of the note sued upon. The note executed by Torrey to Martin only embraced one-half of the sum expended by the latter at the request of Lewis.

It is urged that the cost of improvements made on the lands owned by Lewis and Martin, as well as on the lands which they had leased, is embraced in the note sued upon, and that there can be no lien on lands leased on account of improvements, in effect, made by Martin on lands owned by himself and Lewis, though such lands may have been used in common by them, as were the leased lands. If the fact were as assumed, the legal proposition asserted would evidently be correct, at least in so far as Martin seeks to assert a lien which one tenant in common has on account of permanent and necessary improvements made on the common property; for it would seem that for expenditures made by Martin on the land of himself or Lewis at the request of the latter no lien would exist unless created by contract of the parties. We cannot ascertain, however, from the record that the appellee is seeking to enforce a lien on account of improvements made on lands other than the leased lands which Martin and Lewis held as tenants in common. If one co-tenant requests another to make an expenditure of money in placing improvements on the common estate, he is responsible to such co-owner for his proportion of money so expended, and a lien will exist on his share of the estate to secure it, which binds the property in his hands, or in the hands of his grantees with notice. *Freem. Co-Tenancy*, 262; 3 *Pom. Eq.* 1240; *Story, Eq.* 1234-1237. There can be no doubt that William Torrey knew of the facts which gave Martin a lien on the land at the time he bought from Lewis; and he obligated himself, by the express promise made the basis of this suit, to pay the debt which the lien secures.

Mrs. Torrey is affected with notice of the same facts; for the recitals in the contract between her husband and Lewis, through which she must deraign her own title, are sufficient to put her upon inquiry, which, if pursued, would have led to full knowledge of every fact which gives life to the lien, and, being so affected with notice, it is unnecessary to inquire whether the circumstances of her purchase would entitle her to be classed as a purchaser for a valuable consideration. It may be true that the appellee holds even a vendor's lien; for the note sued upon was given to secure to Lewis a part of the purchase money which Torrey agreed to pay for the land, and the fact that he gave the note to Martin instead of Lewis, his vendor, would not affect that

question. *Pincham v. Collard*, 13 Tex. 335; *Wynn v. Flannegan*, 25 Tex. 778; *Ellis v. Singletary*, 45 Tex. 36; *Iroin v. Garner*, 50 Tex. 54; *Robertson v. Guerin*, Id. 317. It has been held that on a sale of leasehold premises the vendor's lien existed. *Elliot v. Edwards*, 3 Bos. & P. 184. But this case does not require that this question shall be passed upon.

We find nothing in the record sufficient to justify the holding that the appellee at any time waived or intended to waive his lien. The judgment against Mrs. Torrey for costs is broader than should have been entered; but this was not called to the attention of the court below, and its correction asked; and it has several times been held, when this has not been done, that a judgment will not be reversed when the question is raised for the first time in this court.

The district court, even under the judgment entered, may so adjust the matter of costs as to impose on each defendant only such costs as they ought to pay. The judgment against each defendant for costs is general. We find no error in the proceedings of the court below for which its judgment ought to be reversed, and it will be affirmed.

LEWIS and another v. JOHNSON, Jr.

(Supreme Court of Texas. June 10, 1887.)

DEED—FAILURE TO RECORD—VALIDITY AS TO CREDITORS.

Under Pasch. Dig. Tex. art. 4988, which declares void as to creditors all conveyances of lands unless they are lodged with the clerk of the county court, to be recorded, an assignment of two land certificates, which operates as an equitable transfer of the lands located under them, is void as against a judgment creditor without actual notice, when such assignment was never recorded in the county in which the lands are situated, but was filed in the general land-office.

Appeal from district court, Uvalde county.

Simpson & James, for appellants. *Baker, Archer & Clarke*, for appellee.

STAYTON, J. This action was brought by the appellee to recover an undivided one-half of two sections of land located and patented by virtue of two land certificates, which P. T. & M. V. Adams, who were partners doing a land and cattle business, owned and located in 1875. After the lands were located, surveyed, and the field-notes returned to the general land-office, on March 1, 1876, P. T. & M. V. Adams, by a written conveyance, duly acknowledged, transferred the certificates to W. C. Adams, to whom the land was patented in the year 1880, and by conveyances through him the appellants deraign title. The conveyance of the certificates to W. C. Adams was never recorded in the county in which the lands are situated, but it was filed in the general land-office soon after it was executed. On April 6, 1877, George S. Johnson, Sr., brought an action against P. T. Adams, on a demand for money, in which he caused a writ of attachment to be levied on an undivided half of the two tracts of land. Judgment was rendered in his favor in that action, and the land attached was directed to be sold; which was done on June 3, 1879, when the appellee became the purchaser. The action in favor of George S. Johnson, Sr., who was the father of George S. Johnson, Jr., was instituted by the latter as the attorney for the former, under an agreement that he should have one-half of what he might recover from P. T. Adams.

When George S. Johnson, Jr., bought the lands at sheriff's sale, he paid the costs of suit, and credited the amount of his bid on the judgment; but afterwards the matter was adjusted between himself and his father, he retaining whatever interest in the lands the sheriff's deed conveyed to him. Neither George S. Johnson, Jr., nor his father had any notice that the land certificates had been conveyed to W. C. Adams at the time the facts transpired through which the former claims the land, unless the filing of the transfer in the gen-

eral land-office affected them with notice. It is claimed by the appellants that this was the effect of that fact.

It is well settled "that contracts in writing concerning land, to have effect against innocent purchasers and creditors, must be proved and recorded; so must a contract which is to affect or pass an interest in land after its location." *Simpson v. Chapman*, 45 Tex. 566. The sale of the certificates, after location, operated as an equitable transfer of the lands located under them. The declaration of the statute is that "all bargains, sales, and other conveyances whatever, of any lands, tenements, and hereditaments, * * * which shall be hereafter made and executed, shall be void as to all creditors and subsequent purchasers for valuable consideration, without notice, unless they shall be acknowledged, or proved and lodged with the clerk, to be recorded according to the directions of this act." Pasch. Dig. art. 4988.

The statute nowhere makes the filing in the general land-office of the transfer of a land certificate, or of land, to have the same effect as registration in the proper county, and, in the absence of a statute giving such effect to the filing of such a paper in the general land-office, such effect cannot be given to it. To meet such a case, and to give persons who have filed in the general land-office any deed or other paper affecting title to land a means by which such papers may be placed on record in the county in which the land is situated, the law provides that copies of such deeds or other conveyances may be recorded. Pasch. Dig. art. 4984; Rev. St. art. 4930.

Neither the appellee nor his father having notice of the transfer to W. C. Adams at the time the facts transpired on which the appellee bases his right, he is protected through the right which his father had as a creditor, had he not been entitled to protection as a purchaser for value. *Grace v. Wade*, 45 Tex. 522; *Linn v. Le Compté*, 47 Tex. 441.

No question is made as to the extent of the interest which P. V. Adams at one time had in the land, nor as to the existence of equities growing out of the partnership between him and M. V. Adams which might have affected the rights of the parties. The sole claims of the appellants on this appeal are that the appellee had notice of the conveyance to W. C. Adams, from the fact that it was filed in the general land-office, and that he is not entitled to protection as a *bona fide* purchaser; and, as neither of these can be sustained, the judgment of the district court will be affirmed. It is so ordered.

NEWTON v. CALHOUN and Wife.

(*Supreme Court of Texas. June 10, 1887.*)

HOMESTEAD—ABANDONMENT—RENTING.

Evidence that the appellees had for a long time occupied three lots as a homestead; that, with a desire to sell, they temporarily rented the houses on one of said lots, but continued to use the lot for home purposes; and that the intention to sell had been subsequently abandoned,—justifies the finding that such renting was not inconsistent with the uses for which the homestead is protected, and that said lot continued to be part of the homestead of the family.¹

Appeal from district court, Travis county.

Osceola Archer, for appellant. *Sheeks & Sheeks*, for appellees.

STAYTON, J. That the property in controversy was the homestead of the appellees for many years prior to the time they improved the lot on which the house stands in which they actually resided at the time this cause was tried,

¹As to what constitutes an abandonment of a homestead, see *McElroy v. Magoffin*, (Tex.) 4 S. W. Rep. 547; *Reece v. Renfro*, Id. 545; *Gates v. Steele*, (Ark.) 4 S. W. Rep. 53, and note; *Kaes v. Gross*, (Mo.) 3 S. W. Rep. 840; *Sanders v. Sheran*, (Tex.) 2 S. W. Rep. 804; *Honaker v. Cecil*, (Ky.) 1 S. W. Rep. 394, and note; *Newman v. Franklin*, (Iowa,) 28 N. W. Rep. 581, and note; *Tipton v. Martin*, (Cal.) 12 Pac. Rep. 244.

cannot be denied; for with their family they actually lived in the house, and used the lot, and those contiguous to it, for the purposes of a home. It was a question of fact for the determination of the court below whether the use which the appellees had made of lot 5, since they have actually resided on lot 7, was such as to clearly indicate an intention no more to use lot 5 for the purposes of a home, and whether in fact lot 5 had not at all times been to some extent used for the purposes of a home. The simple fact that the houses on lot 5 had been rented, was not sufficient to divest that lot of its homestead character. The necessities of the family may have been such as to induce its head temporarily to rent to others the houses on lot 5 without any intention permanently to use it only for the purpose of renting. Without disregarding the evidence in the case, the court below may have come to the conclusion that this was true, and from his findings we infer did so. The constitution guards the homestead from loss by a mere temporary renting. If buildings not adapted to the purposes of a home had been erected on lot 5, and such disposition made of them and the lot as was inconsistent with a continued intention again to use the lot for the purposes of a home, a different case would be presented.

Lots 5, 6, and 7 were for a long time evidently the homestead of the family, and before either of them, while they continue under one common ownership, will cease to be a part of it, it must be applied to a use inconsistent with the uses for which the homestead is protected; to uses which clearly show an intention no longer to use it for the purposes of a home. The court below was justified in holding that no such use was made of the lot; that there was no intention to abandon it as a part of the home and to rent it permanently; that it was in fact and in law a part of the homestead of the family. There was evidence, slight though it may have been, from which the court was authorized to find that, while the houses on the lot were rented to others, the lot was more or less used all the time by the appellees and their family for home purposes. That the appellants may at one time have thought of selling the lot would have but slight bearing on the question of abandonment. They might desire to sell the three lots, but, unless they did so, this desire could not affect the homestead right so long as they continued to use them for the purposes of a home; and if, with a desire to sell it, they temporarily rented it, intending to return to it if they could not make a sale to suit them, then the temporary renting would not affect their homestead right. It appears, however, from the evidence, that the intention to sell lot 5 had been relinquished. The court below, no doubt, gave to the evidence of a desire, at one time, to sell lot 5, such weight as he thought it entitled to; and gave no weight, in disposing of the case, to the fact that the lot was the separate property of William Calhoun.

The sole ground on which there can be any pretense that the judgment is erroneous is that the evidence required a different finding by the court; but, after a careful examination of all the evidence, we are not prepared to say that it so preponderated in favor of the proposition asserted by the appellant as to justify this court on that ground to set the finding aside; nor that it did not justify the finding made by the court below. The judgment will therefore be affirmed.

BARKER v. TORREY and others.

(Supreme Court of Texas. June 24, 1887.)

1. SCHOOL LANDS—PAYMENT OF INTEREST.

Under the Texas act of April 12, 1883, which allowed actual settlers to purchase certain school lands upon payment of one-thirtieth of the purchase money, and one year's interest, at the time of purchase, such payment of interest is in full discharge of all interest claim, or claim for use of such land, for one year from the date of such payment.

2. CONSTITUTIONAL LAW—PUBLIC LANDS—EXTENSION OF TIME.

A statute which extends the time limited for the payment of interest on the purchase price of school lands is not retroactive, within the meaning of the constitutional inhibition of statutes of that character.

3. SCHOOL LANDS—EXTENSION OF TIME—CONSTITUTIONAL LAW.

A statute which extends for five months the time limited for the payment of interest on the purchase price of school lands does not relieve the purchasers from any liability, and is not in conflict with article 7, § 4, of the Texas constitution, which declares that the legislature "shall have no power to grant any relief" to purchasers of lands set apart to the public school fund.

Appeal from circuit court, Jones county.

Chas. I. Evans, for appellant. *Bentley & Bouyer*, for appellee.

STAYTON, J. This suit is one in which the appellant, to be entitled to the relief which he seeks, must show that he has the superior right to the land which is the subject of controversy; hence, although he seeks equitable relief, it is essentially an action to try title. Such being the character of the suit, the pleadings were such as rendered any proper evidence to show the title of either party admissible.

J. B. Lewis, being an actual settler in good faith on the land prior to January 1, 1883, on December 29, 1883, made an application to purchase the section of which that in controversy is a part, in accordance with the provisions of the fifth section of the act of April 12, 1883, (Gen. Laws, p. 85;) and, on January 30th following, he paid one-thirtieth of the purchase money, and one year's interest. On May 9, 1885, Lewis conveyed the south half of the section to Jane G. Torrey. At some time subsequent to the first day of August, 1885, Lewis not having made any further payment of interest, the secretary of the state land board entered on the account kept by him with Lewis a declaration that the land was forfeited on account of the failure of Lewis to pay interest for the year 1884; and on February 16, 1886, he certified to the commissioner of the general land-office that the land had been forfeited, and the account of Lewis canceled. After this, the section of land was again placed on the market, under the provisions of the act of April 12, 1883, and the regulations of the state land board. On June 22, 1886, the appellant made application to purchase the south half of the section, and on July 10, 1886, the land was awarded to him, on his application, at two dollars per annum, and he at once paid one-thirtieth part of the purchase money. On March 5, 1886, the appellees tendered the sum due as interest for one year on the entire unpaid purchase money for the whole section, and this was refused, on the ground that the right of Lewis or his vendee had been forfeited, and his contract to purchase canceled.

The court below held that the payment of interest made by Lewis at the time he purchased was in full of all interest due prior to January, 1885, and it is urged that this was erroneous. The purchase by Lewis was under the provisions of the fifth section of the act of April 12, 1883, which permitted actual settlers to purchase school lands which had been appraised under the first and second sections of the act of April 6, 1881, at the price fixed by that appraisement; and such purchasers were required to make a payment of one-thirtieth of the purchase money, and one year's interest, at the time of purchase. Such purchasers were also required to pay interest at the rate of 8 per cent. per annum, as provided by the act of April 6, 1881, instead of 5 per cent., as required of other purchasers under the act of April 12, 1883.

After making some other provisions not material to notice, the act last named declares that "such purchasers shall, in all other respects, conform to the provisions of this act; provided, however, that any such person, desiring to purchase any of said lands so appraised, shall, within six months from the time this act takes effect, file in the general land-office his application to purchase

said land, describing it, and on payment of one-thirtieth of the purchase money, and one year's interest," etc.

As before said, Lewis paid one-thirtieth of the purchase money, and interest for one year at the rate of 8 per cent. per annum on that unpaid at the time of his purchase. There is nothing in the act to evidence an intention that such a purchaser should pay anything for the use of the land prior to the time of his purchase. It required "one year's interest" to be paid at the time of the purchase, and the statute declared that "interest is the compensation allowed by law, or fixed by the parties to a contract, for the use, forbearance, or detention of money." Rev. St. art. 2972.

The relation of debtor and creditor must in some way be created before any one can be entitled to interest, for, until this is so, one cannot be said to use or detain money for which another is entitled to compensation, or that there is forbearance on the part of one to receive from another money to which he is entitled. The payment of interest may be required at the time the debtor is first permitted to use or detain the money of the creditor, at fixed periods before maturity of the debt or at maturity; and the right to interest will continue to exist after maturity of the debt, so long as the creditor, by forbearance, permits the money to remain unpaid.

Actual settlers have always been bound by the laws of this state; and the act of April 12, 1883, continuing the same policy that had been before pursued, gave to such persons a preference right to buy, which continued for six months after the passage of the act. No instance can be found in the legislation of this state in which the actual settler has been required to compensate the state for the use of public lands before the time he became the purchaser; and it is not to be presumed that it was the intention of the act of April 12, 1883, to reverse this policy, and to require such persons to pay for the use of land prior to purchase, from the simple fact that one year's interest was required to be paid at the time of the purchase. If the intention had been to require compensation for the use of the land prior to purchase, in the nature of rent, it would have been easy to say so, and that such intention existed cannot be presumed from the sole fact that one year's interest was required to be paid in advance.

The act of April 12, 1883, provided for leasing lands for stock and ranch purposes, and left the manner of the payment of rent to be regulated by the land board. The act of April 1, 1887, also provides for the lease of public lands, and requires that "the lessee shall pay an annual *rental* of four cents an acre for all pasture lands leased, which *rental* shall be paid each year in advance." Gen. Laws, p. 87.

The legislature must be presumed to have understood the meaning of words used in laws enacted by it, and especially so when a word or words used had been expressly defined by statute. When the word "interest" was used, there being nothing in the context to evidence a contrary intention, it must be presumed that the legislature intended it to have the meaning which general usage as well as the statutory definition gives, and not that it meant rent or compensation for the use of land before the date of purchase, or a part of the principal of the purchase money.

Under the theory of the appellant it would be necessary for Lewis or his vendee to pay interest for 31 years on a debt which could not possibly exist for a period longer than 30 years. The payment of interest by all such purchasers as Lewis, except for the first year, was regulated by the ninth section of the act of April 12, 1883, which provided that interest should be payable on or before the first day of March of each year. The interest year would be computed from the date of the purchase, whether the interest was paid in advance or not; but the interest for any given year was not required to be paid until March 1, of each year, although the interest year might expire before that

time. The court below correctly held that the payment of interest for one year at the time the purchase was made, satisfied all claim for interest for one year from that date, and that the declaration of forfeiture on account of the non-payment of other interest prior to March 1, 1886, was unauthorized.

The second payment of interest was due at the end of the second year, computed from the date of purchase; but, under the act of April 12, 1883, Lewis or his vendee had until the first day of March, 1886, to pay it. Before that time arrived, the legislature, through the act of February 16, 1885, provided that "if the payment of annual instalments of interest be made by the first day of August succeeding the first day of March, when the same became due, then no forfeiture shall result or be taken for such delay in such payments." Gen. Laws, 1885, p. 14. If this legislation be not forbidden by the constitution, it is evident that no ground of forfeiture existed; for the interest due on March 1, 1886, was tendered on the fifth of that month.

It is contended that the act of February 16, 1885, in so far as we have quoted it, is violative of that provision of the constitution which forbids retroactive legislation; and also of section 4, art. 7, which declares that "the legislature shall have no power to grant any relief to purchasers" of lands set apart to the public free school fund. It is evident that the law is not forbidden by section 16, art. 1, of the constitution, and we are not prepared to say that it is in violation of section 4, art. 7. A statute which would, if given effect, free the purchaser from obligation to comply with his contract to pay principal or interest, would doubtless violate the section of the constitution last referred to. Such, however, is not the effect of that part of the act of February 16, 1885, which we have quoted.

Notwithstanding that statute, the obligation of the purchaser to pay both principal and interest in strict accordance with his contract, and the law under which it was made, continued; and the state, like any other creditor, could enforce all rights and claims which would ordinarily legally grow out of the fact that the interest was not paid on the very day it became due and payable. The statute did not release the purchaser from any obligation arising from the contract or its breach. The effect of the statute was, while leaving the purchaser fully bound, to suspend the right which the state had to cancel the contract, and thus to forfeit the right of the purchaser to have the executory contract carried out, if the annual interest was not paid on or before the first day of March. The forfeiture of the right to have the land would necessarily free the purchaser from obligation to pay for it.

Cases may arise in which it would be, in a popular sense, a relief to a purchaser to have his contract canceled, as when lands contracted for are not worth, and would not sell for, as much as the balance due under the contract; and in such cases it could not be said that the state, by suspending for a time its rights to forfeit, had given relief to purchasers. In times of great financial depression, or in cases of public calamity, affecting a part or the whole of the state, purchasers of school lands may be unable promptly to pay annual interest; and in such cases it may be to the interest of the state and of the school fund to suspend for a time the right to forfeit school lands on account of the failure of purchasers to pay interest on the day it becomes due; and, if the legislature does so, we are not prepared to say that its act is violative of the constitution.

In the case before us no forfeiture had accrued when the act was passed, and, relying on its validity, the purchaser, recognizing the fact that the law did not relieve him from obligation to pay the interest on the first day of March, tendered the payment on the fifth of that month. The rule is that a law will not be declared unconstitutional unless it is clearly so, and in cases of doubt it will be held valid. The opinion of the legislature of its constitutional power is entitled to great weight; and, if it had not clearly the power to suspend for a time the right of the state to forfeit the right of purchasers

of school lands, the question is, to say the least, a matter of such doubt as to render it improper for this court to declare its act unconstitutional.

The interest was tendered before the time expired within which, under the act, the interest was required to be paid, and we are of the opinion that the land was not subject to resale at the time the appellant attempted to purchase it. Proof of tender made on March 5, 1886, was admissible under the pleadings.

We find no error in the judgment of the court below, and it will be affirmed.

GOULD v. CITY OF PARIS.

(*Supreme Court of Texas. June 21, 1887.*)

1. MUNICIPAL CORPORATIONS—BONDS—LIMITATION OF FUND FOR PAYMENT.

Ordinance No. 45 of the city council of Paris authorized the issue of certain bonds and coupons in payment of a balance due from the city on account of the purchase of a steam fire-engine, provided that payment of principal and interest on said bonds should be made by means of an annual tax of one-tenth of 1 per cent. on the assessed value of the city's taxable property, and further provided that no part of the current expense fund should be used for such payment, and an acceptance of the bonds by the company, to whom they were issued, was to be construed as a consent to these provisions. In an action against the city to enforce payment of certain of said coupons, brought by the holder, who had them from the company aforesaid, held that, as the bonds state upon their face that they were issued under said ordinance, holders of them are bound by the provisions of said ordinance relating to the payment of the bonds.

2. SAME—BONDS—LIMITATION OF TAXING POWER.

Rev. St. Tex. art. 420, (re-enacting the act of March 15, 1875, § 76,) which allows cities to borrow money for the purpose of discharging their accrued indebtedness, and erecting hospitals, city hall, water-works, etc., and which was the law at the time the contract in question was made, is limited by section 9 of article 8 of the constitution, which provides that "the state tax on property * * * shall never exceed 50 cents on the 100 dollars valuation, and no county, city, or town shall levy more than one-half of said state tax, * * * except as in this constitution otherwise provided." The only exception to this limitation of the tax to be levied by cities relates to those of over 10,000 inhabitants; but as plaintiff, who is seeking to coerce the city into the exercise of its taxing power, which it can possess only through the organic or statute law of the state, and on whom, consequently, the burden rests of showing that this power has been granted, has failed to show that Paris contained more than 10,000 inhabitants, he cannot claim for it powers specially granted to cities of that size, which are not conferred upon those of less population. Consequently, the legislature, at the time said contract was made, having already levied a tax of one-fourth of 1 per cent. for current expenses, the city council of Paris had no power to levy the tax for the payment of said bonds and coupons; the contract itself was for that reason void, and the city is not liable for the payment of said bonds and coupons.

3. LIMITATION OF ACTIONS—IMPLIED CONTRACT.

The fire-engine for the payment of which the bonds and coupons in question were issued, was obtained in 1877. The right of action on an implied contract to pay for it was barred by the statute of limitations of Texas at the expiration of two years. Consequently an action to enforce such contract could not be maintained in 1883.

4. MUNICIPAL CORPORATIONS—BONDS—INVALIDITY.

In such action, plaintiff's claim being void, he is not entitled to the balance remaining of the tax already collected under said act, because the money was paid to the city, to be paid to the plaintiff only on condition that he had a valid claim against the city.

Appeal from district court. Lamar county.

Hale & Scott, for appellant. *M Carey, Lightfoot & Denton*, for appellee.

WILLIE, C. J. The city of Paris purchased of the Silabee Manufacturing Company a steam fire-engine, hose-cart, and hose for \$6,625; paying \$1,000 of the amount in a fire-extinguisher, \$1,125 in cash furnished by the citizens of Paris, and for the remainder executing 18 bonds, each for \$250, dated February

10, 1877, due 10 years after date, with 8 per cent. interest payable annually. To these were attached coupons covering the interest accruing upon the bonds. This suit was brought to recover the amount of some of the matured coupons. There was an alternative prayer for the value of the property sold to the city in case the plaintiff was held not entitled to recover upon the coupons. The suit was by Gould, who claimed to have purchased the bonds from the party to whom they were issued. The bonds recited the purpose for which they were issued, and also that they were authorized by ordinance No. 45 of the city council of Paris. This ordinance authorized the execution and delivery of the bonds and coupons in discharge of the balance due from the city upon the purchase; and further provided for an annual tax of one-tenth of 1 per cent. on the assessed value of the city's taxable property for the purpose of paying the principal and interest of said bonds. It was also a special provision of the ordinance that no part of the current expense fund, nor any part of the interest and sinking fund provided for the payment of the principal and interest on the old debt, should be used or held responsible for the bonds and coupons issued under the ordinance; and an acceptance of the bonds by the company's agent was to be construed as a consent to this provision. The city, in defense, claimed that there was no power under the constitution and laws to issue the bonds, and that limitation barred the claim for the value of the property purchased. The city also relied upon the provision of the ordinance that no part of the current expense fund should be used to pay the bonds, and that of this the appellant had notice, and prayed that the bonds be brought into court and canceled. Other defenses were set up, and the plaintiff filed exceptions to the various pleas of the defendant, all of which were overruled. These it will not be necessary to recite.

It was proved that the city had for three years collected the one-tenth of 1 per cent. authorized by the ordinance, and had applied it to the payment of the coupons and 2 per cent. sinking fund on the bonds, till enjoined by the district court, and that about \$300 of the amount thus collected was still in the treasury. It was shown, too, that the indebtedness of the city at the date of the bonds and ordinance did not amount to 6 per cent. of the taxable property of the city. The cause was submitted to the district judge, who held that the city had no power to create the debt or issue the bonds, and that the plaintiff could not recover either upon the bonds, or the value of the engine; but as the city having assessed and collected taxes to pay the bonds, and \$300 still remaining in the treasury, which had been voluntarily paid by the taxpayers, the city should be held a trustee for plaintiff for that sum. Judgment was rendered for plaintiff for the \$300, and canceling the bonds and coupons still in the hands of the plaintiff, and the latter has appealed to this court.

The purchase of the engine, the passage of the ordinance, and the execution of the bonds were contemporaneous acts, all occurring on the tenth of April, 1877. They were parts of the same transaction, and must be construed together in arriving at the rights and obligations of the parties to the contract. The city purchased the engine, paying part of the purchase money in cash or its equivalent, and executing its coupon bonds for the balance. According to the terms of the ordinance these bonds were to discharge the balance, and they were to be paid by the annual levy of an *ad valorem* tax of one-tenth of 1 per cent. on the taxable property of the city. No part of the current expense fund was to be used in their payment. The Silsbee Manufacturing Company accepted the bonds in discharge of the balance due it, and hence became bound to look to the levy of this particular tax for the payment of the bonds, and the indebtedness represented by them, and agreed that no part of the current expense fund should be used in payment of them. These were the features of the contract important to a decision of this case. The recitation in the bonds that they were issued in pursuance of the ordinance, which was described by number, date, and caption, and open to the

inspection of the world, put every one dealing in these bonds upon full notice of the ordinance by virtue of which they were issued. Hence the plaintiff, as well as the Silsbee Manufacturing Company, must be treated as agreeing to take the bonds in discharge of the indebtedness, and not to look to the current expense fund for their payment. It is a principle of law, sustained by the highest authority, that when a municipal corporation contracts a debt to be paid by taxation, if it has not the power to levy the tax, the debt cannot be enforced against it. "The right to contract must be limited by the right to tax; and if, in the given case, no tax can lawfully be levied to pay the debt, the contract itself is void for want of authority to make it. * * *

The validity of a contract which can only be enforced by a resort to taxation depends on the power to levy the tax for that purpose." *Loan Ass'n v. Topeka*, 20 Wall. 660. As the present debt was to be paid by a resort to taxation, and the levy was not to be of taxes devoted to the payment of current expenses, the vital question is, did the city of Paris have the power to levy any other character of tax for the purpose of paying these bonds and coupons, or the debt which they represented?

Article 420 of our Revised Statutes, which is but a re-enactment of section 76 of the act of March 15, 1875, allows cities to appropriate so much of their revenues, no matter from what source derived, as may be necessary for the purpose of retiring and discharging their accrued indebtedness, and for the purpose of improving the public markets and streets, erecting and conducting city hospitals, city hall, water-works, etc., as they may from time to time deem expedient. It also allows them, in furtherance of these objects, to borrow money and issue coupon bonds of the city therefor, provided that the aggregate amount of the bonds issued shall at no time exceed 6 per cent. of the value of the property within the city subject to *ad valorem* tax. The act of 1875 was in force when our present constitution took effect, and remained in force thereafter, and at the time this contract was made, except in so far as it was repugnant to the constitution. Gen. Prov. § 48. Admitting, therefore, that the language of the above section authorized the imposition of a tax to pay a debt contracted by a city for a fire-engine, the authority conferred was effectual on February 10, 1877, only in the event that it was not in contravention of the then existing constitution.

In testing this question, we have only to examine such provisions of our constitution as are applicable to cities of 10,000 inhabitants or less; for, although there was no proof as to the population of Paris on the tenth of February, 1877, yet, as the plaintiff was seeking to coerce the city into the exercise of a power which it can possess only through the organic or statute law of the state, the burden was upon him to show that this power had been granted. If granted to some cities, and not to others, it was in the necessary line of his proof to show that Paris was of the class thus favored by the state. Having failed to show that Paris contained more than 10,000 inhabitants, he cannot claim for it any powers specially granted to cities of that size which are not conferred upon cities of less population. In our view, two sections only of our state constitution have any bearing upon the question before us. One of these is section 4, art. 11, and reads as follows: "Cities and towns having a population of ten thousand inhabitants or less may be chartered alone by general law. They may levy, assess, and collect an annual tax to defray the current expenses of their local government, but such tax shall never exceed, for any one year, one-fourth of one per cent., and shall be collectible only in current money. And all license and occupation tax levied, and all fines, forfeitures, penalties, and other dues accruing to cities and towns, shall be collectible only in current money." The other is section 9, art. 8; and, as it existed when the present contract was made, reads as follows: "The state tax on property, exclusive of the tax necessary to pay the public debt, shall never exceed fifty cents on the one hundred dollars valuation; and no county,

city, or town shall levy more than one-half of said state tax except for the payment of debts already incurred; and for the erection of public buildings not to exceed fifty cents on the one hundred dollars in any one year, and except as in this constitution otherwise provided."

The first of these sections contains a grant of power to levy taxes, to a specified extent, for a particular purpose; and, if it stood alone, might be construed not to prohibit taxation for other objects if authorized by the legislature. But the other section is clearly prohibitive, and fixes the maximum of *ad valorem* taxation, whether levied by cities, counties, or towns, at one-half of the state tax, with certain exceptions. The only exception named in the section itself is the tax for the erection of public buildings. If there be other exceptions, they are to be ascertained by reference to other portions of the constitution. The only section claimed as making an exception to the general rule laid down in section 9, art. 8, is the above-recited section 4 of the eleventh article of the constitution. But this cannot, in a case where the state has levied 50 cents on the \$100, be said to fix a maximum different from that prescribed in the other section. Hence, in such a case, it cannot be said to be an exception so far as the maximum per cent. of taxation is concerned. If the state levies less than 50 cents on the hundred dollars, then doubtless a city of 10,000 inhabitants or less could still levy one-fourth of one per cent. by virtue of article 11, § 4. A different maximum would be prescribed, and the special grant of the last-named section would prove an exception to the general grant contained in the other. *Lufkin v. Galveston*, 68 Tex. 437.

In the case just cited it was held that the city of Galveston, containing, as it did, over 10,000 inhabitants, could, by authority of the legislature, levy a tax of 106 cents on the hundred dollars; that amount being allowed by the special authority given in article 11, § 5, Const. Article 8, § 9, was held to be the general rule as to taxation which would govern in all cases where there were no exceptions prescribed; and, a different maximum being prescribed for cities of over 10,000 inhabitants, they were entitled to tax up to that maximum. The converse of this proposition is also true, that, when the limit is the same, the one clause is no exception to the other; and this is the case so far as the smaller class of cities is concerned. The limitation to one-half the state tax applies to such taxes as are levied for city purposes, which would include current expenses. Reading the two sections together, a city of the smaller class could levy one-fourth of 1 per cent. for current expenses alone, but could not go beyond that amount for any and all corporate purposes, saving those made the subject of special exceptions by the constitution itself. In other words, the constitution said that these smaller cities might levy 25 cents on the hundred dollars for current expenses; but, when they have done so, they have reached the limit beyond which they are prohibited to go, and they shall levy no other tax except for the other purposes mentioned in the constitution. If the state should levy less than 50 cents on the hundred dollars, and their limit should thereby be reduced to less than 25 cents on the hundred dollars, they may still impose that amount of tax for current expenses. Should they not need so large a tax for their current expenses, they might levy a smaller amount, and also another tax for other corporate purposes, provided the two together did not exceed the one-half of the state tax, or 25 cents on the hundred dollars. Thus stood the constitution and the statute law at the time the present contract was made and the bonds issued. The legislature had not at that time the power to authorize the city of Paris to levy the proposed tax when she had already levied one-fourth of 1 per cent. for current expenses. The constitution forbidding it, the legislative act granting the power must be construed inapplicable to the city of Paris in its then condition. The city having no power to levy the tax for the payment of the bonds, or the indebtedness for which they were given, the contract itself was void, and the court below did not err in its conclusions upon this question.

It is unnecessary for us to determine whether the plaintiff could recover, in a proper case, upon an implied contract to pay for the engine. The contract implied from one person's obtaining the property of another without compensation is that he will pay for it immediately. The law implies nothing as to payment at a future date. That must arise upon express contract, or some cause of dealing between the parties, or like circumstances. This engine was obtained by the city on the tenth of February, 1877. The right of action upon the implied contract was barred at the expiration of two years from that time. This suit was commenced in 1883, nearly six years thereafter. The statute of limitations was pleaded by demurrer; the other facts appearing in the petition, and the case, upon the law and facts, was submitted to the judge. He could not have found otherwise than for the defendant upon this issue in the state of the pleadings.

We think, however, that the court erred in rendering judgment against the city for the \$300 produced by the unlawful tax, and remaining undisposed of in the treasury. This money was collected to pay a supposed debt, and was paid to the city in trust that it would be paid over to the plaintiff only in the event that he held a valid claim against it. Otherwise its collection would doubtless have been resisted. If, therefore, the city held it in trust for the plaintiff, this trust was accompanied with the conditions stated. This suit having developed the fact that the debt did not exist, the city could not pay the money over to the plaintiff without a violation of this condition; and it follows, of course, that he could not have a judgment for its recovery.

For this error the judgment will be so reformed as to deny a recovery of the amount decreed in favor of the appellant, and in all other respects it will be affirmed.

GAINES, J., did not sit in the cause.

PARALEE v. STATE.

(*Supreme Court of Arkansas. May 23, 1887.*)

DISORDERLY HOUSE—PROSTITUTES—ORDINANCE FORBIDDING PRESENCE WITHIN TOWN.

A municipal corporation cannot punish, as a criminal offense, the return to the town or city of a prostitute. The mere presence within the town limits of an objectionable person is not a crime. *Buell v. State*, 45 Ark. 336, followed.

Appeal from circuit court, Ouachita county.

B. W. Johnson, for appellant. *Dan W. Jones*, Atty. Gen., for appellee.

COCKRILL, C. J. The town ordinance under which the appellant was convicted is not brought upon the record. There is no bill of exceptions. It is disclosed, however, that the appellant was tried upon the charge of "returning to the town of Camden, being a prostitute;" and the finding of facts, as set out in the judgment, is as follows, viz.: "That on or about the twentieth day of May, 1886, in the said town of Camden, county of Ouachita, state of Arkansas, the defendant, Roxie Paralee, did return to the town of Camden, being a prostitute, which was in direct and open violation of the ordinance of said town." Upon this finding a fine was adjudged against her.

The statute authorizes the punishment, under municipal ordinances, of lewd and lascivious behavior in the streets or other public places, and the suppression of indecent and disorderly conduct; but the appellant was not found guilty of any of the offenses enumerated in the statute, nor was she accused of any overt acts. The power to suppress bawdy and assignation houses is also conferred upon municipalities, and this may be effected by prohibiting the keeping of such places, by forbidding the renting of premises for such purposes, by forbidding lewd women to reside therein, and by other like prohibitions. But there is no power vested in the Camden town council to make

Roxie Paralee's mere presence in the town limits a crime, whatever her character for chastity may be. That was, in effect, what was decided in *Buell v. State*, 45 Ark. 336. The charge against the appellant is not an offense punishable by a municipal corporation, and the judgment is reversed, and the cause remanded.

BANNON v. STATE.

(*Supreme Court of Arkansas. May 28, 1887.*)

CONSTITUTIONAL LAW—CLASS LEGISLATION—RAILROAD COMPANIES—SECTIONS 3 AND 21, CONST. ARK. 1874—ACT FEBRUARY 3, 1875.

The act of Arkansas of February 3, 1875, (Mansf. Dig. § 5545,) provides: "If any section boss or master, hand, or other person employed by any railroad company owning and operating any railroad in this state, or any other person connected with any railroad in this state, shall be caught mutilating, disfiguring, burning, hauling off, or burying any dead carcass that shall be killed on any railroad in this state, without first notifying at least two citizens of the neighborhood, whose duty it shall be to take and preserve all marks, flesh or ear or otherwise, or value of such animal, brute, swine, or other stock, shall be deemed guilty of a misdemeanor, and be fined, etc." Held, that the power of the legislature to enact such a statute is found in the general control which the state has reserved over all agencies for the public safety and protection, and to guard properly the rights of other persons, and that it is not class legislation, nor repugnant to sections 3 and 21, art. 2, Const. 1874, guarantying the equality of all persons before the law.

Appeal from circuit court, Sharp county.

Newman Erb and *Caruth & Erb*, for appellant. *Dan. W. Jones*, Atty. Gen., for appellee.

COCKRILL, C. J. The appellant was convicted, and a fine of \$25 was assessed against him, for a violation of the following provision of the statute:

"If any section boss or master, hand, or other person employed by any railroad company owning and operating any railroad in this state, or any other person connected with any railroad in this state, shall be caught mutilating, disfiguring, burning, hauling off, or burying any dead carcass that shall be killed on any railroad in this state, without first notifying at least two citizens of the neighborhood, whose duty it shall be to take and preserve all marks, flesh, or ear or otherwise, or value of such animal, brute, swine, or other stock, shall be deemed guilty of a misdemeanor, and be fined in any sum not less than \$25, nor more than \$500, for such offense." Mansf. Dig. § 5545.

The appellant was a section boss in the employ of the Kansas City, Springfield & Memphis Railroad Company, and was charged with hauling off and burning stock that had been killed by the company's trains, without first notifying citizens of the neighborhood. His motion for a new trial does not question the adequacy of the testimony to sustain the verdict against him, and he has not challenged here the correctness of the court's charge to the jury. The question pressed for consideration is the constitutionality of the provision of the statute under which the conviction was had.

It is argued that the section is special legislation, discriminating against the employees of railroads, and that it is therefore repugnant to the guaranty of the constitution that the equality of all persons before the law shall remain inviolate, and is not "the law of the land," within the meaning of the bill of rights. Const. 1874, art. 2, §§ 3, 21. The provision is taken from the act of February 3, 1875, requiring railroad companies to pay for damages to persons and property caused by the running of its trains. One of the main objects of the act is to secure the citizens living in the neighborhood of the lines of railways in the recovery of damages against the companies for negligently killing their stock. The obligation to fence the track was not imposed upon the companies, as it has generally been elsewhere,

but they are required to furnish the stock-owner with facilities for ascertaining that his stock has been injured, and the opportunity of identifying it afterwards. This is done by making it incumbent on the company to post a notice at the station-house nearest to the place of the injury, giving a description of the animal injured, with a statement of the time and place of the injury; and, further, by a compliance with the requirements of the provision in question. The power of the legislature to impose upon railroad companies the obligation of affording the stock-owners every reasonable facility for obtaining the evidence of the injury he has sustained by the running of their trains, and of enforcing the performance of the duty by prescribing a punishment for its neglect, cannot be doubted. The right is found in the general control which the state has reserved over all agencies for the public safety and protection, and to guard properly the rights of other persons. The maxim, *sic utere tuo ut alienum non laedas*, lies at the foundation of the power. Cooley, Const. Lim. 710, note; Id. *575 *et seq.*

A punishment in damages in double the value of the animal injured, to be recovered of the company inflicting the injury by the owner, if he is entitled to recover at all, is imposed upon the company for a neglect to post the notice required by the act. Mansf. Dig. § 5538. All of the objections, and others as well, that are now urged against the provision upon which the prosecution is founded, have been made against that last cited, but they have been adjudged to be insufficient to affect the validity of the act, and it has successfully withstood the assaults of the companies. *Little Rock & Ft. S. R. Co. v. Payne*, 33 Ark. 816; *Memphis & L. R. R. Co. v. Horafall*, 36 Ark. 651; Cooley, Const. Lim. *579, and cases cited in note 1; *Humes v. Missouri Pac. Ry.*, 82 Mo. 221; *Houston & Tex. Cent. Ry. v. Harry*, 63 Tex. 256.

The provision in question is of a piece with the double-damage feature of the act, and was designed to stimulate the companies' servants to perpetuate the evidence of the injuries done through the acts of themselves or their co-employees, and the punishment that is prescribed against them is intended simply to compel an enforcement of the statutory duty in aid of the stock-owner. Without a penalty the provision would be worthless. The punishment for removing the culpatory evidence against the company, without complying with the requirements of the statute, is pronounced against all upon whom the duty of performing the obligation is cast; and the section is not partial, within the inhibition of the constitution. Cases *supra*; Cooley, Const. Lim. *390; *McAunich v. Railroad*, 20 Iowa, 338; *Iowa Ry. v. Soper*, 39 Iowa, 112; *Davis v. State*, 3 Lea, 376.

The same power that authorizes the punishment of railroad companies, without extending its operation to other companies or persons, for a failure to post the notice of wounding, justifies the punishment of railroad employees alone for a violation of a like statutory obligation on their part. Let the judgment be affirmed.

MASCOWITZ v. STATE.

(Supreme Court of Arkansas. May 23, 1887.)

INTOXICATING LIQUORS—SALE TO MINOR—PERMISSION OF PARENT.

The written consent of the father of a minor, as follows: "Please let my son John have anything in reason, or a drink when he wants it, and oblige a friend," signed and delivered to the defendant by the father, is a continuing authority to sell to such minor, and until revoked a complete defense to an indictment for selling liquor to such minor in ordinary retail quantities, without the consent of his parent or guardian.¹

Appeal from circuit court, Garland county.

L. Leatherman, for appellant. *Dan W. Jones*, Atty. Gen., for appellees.

¹See *State v. Lowrance*, (N. C.) 2 S. E. Rep. 367, and note.

COCKRILL, C. J. The appellant was indicted for selling liquor to a minor without the consent of his parent or guardian. The proof showed that the minor's father sometimes visited the appellant's saloon, and on one occasion when the appellant refused to let his son have beer on account of his non-age, the father, believing that his son, who was about 19 years of age, would not become a drunkard, wrote and delivered to the appellant on the spot the following order:

"*Mr. Maschwitz*: Please let my son John have anything in reason, or a drink when he wants it, and oblige a friend.

[Signed]

"M. P. HARRISON."

The appellant sold the young man drinks, from time to time, upon the authority of the order, and on one occasion sold him a pint-flask of whisky. He was convicted and appealed.

The order was a continuing authority to sell to the minor. It was evidently so intended by the father, and had not been revoked when the liquor was sold. It was not the province of the court to declare, as a matter of law, that a pint of whisky was not a quantity within reason for a youth to have; and the judge, acting in the capacity of jury, was not authorized to so conclude in this case. The statute vested the right in the father to determine whether his minor child should be allowed to buy liquor without inculcating the seller, and he could, by his written consent, remove the law's prohibition against a sale to his son. *Mansf. Dig.* § 1878. An order given to authorize a sale of liquor should be construed as liberally in a criminal prosecution as it would be in an action to test the maker's civil liability. The order offered in this case would be sufficient to render the maker liable (if there was nothing else to prevent) for any quantity of liquor ordinarily sold to a customer at retail by the person to whom it was addressed. It was sufficient to justify the appellant in making the sales proved, and he should have been acquitted. Reverse the judgment, and remand the cause.

WIDNER v. STATE.

(*Supreme Court of Arkansas. May 28, 1887.*)

SCHOOLS AND SCHOOL-DISTRICTS—CUTTING TIMBER—CONSENT OF DIRECTORS.

In an action of trespass by the state against one who has cut timber on school lands, and converted the same to his own use, an authority to cut the timber derived from the school directors of the district is no defense, as no power with reference to the disposal of such lands is confided by law to the school board.

Appeal from circuit court, St. Francis county.

Geo. H. Sanders, for appellant. *Dan W. Jones*, Atty. Gen., for appellee.

COCKRILL, C. J. The appellant cut timber on the sixteenth section, or school land, and converted it to his own use, under an agreement with the school directors of the school-district in which the land was situated to pay them the value of it. The state sued him for the trespass, and recovered judgment. He has appealed, and relies upon the consent obtained from the school directors as a defense to his action. The statute authorizes the collector of taxes to sell the school lands subject to certain conditions and regulations, but no power in reference thereto had been conferred upon the school boards. It is for the state to determine how and by whom these lands shall be managed and sold, and until she has conferred the authority upon the school boards they can confer no right upon any one to cut the timber, or commit any other trespass upon the land. The legal title to the land is in the state. It is held in trust for the support of schools for the inhabitants of the township in which it is situated. *Mayers v. Byrne*, 19 Ark. 308, 313. The right of the state to sue for the injury is therefore clear, (*Dickinson v. Harris*, 48 Ark. —, 3 S. W. Rep. 58,) independent of the provisions of the act of March 4s.w.no.10—42

17, 1883, (Acts 1883, p. 140,) and the questions mooted by counsel under that act are not presented by the record. The appellant cannot be regarded otherwise than as a trespasser, and the recovery was right. Let the judgment be affirmed.

CLARK v. STATE.

(*Supreme Court of Arkansas.* May 28, 1887.)

CARRYING WEAPONS—MANSF. DIG. ARK. § 1907—"OWN PREMISES."

Under Mansf. Dig. Ark. § 1907, making the carrying of weapons a misdemeanor, except upon the defendant's "own premises," the common stairway of a building, on the upper floor of which defendant and other persons rented and occupied offices for business purposes, is a public place, and cannot be claimed by defendant to be his own premises.

Appeal from circuit court, Phillips county.

F. T. Vaughan, for appellant. *Dan W. Jones*, Atty. Gen., for appellee.

SMITH, J. The defendant was indicted for carrying a pistol as a weapon. On the trial, which took place before the court without a jury, it appeared that the defendant occupied two rented rooms in the second story of a certain building as his law office; that three other persons had their offices or rooms on the same floor of the building; that there was a stairway leading from the sidewalk or street to the several rooms, and furnishing the only means of ingress or egress to their occupants, and others desiring to go into or from said rooms; and that, at the head of this stairway, the defendant was on one occasion seen with a pistol about his person. The defendant asked the court to declare the law to be that the stairway was a part of his premises; but this was refused, and a declaration the reverse of this was made.

Section 1907 of Mansfield's Digest makes the carrying of weapons a misdemeanor; but a proviso recognizes the right of one to carry a weapon "upon his own premises." In *Kinhead v. State*, 45 Ark. 536, we decided that this proviso protects those only who have an estate in the real property which constitutes the premises. Doubtless, a tenant in possession of leased premises has such an interest. *Brumley v. State*, 12 Tex. App. 609; *Zallner v. State*, 15 Tex. App. 23. Now, Clark had the right to use the flight of steps in ascending to or descending from his rooms; but so also did the occupants of the other rooms, and the public generally who had occasion to visit any of the rooms for purposes of business or pleasure. It does not appear that he had the legal right to exercise any authority or control over the stairway, either exclusively or in connection with the other tenants of the building. The stairway was a public place, and in no sense the private premises of Clark. If it was the premises of any one, it was of the landlord. *Downman v. State*, 14 Ala. 242; *State v. Black*, 9 Ired. 378.

Christian v. State, 40 Ala. 376, was an indictment for selling liquor under a statute which forbade it to be sold to be drunk on or about the premises; and it was held that a public road immediately in front of a store was "about the premises," within the meaning of the law. But that statute was in terms much broader than ours. Compare *Brown v. State*, 31 Ala. 353; *Daly v. State*, 33 Ala. 431.

The defendant had no more right to wear a weapon on the stairway than on the sidewalk in front of the building. Affirmed.

RANSOM v. STATE.

(*Supreme Court of Arkansas.* May 28, 1887.)

1. CRIMINAL PRACTICE—ARRAIGNMENT.

When the accused voluntarily pleads to the indictment, without formal arraignment, and the court accepts the plea, he impliedly waives the right to hear the indictment read.

2. WITNESS—COMPETENCY—INFAMY.

The provision—Code Civil Proc. Ark. (Mansf. Dig. § 2859)—declaring persons convicted of larceny, and other enumerated crimes, incompetent to testify, unless by consent of the parties, does not apply to criminal trials. The disqualification is removed in such cases by act of March 24, 1885, enabling accused persons to testify at their own request. It is reversible error, therefore, to exclude the testimony of accused persons on the ground of infamy.

Appeal from circuit court, Franklin county.

J. V. Bourland, for appellant. *Dan W. Jones*, Atty. Gen., for appellee.

SMITH, J. The record does not show that the indictment was read to the defendant, and that he was required to say in open court whether or not he was guilty of what was therein alleged against him. But it does show that he entered his plea of not guilty, and announced himself as ready to proceed to trial. As the object of an arraignment is to obtain defendant's plea, and as it may be dispensed with by the court with his consent, it follows that if he voluntarily pleads to the indictment, without being formally arraigned, and the court accepts his plea, this is an implied waiver of his right to hear the indictment read. Mansf. Dig. §§ 2150, 2154; 1 Bish. Crim. Proc. (3d Ed.) §§ 728, 739, and cases there cited.

On the trial the prisoner offered to testify in his own behalf. He admitted that he had, before that time, been convicted of grand larceny, and had served out his term of imprisonment in the penitentiary. Upon the objection of the prosecuting attorney, he was excluded as a witness. The Code of Civil Procedure declares that persons convicted of larceny, and other enumerated crimes, shall be incompetent to testify, except by consent of the parties. Mansf. Dig. § 2859. But this provision has no application to criminal trials, as was ruled in *Werner v. State*, 44 Ark. 122. However, infamy was a disqualification at common law; and the disqualification continues, unless it has been removed by statute.

The act of March 24, 1885, enacts "that on the trial of all indictments, informations, complaints, and other proceedings against persons charged with the commission of crimes, offenses, and misdemeanors, the person so charged shall, at his own request, but not otherwise, be a competent witness." This abrogates the common-law rule, and gives the accused the absolute, unqualified right to testify. The enabling statute makes no exceptions; and the courts can make none. It is a universal right, and it matters not that the defendant may be branded by a judgment of conviction for an infamous crime. He still has the privilege of stating to the jury any matter calculated to explain the charge against him, and of exonerating himself, if he can. *Delamater v. People*, 5 Lans. 332; *Newman v. People*, 6 Lans. 460, 63 Barb. 630.

The judgment is reversed, and a new trial ordered.

MAYES v. STATE.

(*Supreme Court of Tennessee*. January 15, 1887.)

LARCENY—WHAT IS—FINDING AND APPROPRIATING.

Under Code Tenn. § 5451, providing that "if any person come, by finding, to the possession of any personal property of which he knows the owner, and unlawfully appropriates the same * * * to his own use, he is guilty of larceny," etc., one who finds a cuff button is not guilty of larceny because he refuses to give it up upon demand by the owner, if, at the time he found it, he did not know who the owner was.

Appeal from circuit court, Warren county.

Indictment for larceny, with a count for receiving stolen goods knowing them to have been stolen. The subject of the larceny was a cuff button. The proof was that the prosecutor and defendant were sitting near each other under a tree. After a time the prosecutor rose and left, the defendant re-

maining. After the prosecutor had left, the defendant was seen to pick up a cuff button from the ground where the prosecutor had been sitting. When the prosecutor, before leaving the place, missed his cuff button, and it became known to the witness, who saw the defendant pick it up, he informed the prosecutor of what he had seen. When the defendant was asked for the button, he denied having it, or having seen it, and became angry.

After a correct charge to the jury on the subject of larceny and receiving stolen goods, the trial judge proceeded: "The defendant, by his counsel, insists that he found the button of the prosecutor, and did not know to whom it belonged, and hence did not intend any larceny or criminal conduct with respect to it. Section 5451 of the Code provides that 'if any person come, by finding, to the possession of any personal property of which he knows the owner, and unlawfully appropriates the same, or any part thereof, to his own use, he is guilty of larceny, and shall be punished accordingly.' Now, if you find from the proof that the sleeve button mentioned in the indictment was lost by the prosecutor, and was found and appropriated by the defendant, and at the time of finding and appropriating it he did not know to whom it belonged, he would not then be guilty; *but if, after thus finding it, he afterwards ascertained that it was the property of the prosecutor, and still concealed it, and fraudulently kept it, intending to deprive the true owner of his property, he would then be guilty.*"

F. M. Smith, for accused.

The theory of the defense is that the defendant found the cuff button which the prosecutor had lost, and, not knowing the true owner at the time he found it, he appropriated it to his own use. This is not larceny. *Bish. Crim. Law*, § 859; *Morehead v. State*, 9 Humph. 635, 639; 2 *Bish. Crim. Law*, § 860, and note; *Tanner v. Com.*, 14 *Grat.* 635-637. If the defendant found the cuff button which was lost, and, not knowing the true owner at the time, appropriated it to his own use, but, on being accosted about it soon thereafter by the owner, denied having the button, and denied all knowledge of it, with a view of keeping it, he would not be guilty of larceny. See *Tanner v. Com.*, 14 *Grat.* 635-637; 2 *Bish. Crim. Law*, § 860, and note. Two things must be made to constitute the offense: *First*, felonious intent to appropriate at the time of finding; *second*, reasonable belief that the owner may be found. See *Bish. Crim. Law*, § 680.

The charge of the honorable circuit judge is erroneous. He says: "But if, after thus finding it, he afterwards ascertained that it was the property of the prosecutor, and still concealed it, and fraudulently kept it, intending to deprive the true owner of his property, he would then be guilty." The paragraph of the charge immediately preceding this, to which this is antithetical, is correct, and the judge should have closed with it on this point. The objectionable paragraph makes larceny without any felonious taking. If the original taking and appropriation was lawful, any subsequent refusal to give the goods up would not make larceny.

The Attorney General, for the State.

The request is immaterial. (1) The button was not lost. The prosecutor knew where it was all the while. It could not be the subject of "finding," nor fall within section 5451 of the Code Tenn. pp. 10, 11; *Lawrence v. State*, 1 Humph. 228, *Cassels v. State*, 4 Yerg. 149; *Porter v. State*, Mart. & Y. 226; *Wright v. State*, 5 Yerg. 158. It was taken directly from defendant, without "finding," and the facts make a case of ordinary larceny. (2) The plaintiff in error is shown to have known, at time of taking it, whose it was. "He need not know the exact spot where it [the property] is, or the particular place in a house or field or road, but it is sufficient if he knows it well enough to be able to regain it, if not disturbed, when he desires to do so." *Pritchett v. State*, 2 Sneed, 288. Unless the property was lost, it is not essential that he know whose property it was.

FOLKES, J. This case is reversed for error in the charge of the court, wherein it was said, after a correct statement of the law: "But if, after finding it, he afterwards ascertained that it was the property of the prosecutor, and still concealed it, and fraudulently kept it, intending to deprive the true owner of his property, he would then be guilty." This is manifest error, under the well-established rule in this state, whatever may be the holding by the English and some of the American states. It may have misled the jury, as there was evidence in the case to which such charge might well have been applied by the jury; in consequence of which we reverse, notwithstanding the fact that on the first count the verdict might very well have rested under the proof in the cause. It is not necessary that the indictment should charge a loss and finding under section 5451 of the Code. A conviction can be had on an ordinary indictment for larceny, such as is contained in the first count, upon proof of facts that bring the case within said section of the Code.

NASHVILLE, C. & ST. L. R. CO., in Error, v. SEABORN.

(*Supreme Court of Tennessee. February 9, 1887.*)

1. RAILROAD COMPANIES—CROSSINGS—CONSTRUCTION OF STATUTE.

Code (M. & V.) Tenn. § 1298, par. 4, requires that "when any person, animal, etc., appears upon the road, the alarm whistle shall be sounded, the brakes put down," etc. *Held*, that the requirement was not applicable to a collision which was caused by the tongue of the wagon in which the plaintiff's intestate was riding catching in the locomotive, and drawing the wagon along-side, and thus causing the death; neither the wagon, nor the mules that were pulling it, having got upon the track before the accident occurred.

2. SAME—PUBLIC ROADS AND TURNPIKES.

● Code (M. & V.) Tenn. § 1298, pars. 1, 2, provides that when a train is approaching a crossing of a public road, distinguished by a sign, "Look out for the cars when you hear the whistle or bell," it shall give signals in a certain manner. *Held*, that the section had no application to a turnpike crossing at which no such sign had been put up, and that it was error for the trial justice to charge it to the jury in a suit for damages for a death caused by a collision at such a crossing.

3. NEGLIGENCE—DEATH BY MALICE—INSTRUCTIONS.

It is error to introduce into the charge the question of malice on the part of the crew that was running the train at the time of the accident, when there is no evidence in the case tending to show such malice.

Error to circuit court, Wilson county.

East & Fogg and Tarver & Golliday, for the company, plaintiff in error.
F. E. Williams and Thompson & Son, for Seaborn, defendant in error.

SNODGRASS, J. This action for damages for the negligent killing of Isaac B. Seaborn was brought by his widow, for use of herself and children, against the Nashville, Chattanooga & St. Louis Railroad Company. Seaborn was killed by a train on the road of plaintiff in error on the twenty-second November, 1879, at the crossing of said road and the Stewart's Ferry turnpike in Davidson county. At the time of the accident, Seaborn, with three others, was in a wagon returning from Nashville on said pike. The other occupants were two men and a boy, the latter driving. About 4:30 P. M. of the day mentioned, they arrived at the crossing. It was a clear evening, but no one of the party appears to have seen or heard the train until the moment of the collision. They had approached the crossing in a walk, without thinking of or noticing for the train. Just as they reached the crossing, and before the mules they were driving had stepped upon the track, Seaborn said "Look out, Lewis," speaking to the driver. The other two occupants of the wagon, whose backs were turned in the direction from which the train came, (Seaborn's face having been in that direction,) looked around, and saw the cow-catcher of the train in front of the mules. The mules drew back. The end of the tongue struck and caught in the engine, the wagon was drawn along-

side of it, and Seaborn killed; being found, after the train had passed, in the stock gap, mortally injured, of which injuries he died that night.

The three survivors of the accident testified that no whistle was sounded or bell rung on the engine as it approached, and that they did not see or hear the train until near the moment of the collision. On the other hand the engineer, fireman, front brakeman, and conductor testify that the whistle was sounded and the bell rung for the crossing,—the bell one-fourth of a mile, and the whistle a hundred yards, before reaching it; that the danger signal was given, and the engine reversed, as soon as the danger appeared, 40 or 50 feet from the crossing. Other witnesses, passengers on the train, testify to same effect.

These are the substantial facts as reported by the commission of referees, to which there is no exception on either side. Plaintiff in error excepts to some opinions and erroneous conclusions, but no question is well made upon the correctness of the facts detailed, and they are the facts of the record, upon which this court therefore acts. The commission further reports, and the fact is, that all the persons in the wagon were well acquainted with the road and the crossing, and it is further reported that there were many other facts and circumstances tending to show gross negligence on the part of the plaintiff in error, and gross contributory negligence on the part of the deceased. To this part of the report plaintiff in error alone excepts, and by some specific exceptions brings out other parts of the record for consideration; but, in the view we have taken of the case, this need not be noticed, as the part referred to as reported is sufficient to determine the error of the judgment. There was a verdict for plaintiff of \$10,000, and judgment accordingly, motion for a new trial being overruled, and defendant appealed in error. To the report of the commission of referees, which was in favor of affirmance, many exceptions besides those already noticed are taken, addressed to errors in the charge of the court, and to excessiveness of the verdict.

The errors principally complained of in the charge are those resulting from the attempted application of the statute requiring the observance of certain duties on the part of the railroad companies to prevent accidents, as set forth in section 1298 of the New Code. After explanation of the pleadings, and charging in reference to the statute of limitation, not now material to be quoted, the court said: "The laws of Tennessee have prescribed certain rules to be observed by railroad agents in the running of the train, which, if observed, protect the road against damages for injuries occurring on the road. On the other hand, if the agents fail to comply with the requirements of the statute, and to use all reasonable means in their power to prevent accidents, the road will be held responsible for such damages as may occur from the wrongful acts of its agents." Then follows a quotation of the four sections referred to, with two following sections, making the company liable when these precautions are neglected, and excusing it from liability when they are observed. To this the court adds: "If you find from the proof that the agents of the company were in the performance of the duties required of them by law, your verdict should be for the defendant. But if the agents of the defendant were neglecting any of the duties required of them by subsection 4, § 1298, [of the New Code,] at the time of the accident, your verdict should be for the plaintiff," etc.

Further on, the court instructs the jury that "it is conceded on both sides that the crossing where the accident occurred was at a turnpike, and not at a public or county road, and that there was no sign up 'Look out for the cars,' etc. If you find the facts as conceded, * * * the statute requiring the whistle or bell to be sounded one-fourth of a mile before reaching the crossing, and continuing it at short intervals to the crossing, would have no application to this case, and would leave the parties to their common-law rights, so far as regards the ringing of the bell and sounding the whistle." "At such crossing," he adds, "each must respect the rights of the other, and use due

cation to prevent accidents to persons traveling upon the other, and also to avoid accidents to themselves as passengers over the track. When a railroad company, or its agents, are running a train in violation of the statutory provisions as set forth in section 1298, subsec. 4, and an accident occurs to another during said period, the injured party is entitled to recover, although guilty of negligence at the time which may have greatly contributed to the accident. Such negligence is proper, and should be looked to in mitigation of damages, but not as an answer to the action. But a different rule prevails where the road or its agents are not running in violation of some one or more of said statutory requirements. In such case, if the accident was the result of the plaintiff's negligence, he cannot recover; for, if the accident was caused by the gross negligence of the plaintiff, he is considered the author of his own misfortune. If a party is guilty of some negligence, and is injured by the wrongful act of another, such negligence will not prevent a recovery, unless the damage could have been avoided by ordinary prudence; but if the party could, with ordinary prudence, have prevented the accident, but did not use that prudence, and his want of care and his negligence caused the damages, the plaintiff should not recover, unless the act was *willfully done* on the part of defendant."

There are several objections made to this charge which are well taken. The first, that the statute should not have been given in charge at all, as it had nothing to do, as a whole, with the case, is proper to be first disposed of. There was no part of this statute, except that providing for keeping the "engineer, fireman, or some other person upon the locomotive always upon the lookout ahead," which had any application to the case, and its use, and the attempt to apply section 4 from it is done in a manner calculated to mislead the jury. The *whole* of section 4, applied by the court, was not applicable, as it clearly appears that these animals and wagon tongue struck had not appeared upon the track until the very instant the tongue caught in the engine, and hence no question about an appearance upon the track, and the observance or non-observance of statutory precautions when such appearance is made, should have been allowed to enter into the consideration of the jury. If any negligence existed, it was not the non-observance of these statutory duties, but the non-observance of the common-law obligations of the company to have the lookout watch for, and all hands prevent, the occurrence of any accidents about to happen from some other cause than an object already on the track. The jury should have been told nothing about the statute further than is suggested, or further than to be told that it had no application.

There was, besides, positive error in the instruction against allowing a recovery in plaintiff's favor "unless the act was willfully done on the part of the defendant." This left the jury to conclude that, upon the facts proven, they would have the right to find that the act was willfully done, when nothing in the record would justify the conclusion, and nothing in it called for the charge.

The charge is also objectionable, in stating the propositions insisted upon by plaintiff, and the denials of defendant, in this: that the propositions of plaintiff are enumerated; and it is then added: "The *most* of these propositions are denied by the defendant;" "and then to several of them counter-propositions of defendant are stated, in which defendant is limited to a special denial, among other things, of the rapid speed rate urged by plaintiff as negligence, to 'about twelve miles an hour.'" This charge left the jury to infer that the court did not understand all of plaintiff's positions or claims for recovery to be denied, and that defendant, instead of being allowed to controvert plaintiff's position, "that the train was running at a too rapid rate of speed," by *any* denial was limited to an issue of 12 miles an hour tendered in their proposition. It was not incumbent on the circuit judge to repeat the propositions of parties; but if he sees fit to do it, in the vital form attempted, he must not so state them as

to leave the jury to suppose the case conceded away, unless that concession appears otherwise in the record.

No other objection to the charge need be noticed. It is obvious that it, or something else, misled the jury, as indicated by the amount of the verdict. There is nothing in this case justifying the amount given. The deceased was grossly negligent, and, whatever may have been the negligence of the defendant, a proper consideration of the contributory negligence of the deceased should have caused a different verdict.

The report of the commission is disapproved, judgment reversed, and case remanded. Defendant in error will pay costs on appeal.

ST. LOUIS, I. M. & S. R. CO. v. CITY OF ST. LOUIS.

(*Supreme Court of Missouri.* June 6, 1887.)

APPEAL—ADMINISTRATIVE ORDER—RAILROAD COMPANIES.

Where the charter of a railroad corporation provides, in substance, that the company shall have full power and authority to build their road along or across any state or county road, or the streets and wharves of any city, town, or village, whether corporate or otherwise, an order for the same being first had from the county court of the proper county, *held*, the granting of such order is an exercise of the administrative discretion of the court, from which an appeal does not lie to the circuit court.

Appeal from St. Louis circuit court.

T. J. Portis, for respondent. *L. Bell*, for appellant.

BLACK, J. The St. Louis, Iron Mountain & Southern Railway Company presented its petition to the county court of St. Louis county asking for the right to lay its tracks upon certain streets and alleys in the city of St. Louis. The matter was continued from time to time, in order that the objections of various persons and corporations might be heard. The city of St. Louis, by its law officer, appeared, and insisted that the court had no jurisdiction over the subject-matter, but the court made the order as prayed for, and the city appealed to the circuit court. The proceedings remained in that court from 1876 to 1885, without any steps having been taken by either party, when the plaintiff filed a motion to dismiss the appeal on the ground that the act of the county court was purely discretionary, and not the subject of review, and that the city was no party to the proceedings, and had no right to prosecute an appeal. The motion was sustained; and the only question here is whether the appeal should have been dismissed for the reason stated in the motion.

By the charter of the St. Louis & Iron Mountain Railroad Company, and the special act therein mentioned, (Laws 1851, p. 479; Laws 1837, p. 271.) it is provided: "The company shall have full power and authority to build said road along or across any state or county road, or the streets and wharves of any city, town, or village, whether corporate or otherwise; * * * but, before such right shall vest in said company, they shall apply to the county court of the proper county for such right, and, having filed in the office of the recorder a plat of said road, and the manner in which it is to cross said roads or streets or other public way, and if the county court is satisfied that no great injury will be done to the public, they may, by an order of said court, give the right of way to said company to use the same for that purpose."

The present corporation claims to have succeeded to the rights of the former one, and it is under this special act that the county court made the order. On the other hand, the city insists that the county court lost the power to give the right of way over the streets, and that that power became vested in the city authorities by reason of section 56 and the fifth paragraph of section 28 of the general railroad law of 1853, (Laws 1853, p. 121,) and for the further reason that in 1874 the St. Louis & Iron Mountain Railroad Company was consoli-

dated with the Cairo, Arkansas & Texas Railroad Company, and the name of the corporation remained unchanged. Subsequently, in the same year, the St. Louis & Iron Mountain Railroad Company was consolidated with the Cairo & Fulton Railroad Company, under the name of the present corporation; and that, in consequence of these acts of consolidation, the present corporation became subject to the general laws.

If the right to an appeal from the order exists at all, it is because of section 2, p. 480, 1 Wag. St., now section 1102, Rev. St. 1879, and section 22, p. 442, 1 Wag. St., which were first enacted in 1870, and is now section 1210, Rev. St. The first of these sections defines the jurisdiction of the circuit courts, and gives to them appellate jurisdiction from the judgments and orders of county courts in all cases not expressly prohibited by law. The other in substance declares that, in all cases of appeal from county courts, the circuit court shall proceed to hear the case anew, as if the same had originated in the circuit court. Until 1870 the appeal accomplished nothing more than would be affected by a writ of *certiorari*. *Lacy v. Williams*, 27 Mo. 280; *St. Louis Co. v. Lind*, 42 Mo. 348. Now, it will be seen a trial *de novo* must be had in the circuit court. While the language of section 1102 is comprehensive, for it speaks of judgments and orders, still it must be construed in connection with section 1210, and be made to apply to such judgments and orders only as are in their nature susceptible of a trial anew in the circuit court,—to cases in which the circuit court may enter up a judgment of its own. In other words, the appeal can only be taken when the judgment or order appealed from is judicial. Even before the adoption of section 1210 it was held that an appeal or writ of error could not be prosecuted from an order of the county court ministerial in its character. *St. Louis v. Sparks*, 11 Mo. 202; *Tetherow v. Grundy Co. Court*, 9 Mo. 119. The county courts act as agents, and in a ministerial character, and not judicially, in the matter of location and removal of county-seats, (*State v. Justices County Court*, 41 Mo. 44,) and in many other cases that might be mentioned. These courts are but the agents of the counties in the allowance of accounts. If the account be rejected, the aggrieved party is allowed an appeal, not, however, because of the general appellate jurisdiction clause before mentioned, but because of a special statute applicable to such cases. Section 1216, Rev. St.; *State v. Justices Bolinger Co.*, 48 Mo. 475.

The county court, in granting the way over the streets under the special charter provisions before quoted, acted as the agent of the state in the management of the public highways. The procedure to acquire the right, if such it may be called, is not adversely a contract in the character of a suit at law, as equity is not contemplated. The right to grant the prayer of the corporation rests in the administrative discretion of the court. The circuit court is powerless to review this discretion, for no such power is given by the law. It could not proceed to hear the evidence, and from that say whether the right should or should not be given. Had the county court refused to make the order, or made an order refusing the prayer of the petition, it cannot be claimed that the railroad company could have prosecuted an appeal. If this special charter provision is not available to the present corporation, then the order is a nullity, and may be so treated collaterally. Whether available or not, the act of the county court is one from which the law has given no appeal. It may be questioned in many other ways. The circuit courts have a superintending control over county courts, but that control must be exercised according to the usages and principles of law. *Tetherow v. Grundy Co. Court*, 9 Mo. 121; *Vitt v. Owens*, 42 Mo. 512.

The order dismissing the appeal is therefore affirmed, on the ground alone that the order is one from which no appeal will lie.

(All concurred.)

STATE v. BEAUCLEIGH.

(Supreme Court of Missouri. June 6, 1887.)

1. CRIMINAL PRACTICE—VENUE.

Rev. St. Mo. 1879, § 1813, provides that the venue named in the margin of an indictment shall be taken as that of all the facts in the body of the same. The indictment herein laid the venue in a certain county in the margin and first three counts, and in the fourth and fifth laid the venue on a railroad train which passed through said county. The offense charged being both proved and admitted to have occurred in said county, *held*, that an instruction that but one offense is intended to be charged, and authorizing a verdict on any one of the counts, was correct.

2. SAME—EVIDENCE—ACTS AND DECLARATIONS OF DEFENDANT.

The acts and declarations of a defendant, after the commission of the crime, are competent evidence against himself, though not against his co-defendants.

3. SAME—DEFENDANT AS WITNESS—GENERAL REPUTATION.

When a defendant, on trial for swindling, has testified on his own behalf, testimony of other witnesses as to his general reputation is properly admitted.

4. SAME—INSTRUCTIONS.

An instruction on the doctrine of *falsus in uno*, etc., is in Missouri sufficient if it charge that the witness had willfully sworn falsely, the words "willfully" and "knowingly" being prescribed in the alternative in such cases.

5. FALSE PRETENSES—EVIDENCE.

In a trial for swindling on a train, where it was shown that defendant's colleagues had got off, after the commission of the crime, but defendant remained with their victim, the evidence of one of such colleagues, who had just testified, without objection, as to the gang's operations for 10 days previous to and up to the day of crime, describing their procedure in their prior operations, is admissible to prove defendant's intent in so remaining.

6. CRIMINAL PRACTICE—EVIDENCE—COMPETENCY.

A petition of defendant's bail to the governor for remission of the penalty incurred by defendant's failure to appear, is inadmissible to corroborate defendant's explanation of such failure; and such petition acquires no probative force from its filing with the secretary of state,—the remitter by the governor being recorded in the trial court, and offered to and refused by the defendant as evidence.

7. FALSE PRETENSES—INSTRUCTIONS.

An indictment for swindling being strictly drawn under Rev. St. Mo. 1879, § 1561, and the proof fully supporting the same, *held*, that an instruction to the jury to assess a punishment under said section, excluding from their consideration sections 1563, 1564, relating to similar offenses, but prescribing different penalties, was correct.

8. SAME—CONSPIRACY.

In a trial for swindling, an instruction asked, that the jury disregard all evidence tending to prove a conspiracy between the parties to swindle the public generally or any individual, *held* properly refused.

9. SAME—PUNISHMENT.

In a trial for swindling, an instruction asked, that, if the jury found the offense charged was committed on a railroad train, they should assess the punishment as for a misdemeanor under Rev. St. Mo. 1879, § 1564, the indictment being drawn, and the proof warranting a conviction of felony, under section 1561, *held* properly refused.

10. WITNESS—COMPETENCY—CO-CONSPIRATOR.

A detective who permits a swindle to be committed in his presence is not such a co-conspirator as to be incompetent to testify against the swindler on his trial for that offense.

11. SAME—CO-DEFENDANT ON CRIMINAL CHARGE.

A joint defendant in an indictment for swindling, as to whom a *nolle prosequi* has been entered, is a competent witness against another of the joint defendants, his credibility only being affected.

12. APPEAL—OBJECTIONS MUST BE RAISED BELOW.

Objections to questions asked a defendant on cross-examination must be made, and exceptions saved at the time. Of others the appellate court can take no cognizance.

13. SAME.

Testimony as to the reputation of the associates of a defendant on trial for swindling not having been objected to in the trial, its admission cannot be urged as error on appeal.

14. NEW TRIAL—CROSS-EXAMINATION—HARMLESS ERROR.

Questions improperly asked a defendant on cross-examination, the answers to which could have in no way affected the verdict, are no ground for a new trial.

Appeal from circuit court, St. Louis county.

The defendant, John C. Beaucleight, was jointly indicted at the May term, 1883, of the St. Louis county circuit court, with one William Beaucleight and Pat Byrns, under Rev. St. Mo. 1879, § 1561, for fraudulently obtaining from one Parrott \$350 by a bogus check. William Beaucleight, having obtained a severance, pleaded guilty, and a *nolle prosequi* was entered as to Byrns. Said section 1561 provides that any person "who, with intent to cheat and defraud, shall obtain from any other person or persons any money, property, or valuable thing whatever by means of any * * * 'confidence game,' or by means or by use of any false or bogus check, * * * shall be deemed guilty of a felony, and upon conviction be punished by imprisonment in the penitentiary for a term not less than two years." Under this section, defendant was convicted and sentenced to a term of seven years. His motion for a new trial being refused, defendant appeals. His counsel, among other points, contended that one Phillips, a detective, who had seen and permitted the swindling, should not have been allowed to testify, as being a co-conspirator; that Byrns also was an incompetent witness; that the court erred in confining the jury to the offense defined by section 1561 in the assessment of the punishment. The fourth and fifth counts of the indictment laid the venue on a moving railroad train. Rev. St. Mo. 1879, § 1564, provides that "whoever shall, on a railroad car, coach, or train, practice any confidence game not mentioned in the preceding section" (which makes three-card monte and such games a felony punishable by a fine not to exceed \$5,000, or imprisonment for from two to five years) shall be deemed guilty of a misdemeanor. It was contended that the jury should have been permitted to assess a punishment in accordance with one of these two sections. The other facts and points are sufficiently set out in the opinion.

Atty. Gen. Boone, for respondent. *Zach. J. Mitchell* and *A. McElhinney*, for appellant.

BRACE, J. The defendant was jointly indicted at the May term, 1883, of the St. Louis county circuit court with one William Beaucleight and Pat Byrns, under section 1561, Rev. St. 1879, for fraudulently obtaining from one Simpson C. Parrott the sum of \$350, by means of false and fraudulent representations and pretenses, and of a false and bogus check. A severance having been granted William Beaucleight, who afterwards pleaded guilty, and a *nolle prosequi* having been entered as to Byrnes, the separate trial of defendant came on at the November term, 1885, of said court, and resulted in a verdict of guilty against the defendant, and his sentence to the penitentiary for a term of seven years. In due time he filed his motion for a new trial, alleging, as grounds therefor, that the court admitted illegal testimony for the state, and excluded legal testimony offered by the defendant; that the court misdirected the jury in matters of law, failed to instruct the jury fully as to the law of the case, and refused proper declarations of law asked for defendant; and because the verdict of the jury was contrary to the law and the evidence in the case, and because of a variance between the proof and the allegations of the indictment. The motion for a new trial having been overruled, the defendant appeals to this court.

The court committed no error in permitting Phillips and Byrnes to testify as witnesses for the state. There is nothing in the record to show that the witness Phillips was in any manner disqualified, and the case against Byrnes, jointly indicted with the defendant, and confessedly guilty, having been disposed of by a *nolle prosequi* as to him, he was a competent witness. These facts only affect his credibility. *State v. Clump*, 16 Mo. 885; *Bish. Crim.*

Proc. §§ 1020, 1161. The acts and declarations of the defendant after the commission of the offense, though they could not have been given in evidence against his co-defendants, were competent against himself.

It is contended the court improperly admitted evidence of other offenses. The only testimony that we find in the record in which the action of the court was properly objected to and exceptions saved, which can be construed as obnoxious to this objection, is the following: The witness Byrnes was asked: "Was there any understanding between you as to the part to be taken by each in such transactions?" *Answer.* There was no direct understanding as I know of. *Question.* How did you know as to what each party was to do? *A.* On former occasions they done the same thing. *Q.* Done the same thing? What do you mean by the same thing? *A.* Well, when a man was beat of his money, the third man was to see that he went away all right,—see what he had to say afterwards. *Q.* Who would you call the third man in this transaction in reference to Mr. Parrott? *A.* John was the third man." The subject on inquiry immediately preceding the question objected to was the purpose of defendant in remaining on the train with Parrott after witness and Byrnes had gotten off at Pacific, and in answer to the question, "Was there any understanding as to what Johnnie was to do after he left Pacific," the witness had answered, "Not at that very time." Then he was asked the question objected to. The witness, before that, had given in detail the manner in which Parrott had been defrauded of his money, and the part which he and William and John Beaucleigh, the defendant, had taken in the transaction; and the subject of inquiry to which the question objected to was addressed, was the *quo animo* of defendant in remaining on the train with the victim of the confidence game after the train left Pacific, where the witness and William Beaucleigh had gotten off after obtaining his money. The witness had just before testified, without any objection on the part of the defendant, that he and the defendant and William Beaucleigh, for a week or 10 days previous to the night on which the offense charged was committed, had been engaged in the city of St. Louis playing confidence games, and that on that night they started out on the Missouri Pacific Railroad for the same purpose. The evidence objected to, tending to disclose the system on which such operations had been conducted by the parties for some days previous, up to, and including the time when this offense was committed with which defendant was charged, was admissible for the purpose of showing the intent with which the defendant remained on the train with the defrauded victim after he had been despoiled of his money. *State v. Myers*, 82 Mo. 559; *Bish. Crim. Proc.* §§ 1126, 1127; *Whart. Crim. Ev.* § 32; *State v. Bayne*, 88 Mo. 604.

After a careful examination of the evidence of the defendant in chief, and the questions asked him upon cross-examination, to which objections were made and exceptions saved, and which we can only consider, (*State v. Mills*, 88 Mo. 417,) we find there was no departure from the law requiring such cross-examination to be confined to matters referred to by the defendant in his examination in chief, except in one or two matters of no importance or significance in the case, the answers to which could in no way have had any effect upon the verdict.

The evidence of the witnesses introduced by the state in rebuttal, after the defendant had testified as a witness in his own behalf, as to his general reputation, was properly admitted. *State v. Clinton*, 67 Mo. 380; *State v. Palmer*, 88 Mo. 568. Their testimony as to the reputation of his associates not having been objected or excepted to on the trial, its admission cannot be urged here as error. *State v. Burk*, 89 Mo. 635, 2 S. W. Rep. 10; *State v. Burnett*, 81 Mo. 119.

The defendant offered to read in evidence in his behalf a petition of R. S. McDonald to the governor, praying for a remission of the penalty incurred by him as security for the defendant on his bond for his appearance to answer

the indictment in this case. The court refused to permit it to be read. On no principle of the law of evidence could the contents of such an instrument be introduced in this case. The facts therein stated could not be proved in this way; and the instrument, as to those facts, received no probative force by having been filed in the office of the secretary of state. The one evidential fact which the document had the force to prove—the *remittitur* by the governor of the penalty of the bond—had culminated in an entry of record in the case in the court in which it was then being tried, which entry the court offered to permit the defendant to read, which offer the defendant refused. No error was committed in the refusal of the court to permit the petition to be read.

Two objections are urged against the first instruction given by the court: *First*. That the court instructed the jury "that, although the indictment contained several counts, but one offense is intended to be charged;" whereas the venue of the first three counts is laid in St. Louis county, and the venue of the fourth and fifth is laid on a moving railway train, which, in the course of its voyage, passed through St. Louis county; and the instruction authorized them to convict on any of the counts if they found the act was committed in St. Louis county. *Second*. Said instruction confined the jury to the offense defined by provisions of section 1561 in the assessment of the punishment. It is only necessary to say, in answer to the first objection, that it was not only proven, but admitted by the defendant on the trial, that the offense charged was committed in St. Louis county. The venue laid in the margin of the indictment was St. Louis county. That section 1813, Rev. St. 1879, provides: "It shall not be necessary to state any venue in the body of any indictment, but the county named in the margin thereof shall be taken to be the venue for all the facts stated in the body of the same;" and that the more particular description of the *locus in quo*, contained in the fourth and fifth counts, was not inconsistent with the venue laid in the margin. As to the second objection. The offense charged in the indictment is the offense defined, and for which the punishment is prescribed, by section 1561. The indictment was drawn strictly in accordance with the terms of that section, and in the form therein prescribed. The evidence corresponded with the allegations of the indictment, and tended to prove the offense therein charged, and the instruction very properly directed the jury to assess the punishment in accordance with the provisions of that section of the statute.

The court, in its instruction to the jury upon the doctrine of *falsus in uno*, etc., instructed them that they were at liberty to disregard the evidence of a witness who had *willfully* sworn falsely. It is contended that the instruction was erroneous in that the word "knowingly" was not also inserted in qualification of the false oath. The correctness of the instruction as given is sustained by a number of decisions of this court. *State v. Elkins*, 63 Mo. 159; *White v. Maxey*, 64 Mo. 552; *State v. Palmer*, 88 Mo. 568. The last case is cited by counsel in support of their contention. It is directly in point to the reverse. There is a world of difference between the little words "and" and "or."

Of the instructions asked by the defendant four were refused. The first was to the effect that the jury should not take into consideration any evidence tending to prove a conspiracy between the parties to cheat and defraud the public generally, or any individual whom they might meet; the second and third had no bearing upon the case; and the fourth directed them that, if they found the offense was committed on a railroad train, they should assess the punishment as for a misdemeanor, under section 1564, Rev. St. 1879. There was no error in refusing these instructions. The instructions given by the court upon its own motion, and those given at the request of the defendant, very fully and fairly presented the law of the case to the jury. If the evidence given by the witness Byrnes was true, there can be no doubt of defend-

ant's guilt. His testimony was strongly corroborated, not only by the evidence of the witness Phillips, who was in no sense an accomplice, but by the other witnesses who testified in the case.

The evidence was sufficient to sustain the verdict, and the judgment of the circuit court is affirmed.

(All concur.)

DUNKMAN v. WABASH, ST. L. & P. RY. CO.

(*Supreme Court of Missouri. June 6, 1887.*)

NEGLIGENCE—CONTRIBUTORY—DEGREES OF NEGLIGENCE—RAILROAD COMPANIES.

Plaintiff was injured by a train of freight cars while they were backing into a coal-yard, without having a man stationed on top of the car at the end of the train furthest from the engine, to give danger signals, as required by an ordinance of the city of St. Louis. *Held*, in an action for damages, that, notwithstanding the plaintiff may have been guilty of contributory negligence, the railroad company was still liable for the injury if it could have been prevented by the exercise of reasonable care on the part of the company, after discovery of the danger in which the plaintiff stood, or if the company failed to discover the danger through its own recklessness, when the exercise of ordinary care would have discovered it, and averted the calamity. SHERWOOD, J., dissents.

Appeal from St. Louis court of appeals.

A. R. Taylor, for appellant. W. H. Blodgett, for respondent.

RAY, J. This action was brought in the St. Louis circuit court, by the plaintiff against the defendant, to recover damages, on account of personal injuries sustained by reason of alleged negligence on the part of the agents and servants of defendant in the conduct and management of an engine and train of cars within the limits of said city. At the trial before the circuit court, there was a verdict and judgment for plaintiff, from which defendant appealed to the St. Louis court of appeals, where the judgment of the circuit court was reversed, and the cause remanded; from which the plaintiff appealed to this court.

A brief digest of the opinion of the court of appeals is found in the appendix to 16 Mo. App. at pages 547 and 548, and is to the effect following: "(1) An objection to the introduction in evidence of an ordinance, on the ground that the subject is not clearly expressed in its title, cannot be made for the first time on appeal. (2) Such an objection is waived if not made at the trial. (3) The rule that negligence of the plaintiff which contributes directly to cause the injury complained of will prevent his recovery, is without exception or qualification." The opinion itself is found in the record before us, but is not otherwise reported, except as above stated.

The petition (as said by the court of appeals) predicates the plaintiff's right of recovery upon the violation of an ordinance of the city of St. Louis, numbered 10,805, which requires the observance of certain precautions in the running of locomotives and cars, propelled by steam, in the city of St. Louis. The parts of that ordinance material to the case will be noticed hereafter.

The answer contained—*First*, a general denial; *second*, contributory negligence on the part of the plaintiff. The *third* branch of said answer was to the effect following: That the spur railroad switch track on which the injury occurred was upon the private grounds of Donk Bros. & Co., owned and operated by them as a coal-yard, for their exclusive use and benefit as coal merchants; and that for the purpose of facilitating the reception of car loads of coal, and selling same to their customers, without unloading, said Donk Bros & Co. had caused, by agreement with defendant, said switch track to be connected with the railroad track of defendant adjacent thereto, under an agreement between defendant and said Donk Bros. & Co. that the latter should keep a watchman to notify employees or their patrons of the approach of trains,

and warn them to get out of the way of danger; and that the persons so employed in said yard, and especially plaintiff, had knowledge thereof, and were accustomed to rely on said watchman for warnings of danger; and that plaintiff's injuries were caused by failure of said watchman to warn him of the approach of defendant's engine and cars, while moving on said spur track, or by his failure to look and listen to said watchman for such warnings from said watchman, and not by any fault of defendant's servant. The reply was a general denial.

The evidence in the record tends to show the nature and extent of the injury complained of, and that, at the time of the injury, the plaintiff was standing upon a coal car of the defendant, upon a certain switch, or "spur railway track," in the coal-yard of Donk Bros & Co., unloading coal from said car into a wagon belonging to his employer, Allewell; that the servants of defendant, in charge of a locomotive engine of defendant, backed a freight train of cars against a car adjacent to the one on which plaintiff was standing, with such force and violence as to throw the plaintiff from the car on which he was standing, in such manner as to cause the injuries complained of; that the engine and train of cars approached the plaintiff from behind; that he was, at the time, looking at the coal upon the car which he was engaged in unloading, and that, while so engaged, he did not stop or turn to look or listen for the approach of an engine or train, although he was aware that they were accustomed and liable to come in on said "spur railway track," at frequent intervals; that plaintiff, while so engaged, seemed unconscious of the approach of said engine and train, until the concussion and accident took place; that the bell upon the locomotive was not being sounded, nor was there a man on the top of the car furthest from the backing engine, to give danger signals, as required by said city ordinance, and that there was nothing to obstruct the plaintiff from the view of those in charge of the approaching backing train, if they had been at their post, and attentive to the situation of things in plain view. The evidence was conflicting as to the ringing of the bell, but there was no pretense that there was a man on top of the car furthest from the backing engine; nor was there any pretense but what the plaintiff might have seen and heard the approaching train, if he had looked and listened, in time to have got out of the way.

The city ordinance in question was offered in evidence by plaintiff, to which the defendant made only general objections, on the score of incompetency, irrelevancy, and immateriality; and also because it was not pleaded in substance, or *in hæc verba*, etc. Section 2 of that ordinance is as follows: "Sec. 2. It shall not be lawful, within the limits of the city of St. Louis, for any car, cars, or locomotives, propelled by steam-power, to obstruct any street crossing by standing thereon longer than five minutes; and when moving, the bell of the engine shall be constantly sounded within said limits; and if any freight car, cars, or locomotives, propelled by steam-power, be backing within said limits, a man shall be stationed on top of the car at the end of the train furthest from the engine, to give danger signals; and no freight train shall at any time be moved within the city limits without it be well manned with experienced brakemen at their posts, who shall be so stationed as to see the danger signals and hear the signals from the engine. The steam-whistle of danger shall in no case be sounded except in giving the usual signal for running trains.

At the close of the plaintiff's evidence, and also at the close of all the evidence, the defendant asked instructions in the nature of a demurrer to the evidence, which the court overruled, and defendant excepted.

At the close of the evidence, the court gave eight instructions for plaintiff, and five for defendant. Nine instructions asked by defendant were refused. The instructions given covered the different aspects of the case material to notice, as made by the pleadings and the evidence in the cause. The court of appeals, after disposing correctly of the objections, there made for the first

time, to the introduction in evidence of the ordinance in question, then proceeds as follows: "The other grounds on which we are asked to reverse the judgment relate to the giving and refusing of instructions. We have looked carefully through the instructions. They bear, for the most part, internal evidence of having been very carefully considered, in the light of what we regard as correct applicatory principles of law. One of them, however, we regard as fundamentally erroneous. The defendant asked an instruction, and the court refused to give it, as asked, but added a qualification to it, and gave it as thus qualified. This instruction, as given, was as follows; the qualifying words being in italics:

"No. 8. The court instructs the jury that if the plaintiff knew that, at the place of the accident, defendant was accustomed, with an engine, to switch cars loaded with coal onto, and empty cars off from, the track upon which he was at work, then it became and was his duty to keep a careful watch for the approach of such engine and cars, and that his diligence and vigilance in that behalf should have been increased in proportion as the danger of his position increased. If, therefore, the jury should believe, from the evidence, that the plaintiff, in his work of unloading a car of coal upon the switch track at the coal-yard of Donk, assumed a position upon the said car which he was so unloading, from which he was liable to be thrown by the striking of any car or cars being switched against it, and, having assumed such position, failed to keep a careful and diligent watch or lookout for such engine and cars as were moved onto or off of said track, but, on the contrary, turned his back to the direction from which the switch-engine and cars must come, or would come, then the jury are instructed that such conduct upon his part was negligence, and, if it contributed directly to bring about his injuries, he cannot recover, notwithstanding the defendant's servants were guilty of negligence which also contributed to bring about the plaintiff's hurt, *unless the negligence of defendant, as called for by the instruction No. 2 given you, was the proximate or efficient cause of the injury.*"

"Instruction No. 2, therein referred to, is as follows: 'No. 2. Even if the jury should believe, from the evidence, that the plaintiff took a position upon a car from which he was unloading coal, with his back turned towards a railway track from which trains were accustomed to approach, and although the jury may believe that the plaintiff did not use ordinary care in taking such position, yet if the jury further believe from the evidence that an engine and freight cars, propelled by steam-power, and operated by defendant's servants, did, on the sixteenth day of November, 1882, at a point near Palm street, in the city of St. Louis, back against a car connected with a car on which plaintiff was standing, with such force and violence as to throw plaintiff from said car, and cause him to be run against and injured; and if the jury believe, from the evidence, that at the time said cars, so backing against said car so connected with the car on which plaintiff was standing, caused said injuries to plaintiff, there was no man stationed on the top of the car at the end of the train furthest from the engine to give danger signals; and that a man so stationed on the top of said car could, by the exercise of ordinary care, have discovered that the plaintiff was in a position of danger, and was liable to be injured by being thrown from the car on which he was standing, and could, by the exercise of ordinary care, have averted said injury from plaintiff, either by giving warning to plaintiff of his danger, or signaling the engineer; and that no such warning or signal was given; and that such failure to give plaintiff warning, or to signal the engineer, directly caused plaintiff's said injuries,—then plaintiff is entitled to recover such damages as the jury may believe, from the evidence, will compensate him for the injuries so received, not exceeding ten thousand dollars.'"

Speaking of instruction No. 8, the court of appeals proceeds to say: "We do not see how this instruction can be sustained. If the plaintiff's negligence

'contributed directly to bring about the injury,' it was, in a judicial sense, a proximate or efficient cause of the injury. This being so, the defendant's negligence could not have been 'the proximate or efficient cause of the injury,' though it might have been a proximate cause. If both the negligence of the plaintiff and the defendant were proximate or efficient causes of the injury, the case becomes a case of concurrent negligence, and in such case the person hurt cannot recover damages. In our jurisprudence there is no exception or qualification to the rule that, if the plaintiff's negligence contributed directly to bring about the injury, he cannot recover damages of the defendant for the injury. Such a rule would abolish the whole doctrine of contributory negligence. For the giving of this instruction, as thus modified, the judgment must be reversed, and the cause remanded."

The propriety of this ruling of the court of appeals is the principal question now before us. A careful examination of the adjudications of this court in reference to the doctrine of contributory negligence will show, we think, that the learned judge of the court of appeals, in the foregoing opinion, has stated the doctrine too broadly, especially when applied to the facts of this case. The qualification appended to instruction 8 by the trial judge is, we think, in strict harmony with numerous decisions of this court heretofore rendered. By this qualification, instruction 8 was required to be read in connection with instruction 2, then referred to, and, when so read, the two, taken together, fairly present the exceptions and qualifications to the rule, as stated in various opinions touching that question, to the effect following: "Notwithstanding the injured party may have been guilty of contributory negligence, a railroad company is still liable for the injury if it could have been prevented by the exercise of reasonable care on the part of the company, after discovery of the danger in which the injured party stood, or if the company failed to discover the danger, through its own recklessness, when the exercise of ordinary care would have discovered it, and averted the calamity." This doctrine is recognized, in terms more or less explicit, in repeated decisions of this court, and among them are *Harlan v. Railroad*, 65 Mo. 22; *Kelley v. Railroad*, 75 Mo. 140; *Scoville v. Railroad*, 81 Mo. 440; *Welsh v. Railroad*, Id. 466; *Bergman v. Railroad*, 88 Mo. 678, 1 S. W. Rep. 384; *Rine v. Railroad*, 88 Mo. 392; *Frick v. Railroad*, 75 Mo. 595; *Merz v. Missouri Pac. R. R.*, 88 Mo. 672, at 677, 1 S. W. Rep. 382; *Drain v. Railway*, 86 Mo. 574, and 10 Mo. App. 531; *Karle v. Railway*, 55 Mo. 476,—besides other cases where the same exception and qualification of the rule is recognized.

The question whether the railroad company, in this instance, could have prevented the injury, by the exercise of reasonable care on the part of its servants in charge of the backing train, after discovery of the danger in which the injured party stood, or whether the company failed to discover the danger, through its own recklessness or carelessness, when the exercise of ordinary care would have discovered it, and averted the calamity, was, we think, submitted to the jury by instructions Nos. 8 and 2, when taken together; and the jury having found the issues against the defendant, upon evidence tending to establish the same, their decision in such cases is conclusive upon us.

There is a class of cases, happening in the county, at stations and in villages, where a different rule has been recognized and approved. There it has been said that "the liability of the company, in such cases, is limited to negligence and want of care, occurring after the exposed and dangerous position of the injured party came to the knowledge of the servants charged with the want of care." The theory that the servants of the company might, by the exercise of ordinary care, have discovered the dangerous position of the party injured, in time to have avoided the accident, it has been said, does not apply in such cases; that it is only in populous districts and large cities where the doctrine of the instructions complained of in this case has been most frequently applied and approved, (especially where, by ordinance, certain precautions and safe-

guards are required to be observed by those in charge of the conduct and management of moving trains within the city limits; or where some limitation has been imposed, by like ordinance, as to the rate of speed, while moving within said limits.) Of the class of cases above mentioned, as holding a rule different from the one at bar, the following may be named among them: *Rine v. Railway*, 88 Mo. 392; *Yarnall v. Railway*, 75 Mo. 583; *Maier v. Railway*, 64 Mo. 267; *Zimmerman v. Railway*, 71 Mo. 477. Even in the latter class of cases it has been held that the impossibility of checking the train after the discovery of the perilous condition of the party injured, by those in charge of the train, will not exonerate the company, if guilty of negligence beforehand which creates the impossibility. *Maier v. Railway*, 64 Mo. 267, 276, 277.

In the case of *Rine v. Railway*, 88 Mo. 400, *supra*, Justice BLACK, speaking of that case, uses this language: "There is no analogy between the case at bar, as respects the question under consideration, and those cases where the servants fail to observe some municipal or statutory regulation, and the injury is attributed, in whole or in part, to that, or where they are not found at their proper places when passing a public crossing, or going through a populous city or district, or fail to heed due warning of danger. These observations are sufficient to distinguish this case from *Frick v. Railway*, 75 Mo. 595, and *Kelley v. Railway*, *Id.* 138."

In the case at bar, it will be observed that the provisions of section 4 of city ordinance 10,305, hereinbefore set out, in connection with the evidence in the cause, sufficiently distinguish this case from that of *Rine v. Railway*, *supra*, and at the same time shows that it falls within the recognized principle of the cases there cited with approval.

We are therefore of opinion, and so hold, that the court of appeals erred in reversing the judgment of the circuit court on account of the instruction No. 8, as modified by instruction No. 2, as pointed out by the trial judge in that behalf. As to the third branch of defendant's answer, it is perhaps sufficient to say that even if it be conceded that a breach of the specified contract, on the part of Donk Bros. & Co., might possibly furnish defendant a cause of action against them for any damage thereby sustained, yet it certainly affords no defense to the present action. For these reasons the judgment of the court of appeals is reversed, and the cause remanded to that court, with directions to enter up a judgment affirming that of the circuit court; in which the judges all concur, except SHERWOOD, J., who dissents.

FILBRUN v. IVERS.

(*Supreme Court of Missouri. June 6, 1887.*)

1. PARTNERSHIP—DISSOLUTION—PURCHASE OF OUTSTANDING CLAIM.

After the dissolution of a partnership, but before the final settlement of accounts, the continuing partner bought in, for \$210, an outstanding promissory note of the firm of the face value of \$4,000, and claimed credit for the full amount in the final adjustment. *Held*, that the trust relation which exists between partners is not terminated with the dissolution, but continues until a final adjustment and settlement of the partnership affairs, and that only the amount actually paid in purchasing the claim should be credited.

2. SAME—REFERENCE—FINAL DECREE.

In a suit to settle the affairs of a partnership, it is the duty of the trial court, upon approval of the report of the referee, to so dispose of the assets of the firm, by order of sale or partition in kind or otherwise, as to make a complete and final settlement between the parties.

Appeal from circuit court, Cape Girardeau county.

R. L. Wilson and Oliver & Limbaugh, for appellant. Lewis Brown, for respondent.

RAY, J. This action was brought to settle the mercantile partnership entered into between plaintiff and defendant, in 1863, under the name and style of Filbrun & Ivers, and continued until July, 1880, when the same was dissolved. Plaintiff, Filburn, at this date, went out, leaving defendant, Ivers, in possession and control of the store, goods, notes, book-accounts, etc. There was no adjustment of the accounts of said firm, or of the individual accounts of plaintiff and defendant with said firm, at the time of said dissolution. Defendant Ivers continued from said July, 1880, to carry on the business until May, 1882, when this suit was begun, and a receiver appointed, who thereupon took possession of the partnership stock. After the pleadings were made up in said cause, a referee was appointed by order of the court to state the account between said parties. The report of the referee filed in the cause was as follows:

"I find from the books of the late firm, and evidence, as follows:

RESOURCES.

Due them on personal accounts, per petty ledger,	-	-	\$1,144	37
Due them on personal accounts, per general ledger,	-	-	2,089	76
Bonds, notes, and stock on hand,	-	-	5,017	99
Freight bills due by sundry persons,	-	-	61	55
Proceeds from sale of property reported by receiver,	-	-	969	88
Due from John Ivers on open account,	-	-	9,079	05
Due by John H. Filbrun on open account,	-	-	6,504	43
Total,	-	-	-	\$24,907 03

LIABILITIES.

Due John Ivers, amount account paid Cape County Mills,	-	\$	144	15
Due John Ivers for amount due on a promissory note for \$4,000, dated January 9, 1880, payable to the order of Henry Kiel, signed by the president and treasurer of the Union Mill Co., indorsed by Filbrun & Ivers,	-	-	4,689	75
				4,833 90
Total resources,	-	-	-	\$20,073 13

Objections and exceptions thereto were filed by plaintiff, which were overruled by the court, and judgment based on said report was given for defendant in the sum of \$1,149.20, from which plaintiff has appealed.

In the said report of the referee it will be perceived defendant Ivers is given credit for \$4,689.75, the full amount of principal and interest then due on the Kiel note, and the principle exception to the report and judgment entered thereon is in respect to this credit. As to this note the facts seem to be about as follows: Said firm of Filbrun & Ivers was, with other parties, interested in the Union Mill Company, a company engaged in the manufacture and sale of flour. Said Filbrun, it seems, was the president, and said Ivers secretary, of said mill company. In January, 1880, said mill company, by its said president and secretary, executed the following note, which is the one referred to in the cause:

"\$4,000.

CAPE GIRARDEAU, Mo., January 9, 1880.

"Six months after date, we promise to pay to the order of Henry Keil four thousand dollars, for value received; negotiable, and payable without defalcation or discount, with interest from date at the rate of ten per cent, per annum.

[Signed]

JOHN H. FILBRUN,

"President of Mo. Union Mill Co.

"JOHN IVERS, Secretary."

Said note was indorsed by the said firm of Filbrun & Ivers, and after the dissolution of the partnership, and before this suit was brought, said Ivers purchased said note from Meystedt, the owner and holder thereof, and, as we

have said, the referee, in his report, gives said Ivers a credit therefor in the amount of the face value and the accrued interest.

The relations of plaintiff and defendant being that of partners, their rights and duties, as between themselves, are to be governed by the rules applicable to trustees and agents; and the trust relation which exists between them is not terminated with the dissolution, but continues until a final adjustment and settlement of the partnership affairs is had. Story, Partn. (5th Ed.) §§ 174, 348; *Pomeroy v. Benton*, 57 Mo. 531.

Application of these rules and principles would entitle defendant Ivers to a credit only in the amount actually paid by him for the said note. In this behalf, the testimony of Ivers was, in substance, that he paid Meystedt, the holder and owner of the note, \$250 in cash, and certain commissions on sales of meat which he made for Meystedt between the months of October, 1880, and April, 1881. The usual charge for such commission, as he testifies, was $2\frac{1}{2}$ per cent. for buying, and the same for selling. He testified that he bought more than \$10,000 worth of meats for Meystedt, but would not testify that the amount so purchased was as much as \$15,000. So that, in any event, upon the theory of his testimony, allowing him 5 per cent. on the largest amount, \$15,000, his commissions would amount to \$750; and the \$250 paid in cash would make the note cost him, and the sum actually paid therefor, not to exceed \$1,000. So that, taking this as the testimony of Ivers in this behalf, and accepting the same as correct, the liability of the firm to Ivers on account of said note should have been taken as of the amount so paid in fact, instead of the face of the note and accrued interest. But, taking the testimony of Ivers himself in its entirety, it is not at all clear that there was, even according to him, any consideration for the Kiel note beyond the \$250 cash payment. He also testified that he had no contract or bargain with Meystedt as to buying or selling the meat; that, during the time he was so engaged, Meystedt paid him no commissions, and that nothing was ever said by either of them in that behalf; and, when asked what conversation passed between him and Meystedt at the time he paid the money for the note, he answered that the purport was that, if he would give Meystedt \$250, Meystedt would call everything straight between them, and that nothing was said about commissions.

On the other hand, Meystedt testified that defendant Ivers paid him \$210 in cash for the note, and paid nothing else. He further says that Ivers bought the meat from him, and paid him for it before it was shipped, and that Ivers sold the same for himself, and not for Meystedt. We should also observe that something is said in his evidence about certain accounts against him being settled on the books. These accounts were due the firm of Filbrun & Ivers and said mill company, and cut no figure in determining what the note cost Ivers, for the reason that his interest therein was no greater than Filbrun's.

Upon the question as to what was paid for the said note, said Meystedt is the more disinterested witness. His testimony is given more positively, and under less reserve and qualification; and, further, the rule is that, if there are doubts in and about such claims and transactions, they are to be resolved in favor of the partnership, as against the individual members. Under this evidence, \$210 should, we think, be taken as the sum Ivers actually paid for the Kiel note, and he should be given a credit in that amount on account of said note, and not in the amount of the note, and interest thereon, as was done in said report and judgment. The other item of \$134.15 for which Ivers was given credit by the referee is not disputed, so that upon this basis, which we deem correct, the total liability of the firm to said Ivers should be the sum of \$344.15, instead of the total sum of \$4,833.90, so found and stated by the referee. It appears from the said report of the referee that there was due said firm, on the open account of said Ivers, a sum of \$2,534.62 in excess of that due the firm on the open account of plaintiff, Filbrun; so that, after crediting this

sum with the said \$344.15 paid by Ivers, defendant Ivers would still be indebted to the firm in the sum of \$2,190.47, and plaintiff would therefore be entitled to a judgment in his favor for one-half of said sum, which would be \$1,045.23, and it is accordingly so ordered by this court.

Again, it was the duty of the trial court to dispose of the issues in the cause, and, upon approval of the report of the referee, to so dispose of the assets of the firm as to make a complete and final settlement between the parties. By its approval of the report of the referee the court must have found the resources of the firm to be as therein stated. This report shows resources of the firm of the apparent aggregate value of more than \$8,000, of which some disposition, either by order of sale or partition in kind or otherwise, should be made. Story, Partn. (5th Ed.) 531. For this purpose the cause will be remanded, to enable the parties and court to take such further action in the premises as may be required in that behalf.

(All concur.)

BURNES and others v. BANGERT and others.

(Supreme Court of Missouri. June 6, 1887.)

HUSBAND AND WIFE—EXEMPTION OF WIFE'S PROPERTY FROM DEBTS OF HUSBAND—SECTION 3295, REV. ST. MO. 1879.

Section 3295, Rev. St. Mo. 1879, provides that the rents, issues, and products of the real estate of any married woman, and all moneys and obligations arising from the sale of such real estate, and the interests of her husband in her rights in any real estate which belonged to her before marriage, or which she may have acquired by gift, grant, devise, or inheritance during coverture, shall, during coverture, be exempt from attachment or levy of execution for the sole debts of her husband. *Held*, under this section, that property purchased by money derived from the rents, issues, and products of the separate estate of a married woman is exempt from attachment or levy of execution for the sole debts of the husband.

Appeal from St. Louis court of appeals.

Metcalf & Ferris, for respondents. *W. H. Clopton*, for appellants.

RAY, J. This cause has twice been in the St. Louis court of appeals, and is reported in 13 Mo. App. 144, and 16 Mo. App. 22. In 1872 one Tieman was the owner of a valuable and productive farm designated in the evidence as the "Columbia Bottom Farm," upon which he resided at the date of his death in said year. He left as his widow Wilhelmine Charlotte Tieman, usually spoken of as Charlotte, and four minor children. The widow continued, with the said children, to reside upon the said farm after his death, and held the same under the provision of Tieman's will, which will be noticed hereafter. In the first year after the death of Tieman, the widow saved from the products of the farm the sum of \$1,000. Some gathered crops which the husband left on said farm, and which she sold, entered into this sum. While residing on this farm, in the year 1873, and one year and some months after the death of Tieman, her first husband, said Charlotte Tieman intermarried with the defendant Henry Bangert, who, immediately after the marriage, became administrator *de bonis non* of her first husband's estate, and as such received into his hands about \$2,500. He also became curator for each of said four minor children. He was possessed of no means at the date of the marriage. For three years thereafter he lived with his said wife upon the Columbia bottom farm; and they, with the minor children, cultivated it together,—the wife and children laboring in the fields as well as said husband, and doing the cooking and the household work of all descriptions. Said Henry Bangert had no other occupation or business, or means of making money, except such as were afforded by the said farm so held by the wife. Upon this he bestowed his time and labor, as we have said. In 1876 said Henry Bangert bought a farm near the Columbia farm, held by his wife under Tieman's will, paying therefor \$5,650 in cash, and took a deed of general warranty

therefor in his own name. The grantor in said deed to Henry Bangert was one Frenz, and this farm is spoken of as the "Frenz Farm." In April, 1879, Bangert conveyed the Frenz farm to William Benne, who in May, 1879, conveyed it in trust to Henry Benne for the separate use of said Charlotte, wife of said Henry Bangert. These intermediate deeds were without consideration. In May, 1879, John Bangert, the uncle of defendant Henry, held the latter's note for \$1,000, upon which he instituted suit, and obtained judgment by default thereon in June, 1879. This note was the sole obligation and debt of the husband, and was given prior to his said marriage with the widow of Tieman. John Bangert levied execution under his said judgment on the said Frenz farm, and at the sheriff's sale became the purchaser thereof for one dollar. He thereupon instituted this suit against Henry Bangert, wife, *et al.*; the first count of the petition being in the nature of a bill in equity to set aside as fraudulent said conveyances made by the husband, through a third party, to a trustee to hold for the separate use of the wife. The second count was one in ejectment for the possession of said farm. Said John Bangert and wife, after the institution of this suit, conveyed the Frenz farm by deed of quitclaim to said plaintiffs Burns & Metcalf for \$600, and said John Bangert also assigned to them the judgment obtained by him against said Henry Bangert, and, after the death of said John Bangert, said Burns & Metcalf were substituted on the record, and the suit revived in their name.

The answer of defendants, so far as we care to consider the same, alleges, in substance, that said Henry Bangert, acting as the agent of said Charlotte Bangert, the wife, and as curator of said minor children, purchased the said Frenz farm, and that of the purchase money paid therefor \$1,600 belonged to the minor children jointly, and the remaining \$4,000 belonged to defendant Charlotte Bangert; being the rents, issues, and products of the real estate devised to her by her first husband. The only evidence adduced at the trial as to the acquisition of this purchase money, what it was, and whence derived, was given by the defendant Charlotte Bangert, who was put upon the stand by the plaintiffs. Her testimony is given in the opinion in 16 Mo. App. on pages 33, 34, and 35, and we need not again recite it.¹

In this said opinion the court of appeals say: "If we give full effect to this testimony [meaning that of the wife] it will appear that of the \$5,650 which appears to have been the purchase price of the Frenz farm \$2,650 were given by Mrs. Bangert to Henry Bangert out of moneys which she had kept in the house; the same being accumulations of sales of produce of the Columbia bottom farm, on which her former husband died, and on which she has ever since lived both before and after her marriage with her present husband, Henry Bangert. It will also appear that of this \$2,650, \$1,000 was the result of accumulations by Mrs. Bangert from sales of produce of the farm during her widowhood, and that the remaining \$1,650 was money which had accumulated from sales of produce of the same farm during the period of about three years which intervened between her marriage with Henry Bangert and the purchase of the Frenz farm. Whether it can be inferred from this testimony that any money of Henry Bangert went into the purchase of

¹ Mrs. Bangert testified substantially as follows: That to get together the purchase money for the land in dispute her husband drew out of the Bremen Bank \$3,000 on a notes or notes; that of this \$2,400 was "administration money," which Henry Bangert held as administrator of Mrs. Bangert's deceased husband, and as curator of the four minor children, and that the other \$600 belonged to her, Mrs. Bangert; that this \$600 was money from a sale of wheat for her by a neighbor; that the balance of the \$5,000, which went to make up the purchase price, was kept in the house; that \$1,000 of it had been there a long time—since the year after her former husband died; that the balance was made from the farm left by her first husband. She further testified that she had charge and control of the farm, and worked on it the year around; that Henry Bangert, when he married her, had but \$80; and that, whenever he sold anything, he turned it over to her.

the Frenz farm depends upon the question who was the legal owner of this \$1,650. There is no evidence of any separate ownership of this money by Mrs. Bangert other than the fact that she always had it in her personal custody at the house, and that it was the proceeds of a farm in which an estate for twenty years had been vested in her by her former husband." After some discussion of several opinions of this court, (*Woodford v. Stephens*, 51 Mo. 443, 447; *Kidwell v. Kirkpatrick*, 70 Mo. 214; and *Walker v. Walker*, 25 Mo. 367, 375.) the court of appeals then says: "Applying these principles of the facts of this case, the conclusion is unavoidable that all of that portion of the money which was used by Henry Bangert in the purchase of this farm, amounting to the sum of \$4,000, which the defendants claim in their answer was the money of Mrs. Bangert, is to be deemed to have been the money of the defendant Bangert. When he married the widow Tieman, and went to live with her on the Columbia bottom farm, he is deemed in law to have entered into possession of her estate for years in the farm under the deceased husband's will, which was a chattel interest, and also of all chattels upon the farm belonging to her. There is no evidence whatever of any agreement at that time, or of any purpose on his part, to hold these chattel interests as her trustee, or in any other than his own right as her husband under the law as it then stood. The \$1,000 which she claims to have owned became his *jure mariti* under the decision above quoted from twenty-fifth Missouri. Although it may not have been taken into physical custody,—though Mrs. Bangert may have kept it in the cellar in an oyster can, as she testified at the former trial,—yet, as he had a right to reduce it into his possession at will, that was enough. He and she were one in law, and her possession was his possession."

It will be observed that the court of appeals took the evidence, and dealt with it as chancellors, and reversed the ruling of the circuit court dismissing the bill, and disposed of the case by a decree in favor of plaintiffs, which concluded the rights of Mrs. Bangert, the wife, but did not affect the rights of the minor children, who had not been made parties to the suit. The decree against Henry Bangert and wife was also for the annual rental value of the Frenz farm.

This said disposal thereof, so far as Mrs. Bangert was concerned, was upon the theory, as the above extracts from the opinion show, that the money, thus produced and earned by the joint and common labor of husband and wife and minor children on the said farm held by the wife under the will of the first husband, and that already accumulated by the widow prior to the marriage with the second husband, and held by her as stated, was money which under the law as it then was belonged to the husband in virtue of his marital rights, and, as such, was liable to executions for his sole debts.

In this disposition of the case we are not able to concur. The third provision of the will of said Tieman, which we have referred to, was as follows: "(3) I give and devise all of my real estate situate in the county of St. Louis to my beloved wife, Wilhelmine Charlotte Tieman, to be held for a period which shall extend to twenty years from the date of this will, and at the end of that period I will and order that the said real estate be distributed equally among my wife, Wilhelmine Charlotte Tieman, and my children, Karoline Tieman, Fredericka Tieman, Amaliegen Tieman, and Henry Tieman, to have and to hold to my said wife, Wilhelmine Charlotte Tieman, and my said children, Karoline, Fredericka, Amaliegen, and Henry Tieman, and their heirs and assigns, forever. * * * It is provided, also, that the expense of rearing and educating my children shall be paid by my wife, Wilhelmine Charlotte Tieman, in consideration of the use of the entire farm during the minority of my children."

It will be perceived that, at the expiration of 20 years, the wife was to have absolutely the one-fifth portion of said real estate, sharing equally with each

of the children, and during the period of 20 years she was to have the use, possession, and absolute control thereof, in consideration of which she was to rear and educate the children. Without entering at length upon discussion as to its exact character, the interest of the wife in said lands, as given by the said will, was, we think, "real estate" within the meaning of section 3295, Rev. St., and as that term is used in various other statutes in this state. She could unquestionably have maintained the action of ejectment therefor if she had been ousted of the possession.

As already said, there is no pretense that said Henry Bangert had any money of his own, or that the said \$4,000, used in the purchase of the Frenz farm, was derived or accumulated in whole or in part, in any other way than by the management and cultivation of the Columbia bottom farm, devised as aforesaid, and by the joint labor of the husband and wife and minor children upon the said farm during the three years after the marriage, and from 1873 to 1876. If this is so, then the purchase money of the Frenz farm was so far rents, issues, and products of the Columbia bottom farm, acquired by the wife under the will, and as such was during coverture exempt from attachment or levy of execution for the sole debts of the husband. The Frenz farm, bought therewith, took its place, and was held under like exemption. The statute declares that not only the rents, issues, and products of the real estate of a married woman shall be exempt, during coverture, from attachment or levy of execution, but that all money and obligations arising from the sale of such real estate, and the interest of her husband in her right in any real estate belonging to her before marriage, or which she may have acquired by gift, grant, devise, or inheritance, shall be likewise exempt. With respect to such lands, and money and obligations arising from the sale thereof, and rents, issues, and products of such lands, the marital *status* and rights of the husband as they existed at common law have been changed by said statute. The statute is a disabling statute, and prevents the husband from conveying the wife's real estate, and her interests therein, and the products thereof; and it also exempts the rents, issues, and products, and the money and obligations arising from sale thereof, and the marital interest of the husband therein during coverture, from attachment and execution for the husband's sole debts. Its restrictions are on the creditors of the husband as well as the husband. Whether the possession be considered as in the husband or wife is immaterial, as neither the property itself, nor his marital interests therein, is subject to levy or seizure at the instance of the husband's creditors. If this property is exempt from execution for the sole debt of the husband, it cannot, as to his creditors be the subject of a fraudulent conveyance or sale by the husband. If his creditors cannot reach it for his debt, its sale or conveyance is no concern of the creditor, since they have no right or claim thereon. They can only complain of sales and conveyances of property that is subject to their debts. To this extent the creditors have no standing in court. *Bump, Fraud. Conv.* (2d Ed.) 242, and cases cited; *Davis v. Land*, 88 Mo. 436; *Hartzler v. Tootle*, 85 Mo. 23; *Abernathy v. Whitehead*, 69 Mo. 30; *Vogler v. Montgomery*, 54 Mo. 584.

Since the decision of this cause by the court of appeals, this court has had occasion in *Mueller v. Kaessmann*, 84 Mo. 318, to consider the force and effect of this section 3295 upon the marital rights of the husband as they existed at common law. The subject-matter of the litigations in that case was lands of the wife held in the ordinary way, and not to her separate use; but this case involves kindred and analogous questions arising under said statute, and falls, we think, within the principles of that decision and construction of said statute as therein announced.

For these reasons the judgment and decree of the court of appeals herein is reversed, and that of the circuit court is affirmed; in which all concur.

GARROUTTE v. WHITE.

(Supreme Court of Missouri. June 8, 1887.)

1. LANDLORD AND TENANT—RENT—LIEN ON CROPS.

Under Rev. St. Mo. 1879, §§ 3088, 3091, 3093, 3095, a proceeding for attachment for rent is intended to be a provision for the enforcement of the landlord's lien on the crop grown on the demised premises for the rent of the year in which such crop was grown; and such proceeding can be maintained by the landlord, not only against his immediate lessee, but also against the tenant of such lessee, provided the rent accrued during the term of such lessee. Where, therefore, an under-tenant had removed certain wheat crops from his land within 30 days next before the commencement of a suit for an attachment, and while rent was owing by the lessee to the landlord, *held*, that the landlord was entitled to an attachment against the under-tenant's wheat for the rent due by the lessee to the landlord.

2. SAME.

Rev. St. Mo. 1879, § 3091, gives two independent grounds for an attachment for rent, either of which is sufficient to sustain the writ; and, accordingly, if a tenant either removes his property from the demised premises within 30 days prior to the commencement of the suit for attachment, or if he has disposed, or attempted to dispose, of his property, so as to endanger, hinder, or delay the landlord from the collection of his rent, the proceeding for attachment is well grounded.

Appeal from Greene county.

W. D. Hubbard, for respondent. *O. H. Travers*, for appellant.

BRACE, J. This is a suit by attachment for rent, commenced before a justice of the peace. The defendant pleaded in abatement to the affidavit filed for an attachment, and the jury found for plaintiff on the issues joined by the plea. The defendant refusing to further plead, the cause was tried by the court, and judgment rendered for the plaintiff. There was no conflict in the evidence in regard to any of the material facts, which were substantially as follows: Six or seven years before this suit was commenced, the plaintiff, by oral agreement, rented a farm to John W. White, the father of the defendant, for one-third of the crop to be raised each year on the premises. John W. White had several grown sons living with him on the farm, among them the defendant, each of whom he every year permitted to cultivate for himself portions of the said farm; requiring them only to deliver to the plaintiff such portions of the crop they should raise thereon as would be coming to the plaintiff under his contract with him, being the same as he himself paid as rental under the agreement. Under this arrangement, the defendant and his brother, for some years, cultivated different portions of the farm; delivering to the plaintiff each year his share of the crop raised under said agreement. In September, 1882, the defendant put in a crop of wheat on 37 acres of the farm which he had previously cultivated, and during the ensuing seasons cultivated other portions of the farm in corn and oats. On the fifteenth day of December, 1882, plaintiff and John W. White made the following written agreement:

"Article of agreement made and entered into between Wm. B. Garrouette, of the first part, and J. W. White, of the second part, witnesseth; that the party of the second part agrees to deliver to the party of the first part full and peaceable possession of his farm, without law, to the party of the first part, on the first day of August, 1883, situate on sections 5, 8, 9, township 28, range 24, in Greene county, Mo.; and that the party of the second part agrees to pay one-third of the grain raised on the land in cultivation; and he further agrees to put all the broke land in small grain, and stack one-third of the wheat on said land, and feed the straw out on said land without any danger to the growing crops by stock in the inclosures; and further agrees to cut no growing timber. Given under our hands this fifteenth day of December, 1882."

Plaintiff testified that his object in making this agreement was to get possession of the farm, and he thought he could do so only by making an agree-

ment with John W. White. He did not make the agreement with the defendant, because he did not think he was the proper party to make it with; and that this contract embodied all the terms of the oral contract agreement that had been existing for six or seven years between John W. White and himself, and applied to all the land he had rented him, including the land cultivated by the defendant, and the wheat land for the rent of which this suit by attachment is brought. In August, 1888, John W. White and his family, including the defendant, who continued a single man, residing with his father, removed with their property from the premises. The defendant, having delivered to the plaintiff a third of the oats and corn which the defendant raised upon the premises, moved the wheat from the land on which it was raised, and stacked it on a tract of land he had purchased, and afterwards, and within 30 days after such removal by defendant, on the twenty-seventh day of August, 1888, the plaintiff instituted suit against the defendant and caused the attachment to be levied upon the wheat. It is contended for the appellant that this action cannot be maintained, for the reason that the defendant was the tenant of his father, and not of the plaintiff. The action is a statutory one, and the contention can be determined by simply setting out in consecutive order the statutory provisions regulating it, and applicable to the case. Section 3083, Rev. St. 1879, provides that "every landlord shall have a lien upon the crop grown upon the demised premises in any year, for the rent that shall accrue for such year; * * * and such lien may be enforced by attachment in the manner hereinafter provided." Section 3091, Id.: That "when any person who shall be liable to pay rent, whether the same is due or not, or whether the same be payable in money or other things, if the rent be due within one year thereafter, * * * has within thirty days removed his property from the leased premises, or shall in any manner dispose of such crop, or attempt to dispose of the same, so as to endanger, hinder, or delay the landlord from the collection of his rent, the person to whom the rent is owing 'may have a writ of attachment' for the rent against the personal property, including the crops grown in the demised premises of the person liable for the same." Section 3098, Id.: "That any person to whom rent is due, whether he have the reversion or not, 'may recover such rent,' as provided in the preceding section." And section 3095 provides "rent may be recovered from the lessee, or person owing it, or his assigns or under-tenant, * * * by the same remedies given in the preceding section, but no assignee or under-tenant shall be liable for rent which became due before his interest began." considering these several sections, treating of the same subject-matter, together, we are of the opinion that the proceeding by attachment for rent, under said section, was intended to be a provision for the enforcement of the landlord's lien on the crop grown on the demised premises for the rent of the year in which such crop was grown, and that such proceeding can be maintained by the landlord, not only against his immediate lessee, but also against the tenant of such lessee, provided the rent accrued during the term of such lessee; and in this case the plaintiff, having a lien on the wheat grown by the defendant on the premises of the plaintiff, for rent thereof accruing during the term of the defendant, could proceed against him to enforce such lien, and to recover the rent due him for the premises upon which such wheat was grown, whether, under the facts of the case, the defendant be regarded as the tenant of the plaintiff, or as the tenant of his father, the plaintiff's lessee, provided he had good grounds for an attachment under the act.

The plaintiff, in his affidavit, set out two causes for an attachment: (1) That defendant, within 30 days next before the commencement of this action, did remove his property from the rented premises. (2) That the defendant did attempt to dispose of the crop so as to endanger, hinder, and delay plaintiff in the collection of his rent. The defendant, by his plea, joined issues on the causes assigned, and both issues were found by the jury for the plaintiff.

Each cause is by the statute made an independent and substantial ground for attachment, and either was sufficient to sustain the writ. The uncontradicted evidence was that the defendant had removed all of his property from the premises, as charged in the affidavit; and the verdict must have been for the plaintiff upon the issue joined on that ground of the attachment, even though the other might not have been sustained by the evidence. We find no error in the instructions given that could have affected the verdict, and no error in the refusal of the court to give the instructions asked for by the defendant.

The judgment is affirmed.
(All concur.)

POWER and others v. HAFLEY and others.

(Court of Appeals of Kentucky. June 2, 1887.)

1. ADOPTION—DESCENT AND DISTRIBUTION.

L., desiring to adopt S., a girl residing in his family, procured the enactment by the legislature of a special act to that end, which changed the name of S., and provided that she should inherit the estate of L., both real, personal, and mixed. S. died before L., leaving children. *Held*, that such children were to be considered the legal grandchildren of L., and, as such, entitled to share in the distribution of his estate.

2. SAME.

The event of adoption fixes the legal status of the adopted child, who thereafter stands, as to the property of the adopting parent, in the same light as a child born in lawful wedlock, save in so far as the statute authorizing the adoption may otherwise provide.

3. SAME.

"Kindred" as used in chapter 31, § 1, Gen. St. Ky., (law of descents,) is not necessarily confined to blood relations; nor is "children" in subsection 1 necessarily confined to children born in lawful wedlock. Both these words may be properly construed to take in persons adopted by a decedent.

Appeal from circuit court, Casey county.

Harrison & Belden and Lewis Edelen, for appellants. Geo. Denny, Jr., for appellees.

BENNETT, J. In 1842, Frederick Hafley, being desirous of adopting Sylvania Floyd, his infant sister-in-law, who was living with him as a member of his family, induced the legislature of this state to pass an act which reads as follows: "Whereas, it is represented to the present general assembly of the commonwealth of Kentucky that Frederick Hafley, a citizen of Casey county, is desirous of having the name of Sylvania Floyd, a girl now living in his family, changed to that of Sylvania Hafley, and that said Sylvania should be adopted as his legal heir, and take his estate by descent as though she had been his lawful child, therefore be it enacted by the general assembly of the commonwealth of Kentucky that the name of the said Sylvania Floyd be, and the same is hereby, changed to that of Sylvania Hafley, by which name she shall hereafter be styled and known; and that she may be capable of taking and holding by descent, the estate of said Frederick Hafley, real, personal, and mixed, in as full and complete a manner as if she was his lawful child. Approved January 22, 1842."

Sylvania Hafley, after her adoption, married ——— Power. Several years after said marriage she died leaving children, the appellants. After her death, Frederick Hafley died intestate. The appellants, as the children of Sylvania, claim the estate of Frederick Hafley as his legal representatives; and as such brought suit in equity in the Casey county circuit court for the purpose of establishing their right to Hafley's estate, and having same divided among themselves. The appellee Cynthia Hafley, the widow of Frederick Hafley, resisted the appellants' right to the estate, and demurred to their petition upon the

ground that appellants had no right to the estate. The lower court sustained the demurrer, and dismissed the petition.

The contention of the appellees is that, Sylvania Power having died before her adoptive father died, her children could not inherit his property, because her relation to the adoptive father, and her right to inherit his estate as his adopted daughter, being purely personal, the right died with her. In other words, the relation of adopting father and adopted daughter, which existed between Frederick Hafley and Sylvania, was a purely legal relation, which was personal in its character, and that Sylvania's right to inherit his estate by virtue of that relation depended upon her surviving him; and, she having died before he did, the legal relationship was wholly dissolved, and her children, therefore, could not inherit from the adoptive father in her stead.

The common law made no provision for adopting children. Hence we get no light from that law to guide us in the present investigation. Most of the states of the Union have within the last few years enacted general laws providing for the adoption of children, and making them the legal heirs of the adopting parents through the courts. Of course, the laws of these states are not uniform in substance; the laws of each more or less limit and restrict the legal *status* of the adopting parent and the adopted child; and, while the reported adjudications of these states construing the adopting statutes are sparse, yet they nearly all agree in fixing the legal *status* of the adopted child as follows: That it is the event of adoption that fixes, under the law authorizing the adoption, the legal *status* of the adopted child; and the child, by the event of adoption, becomes the legal child of the adopting parents, and stands, as to the property of the adopting parent, in the same light as a child born in lawful wedlock, save in so far as the exceptions in the statute authorizing the adoption declare otherwise. And, when the statute authorizes a full and complete adoption, the child adopted thereunder acquires all of the legal rights and capacity, including that of inheritance of a natural child, and is under the same duties. See *Humphries v. Davis*, 100 Ind. 280; *Wagner v. Varner*, 50 Iowa, 532; *Barnes v. Allen*, 25 Ind. 222; *Burrage v. Briggs*, 120 Mass. 103; *Ross v. Ross*, 129 Mass. 243.

By the request of Frederick Hafley, the legislature, by the act *supra*, made Sylvania his legal heir, and invested her with as full capacity to take and hold his estate by descent as if she was his natural child. Thus was her legal *status* fixed by a law operating directly upon her and Hafley, and which contained no restrictions or limitations whatever. She was made a full legal heir, and was put precisely upon the same footing, so far as taking and holding Hafley's property by descent was concerned, of a natural child. So it would seem to follow as a logical sequence that the children of Sylvania, she having died before Hafley, take, under our laws of descent, as her direct representatives.

As before stated, the common law made no provision in reference to adopting children; but the civil law made ample provision in that regard; and presuming that the legislature, in passing the act *supra*, and subsequently passing a general law upon the same subject, had in view the principles of the civil law, we have therefore deemed it proper to consult the principles of that law in arriving at the construction we have given said act. By that law (the civil) the adopted child was "assimilated in many points to a son born in lawful matrimony." The adopted child retained all of the family rights resulting from its birth, and there was secured to it all of the family rights procured by the adoption. See Sander's Justinian, 103, 105, 107. Also, in the case of *Vidal v. Commagere*, 13 La. Ann. 519, it is said that by the civil law the effect of adoption was such "that the person adopted stood not only himself in relation of child to him adopting, but his children became the grandchildren of such person." So, taking the logical sequence of the language of the act *supra*, aided, as it is, by the principles of the civil law, the conclusion is inevitable

that the appellants are the legal grandchildren of Frederick Hafley, and as such are entitled to share in the distribution of his estate under our laws of descent.

The word "kindred" in section 1, c. 31, ("Of Descents,") Gen. St., is not necessarily confined to blood relations; nor is the word "children," in subsection 1, necessarily confined to children born in lawful wedlock; for these sections "must be understood as merely laying down the general rules of inheritance, and not as completely defining how the *status* is to be created which gives the capacity to inherit." Section 1 does not undertake to define the word "kindred." The word may include in its meaning a relation by blood and a relation in law. The word "children" may include in its meaning children born in lawful wedlock, and children made legitimate by the marriage of their parents, and children by adoption; for they are the legal children of their adoptive parents. So, whenever the kindred by blood or in law have the right to inherit, either by general or special law, section 1, *supra*, includes them; and, whenever the children have a right to inherit either by general or special law, subsection 1 includes them. See *Drain v. Violet*, 2 Bush, 157; *Ross v. Ross*, 129 Mass. 267. Therefore there is nothing in the statutes of descent and distribution that militates against the construction we have given the act under consideration.

In reaching the conclusion that one, by adopting another, may make that other his own heir, with full capacity to inherit his estate, and that the children of the adopted may also inherit from him, we do not wish to be understood as deciding that the adopting parent can make the adopted child the heir of other people so as to entitle it to inherit property that does not come directly from him. The case at bar does not involve that question, and we prefer to reserve any expression of opinion thereon until the question actually arises.

The judgment of the lower court sustaining the demurrer to the appellant's petition and amended petition is reversed, and the case is remanded, with directions to overrule the same, and for further proceedings consistent with this opinion.

JACKSON v. COMMONWEALTH.

(Court of Appeals of Kentucky. June 7, 1887.)

FALSE PRETENSES—"LARCENY"—SECTION 2, ART. 13, CH. 29, GEN. ST. KY.

Section 2, art. 13, c. 29, Gen. St. Ky., provided: "If any person, by any false pretense, statement, or token, with intention to commit a fraud, obtain from another money, property, or other thing which may be the subject of larceny, or if he obtains, by any false pretense, statement, or token, with like intention, the signature of another to a writing, the false making whereof would be forgery, he shall be confined in the penitentiary not less than one nor more than five years." Under section 1, art. 1, c. 29, all offenses are either felonies or misdemeanors; felonies being offenses punishable with death, or imprisonment in the penitentiary. Under section 1, art. 11, c. 29, the larceny of goods and chattels of the value of *ten dollars* or more constituted grand larceny, punishable as a felony; but, if worth *less than ten dollars*, petit larceny, punishable as a misdemeanor. Appellant was indicted, under the statute above cited, for obtaining *eight dollars* by false pretenses, and, pleading guilty, was sentenced to one year in the penitentiary. *Held*, sustaining the conviction, that the word "larceny," as used in the statute, did not necessarily mean grand larceny, and that the legislature did not intend that said word should be so restricted.

Appeal from circuit court, Henderson county.

Thos. Eldard, for appellant. *P. W. Hardin*, for appellee.

HOLT, J. This appeal involves the construction of section 2, art. 13, c. 29, Gen. St., which provides: "If any person, by any false pretense, statement, or token, with intention to commit a fraud, obtain from another money, property, or other thing which may be the subject of larceny, or if he obtains by

any false pretense, statement, or token, with like intention, the signature of another to a writing, the false making whereof would be forgery, he shall be confined in the penitentiary not less than one nor more than five years." By our statute all offenses are either felonies or misdemeanors. Such as are punished with death or confinement in the penitentiary are felonies; while all others, whether so at common law or made so by statute, are misdemeanors. The larceny of goods and chattels of the value of \$10 or more, under the statute, constitutes grand larceny, and is punishable by confinement in the penitentiary for not less than one nor more than five years; but, if worth less than \$10, then it is petit larceny, and the offender guilty of a misdemeanor only.

The appellant, Frank Jackson, was indicted, under the section of the statute above cited, for obtaining *eight* dollars by false pretenses. His demurrer to the indictment having been overruled, he pleads guilty as charged, and his punishment was fixed at one year in the penitentiary. He now contends that the word "larceny," as used in the statute, must be held to mean grand larceny; and that the legislature, in enacting the law, intended it should be so restricted. It at once occurs to the mind that, if this be so, then the offender who with evil and fraudulent intention obtains property by false pretenses goes free if it be worth less than \$10. It strikes one at first blush that such could not have been the legislative intention. A further consideration and examination of this provision of the statute confirms this view. Its object is not to prevent mere larceny, either grand or petit,—another section provides for their punishment,—but to punish the fraud. One may be sent to the penitentiary for fraudulently signing another's name to a note for less than \$10. In such a case it is the fraud that constitutes the offense. If the amount of it were to govern, then its forgery could not be punished by penitentiary confinement unless it represented as much as \$10. It is not the amount thus fraudulently obtained, or the theft itself, but the fraud practiced, which makes forgery for small sums penitentiary offenses. Likewise the statute now under consideration was not intended to punish the mere larceny, or, more properly speaking, the fraudulent appropriation, of a certain amount of property; but if obtained by "false pretenses, statement, or token, with intention to commit a fraud," then, if it might be the subject of larceny, but without regard to the amount or value, it constitutes a penitentiary offense,—just as the signing of another's name to a check without his consent, and with an intention to steal or appropriate it, constitutes forgery, although it may be for less than \$10. It is manifest that this is the correct interpretation of the section, in view of the latter part of it: "Or if he obtain, by any false pretense, statement, or token, with like intention, the signature of another to a writing, the false making whereof would be forgery, he shall be confined in the penitentiary not less than one nor more than five years." The section provides the same punishment for obtaining by false pretense, statement, or token, with intent to commit a fraud, anything which may be the subject of larceny, as is provided in case the signature of another is likewise obtained, and for a like purpose, and the false making of which would be forgery.

If the word "larceny," in the first part of the section, is restricted to grand larceny, then it results that one who obtains property by a false pretense cannot be punished unless it amounts to \$10 in value; but that, under the same section, an offender who thus obtains a signature may be sent to the penitentiary without regard to the sum involved. The latter part of the section explains the whole of it. It so allies the offenses denounced by the entire section to forgery, that the rules and reasons applicable to one apply to both. It is the false pretense and *fraud* which distinguish them from mere larceny. Judgment affirmed.

MCDONALD v. COMMONWEALTH.

(Court of Appeals of Kentucky. June 9, 1887.)

1. ARSON—SETTING FIRE TO CHURCH—CHAPTER 29, ART. 7, GEN. ST. KY.

A statute of Kentucky (chapter 29, art. 7, Gen. St.) provided "that if any person shall willfully and unlawfully burn a powder-house, warehouse, store-house, stable, barn, or any house or place where wheat, corn, or other grain, fodder, hemp, cotton, wood, fruit, ice, hay, or straw is usually kept, or any other house whatever, or any stack, rick, or shock of hay, fodder, etc., pile of lumber, plank, rails, posts, hoop-poles, shingles, [and other property specifically mentioned,] he shall be confined in the penitentiary not less than one nor more than six years." *Held*, that the words, "or any other house whatever," were sufficiently broad to include the offense when committed by burning a church.

2. WITNESS—DEFENDANT IN CRIMINAL TRIAL—IMPEACHMENT.

While the general rule prevails that the state cannot place the character of the accused in issue unless the latter shall have first attempted to establish his character by proof, yet, where the accused offers himself as a witness, his general character for truth and veracity may be impeached by the state, like that of any other witness.

Appeal from circuit court, Meade county.

The opinion sufficiently states the facts.

H. T. Kendall and Lewis & Fairleigh, for appellant. *P. W. Hardin*, for appellee.

PRYOR, C. J. The appellant, McDonald, was tried and convicted in the Meade circuit court of the crime of house-burning; it being alleged in the indictment that the accused willfully and unlawfully set fire to and burned the Cedar Grove Church, the property of and belonging to the Methodist Episcopal Church South, etc., contrary to the form of the statute in such cases made and provided. The statute provides "that if any person shall willfully and unlawfully burn a powder-house, warehouse, store-house, stable, barn, or any house or place where wheat, corn, or other grain, fodder, hemp, cotton, wool, fruit, ice, hay, or straw is usually kept, or any other house whatever, or any stack, rick, or shock of hay, fodder, etc., pile of lumber, plank, rails, posts, hoop-poles, shingles, [and other property specifically mentioned,] he shall be confined in the penitentiary not less than one nor more than six years." Chapter 29, art. 7, Gen. St.

The unlawful and willful burning of a church was not arson in the offender by the rules of the common law. He was liable to fine and imprisonment only under an indictment for malicious mischief; and it is therefore urged that the burning of a church building, not being specifically mentioned, is not embraced by the statute; that after the enumeration of the various subjects of the offense, such as powder-houses, warehouses, barns, stables, storehouses, or places where grain, hemp, and cotton are kept, the words, "or any other house whatever," are restricted in meaning to buildings or objects of a like kind; and such is ordinarily the rule of construction in interpreting the meaning of a statute. The legislature in the list of offenses enumerated by this statute, and for which punishment is inflicted, seems to have omitted churches, school-houses, etc., but indirectly intended, by the general language used, to embrace all kinds of buildings; and while church edifices and school-houses should have been more prominent in the minds of the legislature, and therefore specially mentioned, than a barn, stable, or pile of lumber, at the same time it is unreasonable to suppose that the willful and unlawful burning of a stable or pile of lumber should be made an offense the punishment of which is confinement in the state prison at hard labor, while the burning of a house of public worship is only to be considered a misdemeanor, and the offender punished only by fine and imprisonment in the county jail.

This court in *Wallace v. Young*, reported in 5 T. B. Mon. 155, held, under a similar statute, that the burning of a school-house was embraced by the words, "or any other house whatever." The construction, as there said, should be as broad as the words naturally import. The legislative intention must control; and where there is no provision of the statute punishing the burning of church property as a distinct offense, the words, "or any other house whatever," should be held to embrace a church building; and the law-making power evidently intended, in using such comprehensive language, to make it apply to all houses, the distinction of which is not made the subject of punishment by some other statute. The demurrer to the indictment was therefore properly overruled.

The appellant offered himself as a witness, and, being examined, his general character for truth and veracity was impeached by the state. The undoubted and general rule in criminal practice is that the state cannot place the character of the accused in issue, unless the latter shall have first attempted to establish his character by proof. This rule is founded in sound policy, and prevents those charged with crime from being punished because of their bad character, rather than on the testimony adduced as to their guilt of the particular offense charged. Nor has this rule been repealed, expressly or by implication, by reason of the statute permitting the accused to testify on his own behalf. When he comes before the jury as a witness, although charged with the offense, he subjects himself to that character of examination that can be made of any other witness; and his inclination to tell the truth, or to swear falsely, may be shown by the commonwealth in the usual mode of impeaching the general character of a witness for truth and veracity.

In this case the examination as to the character of the witness (who was the accused) was confined to his general character for truth, and we see no reason for placing this witness in such a position before the jury as would preclude all investigation by the state on the subject. The object of the jury is to arrive at the truth or falsity of the statement made. If the accused, by reason of his bad character for truth, is not to be believed on oath, the jury ought to know, and the privilege given the accused to testify will not shield his character from such an investigation.

Mr. Wharton, in his work on Criminal Evidence, page 495, says that *his character for truth and veracity may be impeached*; in fact, his credit, like that of all witnesses, is for the jury. In the case of *Com. v. Keenan*, 97 Mass. 589, where the accused could testify by reason of the statute, it was held that, by availing himself of the privilege, he subjected himself to the liabilities incident to that position. The statute does not exempt him from cross-examination as a witness, or his impeachment. In the case of *Connor v. People*, reported in 50 N. Y. 240, where the accused offered himself as a witness, and was examined, it was held that he thereby subjected himself to the same rules and tests applicable to other witnesses.

In this case the instructions given the jury embraced the whole law of the case, and are unobjectionable. No incompetent testimony was admitted, nor any error committed to the prejudice of the accused, in impeaching his character for truth. The question was as to the veracity of the witness. The inquiry on the examination made by the attorney for the commonwealth was directed to that particular point. Those, where his character was known, seemed to think he was not worthy of credit; their opinions were based upon what was said about him in that regard by his neighbors.

Judgment below is affirmed.

McFADDEN v. MISSOURI PAC. RY. CO.

(Supreme Court of Missouri. June 6, 1887.)

1. NEGLIGENCE—PLEADING.

In an action against a common carrier to recover the value of a car-load of mules destroyed by fire through defendant's negligence, the petition alleged the delivery and loss of the property while in defendant's possession as a common carrier, and charged negligence in managing and operating the train, whereby the car containing the mules was set on fire, and the mules destroyed. *Held* that, even without the last allegation of negligence, the petition stated facts sufficient to constitute a cause of action.

2. CARRIERS—TRANSPORTATION OF LIVE-STOCK—NEGLECT.

The placing of a car bedded with straw, containing valuable live-stock, so near the engine that sparks therefrom could easily ignite the straw, and thus burn up and consume the car and its contents, considered negligence.

3. SAME—LIVE-STOCK TRANSPORTATION—LIMITATION OF LIABILITY.

A stipulation in a bill of lading or contract of shipment of live-stock, whereby the shipper assumed "the risk of loss or injury to the mules by fire or any account whatever," does not relieve the common carrier from his common-law liability as an insurer of goods intrusted to his care, destroyed by an act of such negligence.¹

4. SAME.

Whether a stipulation in a bill of lading or contract of shipment, whereby a common carrier limits his liability to a certain fixed sum for each head of stock to be transported, shall limit the shipper to such sum in case the goods are destroyed by the carrier's negligence, depends on the fact whether the shipper has received adequate consideration for the concession. If obtained from the shipper by a false representation that his goods are to be carried at a special and reduced rate in consequence thereof, such a stipulation is not binding upon him, in the absence of bad faith on his part towards the carrier.²

5. SAME.

Parol evidence is admissible between the parties to show the falsity of a representation contained in a bill of lading to the effect that the shipper's goods are being carried at a reduced rate, in consideration whereof the carrier limits his liability for loss.

6. APPEAL—OBJECTION WAIVED.

The failure of defendant to object on the trial to the admissibility of parol evidence to show the falsity of the consideration clause contained in the bill of lading, limiting the carrier's liability, precludes him from afterwards making the objection.

Appeal from circuit court, Cooper county.

Cosgrove & Johnston, for respondent. *T. J. Portis*, for appellant.

RAY, J. Plaintiff brought this action in the circuit court of Cooper county against the defendant, as a common carrier, to recover the value of a car-load of mules delivered to defendant at Boonville, to be transported over its railroad to the state line at Kansas City. While in transit the car containing the mules caught fire, and 13 head were burned to death, and the other 3 so injured as to be a total loss to plaintiff. An objection was made to the introduction of any evidence, upon the ground that the petition did not state facts sufficient to constitute a cause of action, which said objection was properly overruled. The petition not only alleged the delivery and loss of the mules while in defendant's possession as a common carrier, which was suf-

¹A common carrier will be liable for the actual value of goods lost through its negligence, notwithstanding they may have been shipped under a special contract, which in terms fixed the value at a less sum. *Adams Exp. Co. v. Holmes*, (Pa.) 9 Atl. Rep. 166.

Respecting the limitation of a carrier's liability by contract, see *Missouri Pac. R. Co. v. Harris*, (Tex.) 2 S. W. Rep. 574, and note; *Gulf, C. & S. F. R. Co. v. Trawick*, (Tex.) 4 S. W. Rep. 567. See, also, *Marr v. Western Union Tel. Co.*, (Tenn.) 3 S. W. Rep. 498, and note.

²As to the validity and construction of contracts limiting the liability of carriers to the value of the goods as stated in the bill of lading, and on the basis of which the freight is paid, see *The Bermuda*, 29 Fed. Rep. 399, and note; *Hill v. Boston*, H. T. & W. R. Co., (Mass.) 10 N. E. Rep. 836.

sident, but charged negligence in managing and operating the train, whereby the car was set on fire, and the mules burned, injured, and destroyed. No other point was made in respect to the pleadings, and we need not set them out. The evidence of plaintiff shows the delivery of the mules by plaintiff to defendant, that the car in which they were transported was bedded with straw and placed next to the engine; that this was not customary, but unusual and dangerous, and prudence required that such cars should be placed at a greater distance in the train from the engine; that the rear of the train was the safest place, while next to the engine was, for such cars, the most dangerous, on account of the liability of the straw bedding to take fire from the sparks of the engine. It should be also stated that the train in question consisted of 15 or 20 cars, but two of which, besides the one in question, were loaded with stock, and of these one was placed next to the car containing the mules injured by the fire, or second from the engine, while the other was put near the rear end of the train, and next to the caboose. This was the substance of the evidence in chief in behalf of plaintiff.

Defendant offered no oral testimony in the cause, but relied upon the bill of lading or contract of shipment, which it set up in the answer, and read in evidence at the trial. The evidence in rebuttal will be considered later in the course of this opinion. It has been held in this and most of the states that by special or express contract or special acceptance, fairly and understandingly made, the carrier may limit his common-law liability. The shipper may lawfully, if he sees fit, surrender the obligation of the carrier as an insurer of his property; but the law is firmly settled in this state that the common carrier cannot, by any sort of stipulation, exempt himself from the consequences of his own negligence. We need not again discuss that question. If placing the car bedded with straw, containing the mules, next to the engine was unusual, negligent, and dangerous, and the car was set on fire by the sparks from the engine, and the mules thereby destroyed, all which the evidence for plaintiff shows, without any attempt at contradiction from defendant, then, under numerous rulings of this court, the provision in the contract, whereby the plaintiff assumed "the risk of loss or injury to the mules by fire or any account whatever," would be so far invalid, and no protection to the defendant.

In an analogous case the supreme court of Pennsylvania, (32 Pa. St. 414,) in considering the liability of common carriers, say: "A defective wheel or axle or frame-work would confessedly render them liable, even as against the release. The carrying of a combustible article so near the engine as to be exposed to sparks was even more inexcusable, for this could not escape observation, as defects in the vehicle might." *Powell v. Pennsylvania R. R.*, 32 Pa. St. 414. See, also, *Holsapple v. Railroad*, 86 N. Y. 275. At all events, in the absence of all opposing evidence on the part of defendant in that behalf, this court must, after verdict, assume the negligence of defendant, and dispose of the case under that view.

But the stipulation in the contract of shipment most relied on for a reversal of the judgment is the one declaring the company should not be liable for more than \$100 per head for the mules. Such a stipulation, it is claimed, is valid and binding, and does not contravene the rule which forbids the carrier to stipulate against his own negligence. Numerous decisions sustain such stipulations, when fairly made, and where the parties agree on a fixed valuation of the property, and a special and reduced rate of freight is given and received, based upon the condition that the carrier assumes liability only to the extent of the agreed value of the property. *Hart v. Railroad*, 112 U. S. 331, 5 Sup. Ct. Rep. 151, and cases cited.

Other decisions deny the validity of such provisions, and hold them void, as releasing the carrier from the full and proper liability for the consequences of his negligence. *Black v. Goodrich Transp. Co.*, 55 Wis. 319, 13

N. W. Rep. 244; *Moulton v. St. Paul, M. & M. Ry. Co.*, 31 Minn. 85, 16 N. W. Rep. 497; *United States Exp. Co. v. Backman*, 28 Ohio St. 144.

Hutchinson on Carriers says, in substance, that the cases cited by him, as recognizing the right of the carrier to thus limit the liability as to value, occur in states in which the law permits the carrier, by special and express contract, to relieve himself of the consequences of his negligence in the carriage of goods, and that these cases would not be considered controlling authority in those states in which such claim to exemption is not permitted to be made. Sections 257-260.

But, even under the rule declared in the former class of decisions, these provisions, thus employed and resorted to by common carriers to restrict their liability, are to be tested by their fairness, justice, and reasonableness. We will consider the case before us briefly under this view.

The answer charges that defendant agreed to transport the mules for plaintiff between said points at the rate of \$31 per car, which was charged to be a special and reduced rate, lower than the regular rate. The written contract, read in evidence, recited that the said rate was a reduced rate, made in consideration of agreement, etc. The execution of the contract was not admitted, but denied in the reply. The evidence, however, showed that it was in fact signed by the agent of plaintiff, after the mules were loaded into the cars, and just before the train started. This court has heretofore held that all prior verbal negotiations between the parties are merged in the written contract, and that the plaintiff cannot admit the execution of the contract, and avail himself of the fact that he did not read the same, or know its contents, where no mistake, fraud, imposition, or deceit is charged to have occurred.

In this case plaintiff claimed, and was permitted to show by parol evidence, that the said recital in the contract of shipment that the rate named was a reduced rate, was false, and that the same was the usual and customary rate charged all shippers for similar shipments of such stock by the car-load. The oral evidence in that behalf was not objected to by defendant when offered by plaintiff, and no exception saved to its admission in evidence. The following is the substance of this evidence, as given in the abstract for plaintiff, and is, we believe, correct. R. S. Moore testified that he was the agent of the railway company at Boonville; that the bill of lading in evidence was of the same form in use by the company in April, 1884, and had been for a year before that time. Everybody that shipped stock used this form. This is the regular rate of shipment of stock by the car-load. The rates on other classes of freight per car-load was much higher considering the value of the mules. These were the usual rates paid by all shippers of stock by the car-load.

Mr. Frost, who acted in behalf of plaintiff in making the shipment, and signed the contract, testified that nothing was said about the bill of lading being a special contract; that he never asked for reduced rates, but that he shipped the stock and signed the bill of lading, in this instance, just as he had done in all others, when acting for other shippers, and that, so far as he knew, the bill of lading in this case was the ordinary one, and signed by him as in all other cases of stock shipment.

The written contract was not, we think, under these circumstances, conclusive evidence, but merely *prima facie* evidence, that the given rate was a special and reduced rate. As between the parties, it was, in this respect, open to explanation, and impeachable for error, mistake, or false statement. The reduced rate, if such it was, was the consideration for the exemption from liability beyond the \$100, even in case of injury and loss from defendant's negligence, and parol evidence in that behalf is, we think, competent and admissible for the purpose indicated.

The consideration clause in bills of lading, contracts, deeds, and other instruments, ordinarily has only the force and effect of a receipt, and is open to explanation and contradiction by parol evidence. Hutch. Carr. §§ 122, c

123; *Fontaine v. Boatmen's Sav. Inst.*, 57 Mo. 552; *Hollocher v. Hollöcher*, 62 Mo. 267; *Edwards v. Smith*, 63 Mo. 119.

But even if this is not so, it devolved upon the defendant to make the objections to the admissibility, and save the exception if the objection was overruled; and, having failed to do so, no complaint can now be heard at his instance in that behalf. This case, then, under this state of facts, does not fall within the rule declared in *Hart v. Railroad*, cited by counsel for plaintiff. In the case of *Hart v. Railroad*, especially relied on, the discussion was had upon the terms of the bill of lading alone, and as the court say "without any evidence on the subject; and, especially in the absence of evidence to the contrary," and under the qualifications it contains, we cannot regard it as controlling authority in a case where the evidence clearly shows absence of reduced or lower rate, or any graduation of compensation to the valuation.

On the one hand it may be, as it there said, unjust, unreasonable, and repugnant to sound principles of fair dealing for the shipper to reap the benefits of a contract by which he secures a lower rate than the carrier might reasonably charge for the service rendered, if there is no loss, and to repudiate it in case of loss. Where the shipper procures the lawful rates of the carrier to be reduced in express consideration of the agreed value upon which the compensation is based, he is, under numerous authorities, some of which are cited, held to be estopped to say the value is greater when the loss occurs. On the other hand, it would, we think, be no less unfair, unreasonable, and unjust that the carrier, without any sacrifice of his interest or lawful demands, or diminution of his lawful charges, should secure, without any consideration therefor, such important advantages and release of liabilities to which he would otherwise be subjected under the law.

Another case especially relied on is the case of *Harvey v. Terre Haute & I. R.*, 74 Mo. 538, which we deem distinguishable from this present case, and which we will now examine briefly. In the first place, the action was brought upon a special contract. The horse was alleged to be of the value of \$10,000, and the value was limited by the contract to the sum of \$100. The answer set up the affirmative defense that the defendant had certain regular rates of transportation for horses of ordinary value, and that for those of greater value 5 per cent. on the owner's valuation was charged in addition; that defendant asked plaintiff or his agent the value of the horse, and that said value was falsely represented to be \$100, and that said valuation given by the plaintiff was then agreed on. Defendant offered evidence tending to establish the matters set up in the affirmative defense, and instructions numbered 2 and 3, submitting this evidence to the jury, were refused by the court. The third was to the effect, in substance, that if Dickson intentionally misrepresented the value of the horse, and stated it much lower than it actually was, for the purpose of procuring the lower rate, then plaintiff could only recover the value which he had fixed. This court held it error to have refused the instructions asked, and said: "We do not regard a contract limiting a right of recovery to a sum expressly agreed upon by the parties as representing the true value of the property shipped, as a contract in any way exempting the carrier from the consequences of its own negligence. Such a contract, fairly entered into, leaves the carrier responsible for its negligence, and simply fixes the rate of freight, and liquidates the damages. This, we think, it is competent for the carrier to do. And where the reduced value is voluntarily fixed by the shipper with a view of obtaining a low rate of freight, without any knowledge on the part of the carrier that the property was of greater value, it would be a fraud upon the carrier to permit the shipper to recover a greater sum than fixed by him."

In the case now before us there was no pretense that the plaintiff or his agent fraudulently concealed or falsely represented the real value of the mules. They were delivered without any inquiry or representations as to value. They

may have been a somewhat choice lot of mules, but they were not of extraordinary or fanciful value, such as blooded stock, or on account of speed or other qualities, as in the *Harvey Case*, and there is no pretense that defendant was in any way deceived as to their value, or misled as to the degree of care they would require. On the other hand, the recital that the given rate was a reduced rate was in fact false, as was shown by the evidence of the station agent, who testified it was the usual rate charged all shippers. If, in the one case, it is competent for the carrier to show that the real value of the property was concealed, and the lower rate thus secured by the fraud or deceit of the shipper, why may not the shipper be permitted to show that the alleged reduced rate, in consideration of which he surrendered the obligation imposed by law upon the carrier as an insurer of the property, was false, and in fact no reduced rate at all? It may be that plaintiff was not deceived by it at the time, as he did not ask for or suppose he was getting a reduced rate; but if the pretended lower rate was the usual rate, and known to be such to both parties, it would work a fraud upon the rights of plaintiff, under the law, if the defendant were now permitted to treat it as a lower rate, and to thus deprive plaintiff of important rights, and thus secure release of part of its liability by reason thereof. Under the circumstances of this case there was, we think, no consideration for the limited valuation placed upon the mules by defendant, and the stipulation in that respect is, we think, void, as releasing the carrier from the full and reasonably adequate liability for its negligence. The instructions given for plaintiff were in harmony with these views, while those refused for defendant were not in accordance therewith. Finding no error in the record, we affirm the judgment; and it is so ordered.

(All concur.)

IRWIN and others v. EVANS.

(*Supreme Court of Missouri.* June 6, 1887.)

1. ATTACHMENT—PLEA IN ABATEMENT—REV. ST. MO. § 438.

Section 438, Rev. St. Mo. provides that, where property is attached, defendant may file a plea in the nature of a plea in abatement "verified by affidavit," etc. Held, that defendant's attorney could, by leave of the court, file the plea, and could also make the affidavit.

2. SAME.

A verification to such plea in the following language: "This affiant, attorney for the defendant, upon his oath says that the allegations contained in the foregoing plea are true,"—is in all respects sufficient. It is not necessary for the affiant to set out and show that he has a knowledge of the facts stated in the plea, or the means of his knowledge.

Appeal from circuit court, Scotland county.

Smoot & Pettingill, for respondents. *Higbee & Raley*, for appellant.

BLACK, J. Plaintiffs commenced this suit by attachment, and the defendant filed an amended plea in abatement, signed by his attorneys, Higbee & Raley, and verified as follows: "This affiant, attorney for the defendant, upon his oath says that the allegations contained in the foregoing plea are true. [Signed] EDWARD HIGBEE."

Plaintiffs moved to strike out the plea because it was not verified by the defendant, but by Higbee, and it did not appear that he had either the knowledge to justify him in making the affidavit, or the authority to make the same for defendant, which motion was sustained, and a judgment entered sustaining the attachment.

The statute (section 438) only requires that the plea shall be verified by affidavit; and it was held in *Norrell v. Porter*, 62 Mo. 312, that the affidavit of an attorney was a sufficient verification, and we see no reason for departing from what is there said. From the peculiar form of the affidavit the affiant

does not swear to the fact that he is the attorney for the defendant, but the record shows that defendant, by his attorney Edward Higbee, by leave of the court, filed the amended plea in abatement. This shows that he was recognized by the court as an attorney in the cause for the defendant, and, having authority to appear in the cause, he had authority to make the affidavit. It would seem the court sustained the motion upon the ground that the attorney did not in the affidavit set out and show that he had a knowledge of the facts stated in the plea; and, in support of this view of the case, we are cited to the case of *Eldridge v. The William Campbell*, 27 Mo. 596, where it was held that a complaint under the boat and vessel act, verified as this plea is, was an insufficient verification; that the affidavit by an agent must disclose the agent's means of knowledge. The rule there stated seems to have been adopted in analogy to the rules and practice prevailing in some of the courts of admiralty. It was said in the more recent case of *Gilkeson v. Knight*, 71 Mo. 404, that the rule requiring the agent to disclose in his affidavit his means of knowledge has never been applied to any other proceeding than those under the boat and vessel act. That was an affidavit for an attachment, but we can see no reason why any distinction should be made between an affidavit for an attachment and an affidavit to a plea in abatement in the respect under consideration. Here the affidavit is not upon information and belief, but it is positive, and we entertain no doubt but it is sufficient in all respects. The motion should have been overruled.

The judgment is reversed, and the cause remanded, with direction to the court to proceed to hear the issues made by the plea in abatement.

(All concur.)

BURNETT v. MCCLUEY.

(Supreme Court of Missouri. June 6, 1887.)

1. ATTACHMENT—AFFIDAVIT.

A statute of Missouri (1 Rev. St. 1855, p. 240, § 6) directed that the affidavit to procure a writ of attachment should state that the plaintiff had a just demand against the defendant, the amount due after allowing all credits and set-offs, and that the affiant had good reason to believe and did believe in the existence of one or more of the causes which would entitle the plaintiff to an attachment. By section 1 non-residence of defendant was one of these causes. By section 23 an affidavit of defendant's non-residence also entitled plaintiff to an order of publication. In an action on a bill of exchange there was appended to the petition, along with the verification, the following affidavit (omitting formal parts) made by plaintiff's attorney: "This affiant states that the within-named defendants [naming them] are non-residents of the state of Missouri, to the best of his knowledge and belief." An order of publication was made, and a writ of attachment issued on this affidavit, and certain lands sold thereunder. In an action of ejectment by one claiming title under a deed from the widow and heirs of the non-resident against a person in possession under a sheriff's deed given on the sale under the attachment, *held*, (1) that the affidavit was to be regarded as an affidavit for attachment; (2) that it was defective in not stating that the plaintiff had a just demand against the defendants, and in not stating the amount due after allowing all credits and set-offs, but that the judgment founded thereupon was not void, but voidable.

2. SAME.

When defendants are duly notified by publication, and fail to appear, and property is seized and brought into the custody of the court by a writ of attachment formal on its face, the judgment obtained in the action cannot be assailed in a collateral proceeding on the ground that the affidavit upon which the attachment was obtained was defective.

3. SAME.

An affidavit for a writ of attachment being amendable by 1 Rev. St. 1855, p. 254, § 53, a judgment founded upon an attachment obtained on an affidavit defective in not stating that plaintiff had a just demand against defendants, and omitting the amount due after allowing credits and set-offs, but correctly giving plaintiff's name, the court in which the action is pending, and the ground of attachment, cannot be attacked in a collateral proceeding.

4. JUDGMENT BY DEFAULT—EXECUTION.

A writ of attachment, and an order of publication notifying a non-resident thereof, having been issued against certain lands belonging to him, he made default, and general execution was issued, under which the sheriff levied upon the attached lands, selling them to M. *Held* that, while there should have been a judgment to be levied of the attached property, and a special execution issued thereon, yet, as the property levied upon and sold was only that actually seized by the attachment, the deed given by the sheriff to M. would be upheld, as against a purchaser claiming title by deed from the widow and heirs of the non-resident, suing M. in ejectment.

Appeal from circuit court, Dade county.

Hoskinson & McCluer, for respondent. *N. Gibbs*, for appellant.

BLACK, J. This was an action of ejectment for the undivided half of 320 acres of land in Dade county. Both parties claim title from John N. Ferguson, who died in 1868. The plaintiff put in evidence a deed from the widow and heirs of Ferguson, dated January 13, 1875. The defendant put in evidence a sheriff's deed, dated April 28, 1866, upon which he relies for title. To defeat the sheriff's deed, the plaintiff read in evidence the petition, judgment, execution, and proceedings upon which it was based; and from which it appears that on the fifth of August, 1865, the Merchants' National Bank commenced a suit in the Dade circuit court against John N. Ferguson and Marshall G. Stephens. The petition declares upon a bill of exchange which is fully set forth. Appended to the petition are the following affidavits:

"Joseph Estes, attorney for the plaintiff, makes oath, and says the matter and statements contained in the foregoing petition he believes to be true.

"JOSEPH ESTES.

"*State of Missouri, County of Dade—ss.*: This affiant states that the within-named defendants, Marshall G. Stephens and John N. Ferguson, are non-residents of the state of Missouri, to the best of his knowledge and belief.

JOSEPH ESTES, Attorney for Plaintiff.

"Subscribed and sworn to before me this fifth day of August, A. D. 1865.

"B. APPELBY, Clerk,

"By NELSON McDOWELL, Deputy."

Upon these papers the clerk issued a writ of attachment, by virtue of which the sheriff seized the lands in question. The clerk also made an order of publication notifying the defendants, among other things, that their property had been attached. The defendants made no appearance to the suit; and two judgments by default were rendered, both on the third November, 1865. The first is a judgment for the amount found to be due, to be levied of the attached property, which is described, and the other is simply a general judgment. The docket shows that the suit was entitled "Civil Action by Attachment." General execution was issued on the twenty-sixth January, 1866, under which the sheriff levied upon the attached lands, and none other, and sold the same to defendant. The deed made by the sheriff to the defendant is regular on its face.

The court, at the request of the plaintiff, declared the law to be that the sheriff's deed was void, because made under proceedings in attachment, without any affidavit therefor. This instruction presents the controlling question in the case.

The question of the validity of this deed has been before the court on two former occasions: First, in *Bray v. McClury*, 55 Mo. 128; and next in *Burnett v. McCluey*, 78 Mo. 676, which was the first appeal in the present case. On both occasions the deed was held to be invalid, but always by a divided court. From the opinion of Judge ADAMS in the first case it will be seen that he regarded an affidavit for an attachment as essential as jurisdictional, without which the judgment, on publication of notice only, would be void, and that there was no affidavit for attachment in the case, and that the affidavit filed was simply one for an order of publication. Had he regarded the affidavit

as one filed for an attachment also, it is probable he would have reached a different conclusion, for he says: "As there was no affidavit at all filed for the purpose of suing out the attachment, it is unnecessary to discuss the question whether a defective affidavit could be amended so as to sustain the attachment. In my judgment that could be done." The other judges who reached the conclusion that the deed was void, did so evidently, not upon the ground that there was no affidavit filed for the purpose of suing out an attachment, but because the affidavit filed was not in substantial compliance with the statute.

The first question is, was there any affidavit at all filed for the purpose of suing out the writ? We place no reliance upon what appears to be a verification of the petition. By the statute, the affidavit for an attachment (1 Rev. St. 1855, p. 240, § 6) should state that the plaintiff has a just demand against the defendant, the amount due after allowing all credits and set-offs, and that the affiant has good reason to believe, and does believe, in the existence of one or more of the causes which would entitle the plaintiff to an attachment. There are 13 of these causes, one of which is non-residence of the defendant. An affidavit of non-residence will also entitle the plaintiff to an order of publication. Section 23. The law does not require these affidavits to be labeled for the one or the other purpose. One affidavit, stating all the facts necessary to procure a writ of attachment and an order of publication, will be sufficient for both purposes. Now, the record shows that the clerk did make the order of publication, and issue the writ of attachment on this affidavit, and it cannot be said there was no affidavit at all filed for the purpose of suing out the writ. There was, then, an affidavit used for the purpose of issuing the writ. It is defective in that it does not state that the plaintiff had a just demand against the defendants, and does not state the amount due after allowing all credits and set-offs.

The question, then, is, is the judgment to be treated as a nullity, when assailed collaterally, in the face of the fact that defendants were duly and properly notified by publication, and in face of the further fact that the property was seized and brought into the custody of the court by a writ of attachment, formal on its face? In *Kane v. McCown*, 55 Mo. 194, the judgment was assailed because the clerk failed to designate the newspaper in which the order of publication in an attachment suit was to be published, but it was held that, though the omission was error, yet it did not destroy the judgment in a collateral proceeding. That a judgment which is not void, but merely voidable, cannot be assailed in a collateral proceeding, is so well understood that a further citation of authorities is not required. The affidavit for an attachment may be amended by express authority of the statute. 1 Rev. St. 1855, p. 254, § 58; *Henderson v. Drace*, 30 Mo. 358; *Musgrove v. Mott*, 2 S. W. Rep. 214. Judicial proceedings which are amendable are not void. *Hardin v. Lee*, 51 Mo. 241. *Booth v. Rees*, 26 Ill. 45, was an action of trespass, and with respect to the affidavit for an attachment it was said: "When it contains the names of the parties, the amount of indebtedness, and specifies any of the statutory grounds for issuing the writ, however defectively stated, or if it contains some of the statutory requirements, and omits others, it may be amended. * * * While the affidavit was defective, it was not void, and can only be attacked in a direct proceeding, and is sufficient to protect those acting under it." See, also, *Moore v. Mauck*, 79 Ill. 391.

Here the affidavit is attached to the petition, and is to be read in connection with it so far as to ascertain the name of the plaintiff and the court in which the suit is pending. The affidavit is sufficient in these respects, and it also sufficiently states the ground of attachment, *i. e.*, non-residence of the defendants. It would seem that the cause for the attachment is the most material averment, for it is that only which could be put in issue by a plea in abatement. Whether the plaintiff had a just demand, and if it had, then how

much was due, were facts which could not be put in issue on such a plea, for that would be pleading to the merits of the case, which is not allowed on a plea in abatement. *Cannon v. McManus*, 17 Mo. 345. The conclusion is irresistible that there is enough of the affidavit in this case to amend by, that such an affidavit is amendable, and that we can no more declare the judgment a nullity than we could declare a judgment void in a collateral proceeding because based upon a defective petition. We think this view of the case was not well considered in the case of *Bray v. McClury*, *supra*. The conclusion here reached cannot overthrow, but tends to the stability of, titles and judicial proceedings, and for that reason we have the less hesitancy in asserting it. Authorities are cited which go much further in support of these attachment judgments, but the facts of this case do not call for a discussion of them.

There is nothing in this record to show that the first judgment is marked, on the margin of the record thereof, "erroneous." But let it be assumed that this judgment had been set aside by a proper order of the court, and the general judgment entered, still the judgment would not be void. Regularly, there should have been a judgment to be levied of the attached property, and a special execution issued thereon. But as the property levied upon and sold was that, and only that, actually seized by the writ of attachment, these are but errors which do not render the sale, and deed made thereunder, void in this proceeding. *Massey v. Scott*, 49 Mo. 278.

The judgment is reversed, and a judgment will be entered here for the defendant.

(All concur.)

STATE *ex rel.* WEAVER v. WEAVER and others.

(*Supreme Court of Missouri. June 20, 1887.*)

1. GUARDIAN AND WARD—BREACH OF BOND—PRIMA FACIE CASE.

On the trial of an action against the personal representative of the principal and the sureties on a bond given by a father, as guardian, to sell the real estate of his minor child, for breach of the condition to "conduct such sale with fidelity to the interests of said ward, and faithfully account for the proceeds of such sale according to law, and as the order of the court may require," the plaintiff introduced evidence showing that a sale had been made in accordance with the statute regulating the mode of selling infants' lands, and that the proceeds had been received by the guardian. *Held*, that a *prima facie* case had thereby been made out, and the defendant's demurrer to the evidence was properly overruled.

2. SAME—ACTION ON BOND—ESTOPPEL.

The sureties on the bond of a guardian to sell his ward's real estate cannot be heard, as a defense to an action by the ward for breach by failing to faithfully account, etc., to set up that the report filed by the guardian on the sale, which has been confirmed by the court, was untrue, and that, instead of an actual sale, there was only a colorable sale, by which other lands were conveyed to the ward as an offset for the lands falsely represented to have been sold.

3. SAME—BREACH OF BOND—SALE OF REALTY.

Where, instead of actually selling the lands of his ward, the guardian of a minor child, appointed to make such sale, received in trade other lands, which were subsequently conveyed to the ward, and by him sold at a loss, *held*, in an action against the sureties and the personal representatives of the principal on the guardian's bond, that the defendants should be charged with the sum falsely represented by the guardian in his report to have been received in cash, with interest thereon, less the amount actually obtained by the ward, with interest, deducting incumbrances and taxes and the legitimate expenses of the sale.

Appeal from circuit court, Bates county.

Wm. Page, for respondent. *Holcomb & Stilcers*, for appellant.

BRACE, J. The deceased, Jacob Weaver, was the father and natural guardian of the relator, George W. Weaver. This action was brought on a bond for \$3,000, executed by the said Jacob Weaver as principal, and the said de-

fendants Felix R. Weaver and William Fisher as sureties, the condition of which is as follows:

"The condition of the above obligation is such that whereas, the above-bounden Jacob Weaver, as the natural guardian of his son George W. Weaver, did at the March term, 1874, of the circuit court of Bates county, Missouri, obtain from said court an order directing him to sell the land or real estate of the said George W. Weaver, and all his interest in said real estate described in said order, now, if the said Jacob Weaver shall conduct such sale with fidelity to the interests of his said ward, George W. Weaver, and faithfully account for the proceeds of such sale according to law, and as the order of the court may require, then this obligation to be void, otherwise to remain in full force and effect in law."

It is alleged in the petition that said bond was, on the twenty-eighth day of July, 1874, duly approved by the circuit court of the county of Bates aforesaid, and the following breach of the condition thereof is assigned: "That said Jacob Weaver, as such guardian, sold said land at the July term of said circuit court for the year 1874, for the sum of twenty-one hundred and sixty dollars, and received said sum of money into his hands as such guardian, but that said Jacob Weaver, as such guardian, failed to faithfully account for the proceeds of such sale according to law, in this: that he failed, refused, and neglected to reinvest said sum of money as required by law, and neither he nor any one for him has ever accounted for or paid over the same." The defendant Martha A. Weaver, executrix of said Jacob Weaver, deceased, made default.

The defendants Felix R. Weaver and William Fisher answered, saying that they had no information sufficient to form a belief as to whether the said Jacob Weaver sold said land for the sum of \$2,160, and received said sum of money as charged in the petition or not; denied the breach of the bond therein assigned, and for further answer alleged, in substance, that the real estate described in the petition as the property of the relator was purchased, and the consideration therefor paid, by the said Jacob Weaver, deceased; who caused it to be conveyed to his son, the relator, who was a minor about 12 years of age when the last conveyance was made, in January, 1871, residing with his father, and who continued to reside with his father until his majority, July 18, 1880, and until the death of his father, December 28, 1881; that said real estate was sold by the said Jacob Weaver, guardian of the relator, at public sale, under the order of the circuit court of Bates county, and the said defendant Felix R. Weaver became the nominal purchaser thereof, the actual purchaser being one Joseph Bybee, who paid the whole consideration therefor; that although the deed of the said Jacob Weaver, guardian as aforesaid, conveying said real estate to said Felix R. Weaver, recites a consideration received by said guardian from said Felix R. Weaver of \$2,160, no consideration was in fact paid by said Felix R. to said guardian therefor; that the actual consideration for said real estate was paid by said Bybee; that the consideration paid therefor by said Bybee, and for other lands held by said Jacob Weaver in his own right and that of his wife, was the conveyance by the said Bybee to the said Jacob Weaver on the fifth day of May, 1874, of certain lands owned by the said Bybee, among others a certain lot adjacent to the city of Portsmouth, in the state of Ohio; that the said Felix R. Weaver, on the nineteenth of December, 1874, at the request of the said Jacob, and without any consideration by him received therefor, united with the said Jacob and his wife in a deed of conveyance of said real estate of the relator, so nominally purchased by him at said public sale, conveying said real estate to the said Bybee; that said real estate, so nominally purchased and conveyed by him, was worth \$2,160, and said lot adjacent to the city of Portsmouth was worth \$4,000; that afterwards, on the tenth day of June, 1881, the said Jacob Weaver conveyed said lot to the relator in full discharge of his said trust, and by such conveyance

fully reimbursed the relator for the value of his lands so sold by the said Jacob at public sale, as aforesaid; that at the time said lot was conveyed to the relator it was worth the sum of \$3,200; that prior to such conveyance the said Jacob had incumbered said lot with a mortgage to the amount of \$1,000, and, to further reimburse relator, the said Jacob afterwards, in his life-time, gave relator certain personal property of the value of \$450, and by his will bequeathed him certain other personal property.

The plaintiff replied to this answer, denying each and every allegation therein contained. The case was submitted to the court on the pleadings and evidence, without a jury. The court found for the plaintiff, assessed his damages at \$3,000, and rendered judgment accordingly, from which defendants Felix R. Weaver and William Fisher appeal to this court.

The plaintiff, to sustain his cause of action, introduced in evidence the petition of Jacob Weaver, as natural guardian of the relator, to the circuit court of Bates county, presented to said court at its March term, 1874, certified by his affidavit praying for an order for the sale of the real estate of his said ward in accordance with the provisions of sections 34 and 35, c. 116, Gen. St. 1865, p. 470; the order of said court, made at said term, authorizing the said guardian to sell said real estate upon the terms in said order stated, at public sale, first having the same appraised, and entering into bond to the state of Missouri in the sum of \$3,000, conditioned that he make such sale with fidelity to the interests of said George W. Weaver, and faithfully account for the proceeds of such sale, and make report of his proceedings in the premises to said court; the bond sued on given by said Jacob Weaver as principal, and Felix R. Weaver and William Fisher as his sureties; report of the sale of said real estate, verified by the affidavit of said Jacob Weaver, showing a compliance with the terms of said order, and a sale of said real estate at public sale to Felix R. Weaver, he being the highest and best bidder therefor, for the sum of \$2,160, and the receipt from him by said Jacob Weaver of the purchase money aforesaid; the record of said court of the approval of said sale, and order directing said guardian to execute a deed to the purchaser; and the deed of said guardian to said Felix R. Weaver, reciting the order of sale, and proceedings thereunder, the sale, report, and approval thereof, and receipt of the purchase money, conveying all the interest of the said George W. Weaver in said real estate to the said Felix R. Weaver, in consideration of the premises and said sum of \$2,160.

The plaintiff then rested in chief, and the said defendants thereupon demurred to the evidence on the ground that it showed no breach of the bond, the court overruled the demurrer, and this action of the court is assigned for error. The obligation of the defendants was to pay a certain sum of money, to be void upon the condition that the guardian should account for the proceeds of the sale of the ward's real estate. The plaintiff made out a *prima facie* case when he showed that a sale had been made, and that the proceeds of the ward's real estate had come into the hands of the guardian. It then devolved upon the defendants to show that those proceeds had been accounted for. Given, the execution of the bond by the guardian and his sureties, the receipt by the guardian of the proceeds of the sale of his ward's lands, the obligation of the guardian to account for those proceeds became absolute; the liability of defendants on their bond was fixed, and could only be discharged by showing that the guardian had accounted for those proceeds; and, in whatever form presented in the pleadings, this was an affirmative proposition, necessary to be asserted and proven by the defendants in order to discharge them from the obligation of their bond, and defeat plaintiff's recovery. There was no error in overruling the demurrer to the evidence.

The defendants then introduced evidence tending to prove some of the many immaterial and redundant allegations of new matter contained in their answer, and upon this evidence contend that it having been shown thereby that

F. R. Weaver paid no part of the purchase money, that the sale was made to carry out a land trade previously made by the guardian with Bybee, and that the guardian did not receive any money in cash for the lands of his ward. *Ergo*, said sale was a mere fiction, the guardian did not receive the proceeds of said sale, and had nothing to account for, and the ward must be "remitted to his action on the bond for the failure of the guardian to make an actual *bona fide* sale, instead of a bogus one, for his own private ends." Nevertheless it must be conceded that the ward's title to the land is gone from him; that it was worth \$2,160; that he has been divested of his title thereto by the solemn adjudication of a judicial tribunal having jurisdiction of the subject-matter, in a proceeding instituted by the guardian against the real estate of his ward, and to which the appellants voluntarily became parties by the execution of their bond, and upon the faith of which, and the report of the guardian on oath that it was sold for \$2,160 in cash and the money paid, the court stamped the transaction, as thus recorded, with the seal of absolute verity, by its judgment of approval. Can the appellants be now heard to question that record? We think not. By signing the bond of the guardian in this *ex parte* proceeding to procure the sale of the ward's land, the appellants voluntarily assumed such a connection with that proceeding that they can no more be permitted to dispute the facts contained in the report of the guardian which were passed upon, by and on which was based the judgment of the court in that proceeding which divested the title of the relator to his lands, than would be the guardian who made that report. We hold the guardian and his sureties bound by the record they made in that proceeding, and that they must account to the relator for the sum of \$2,160, proceeds of the sale of his land received by the guardian, as per his report, on the thirtieth day of July, 1874.

The purchase of the Portsmouth lot was not made by the guardian on his ward's account; the title was not taken in his name; it was not within the jurisdiction of the court that alone could authorize a reinvestment of the funds of his ward. It was purchased before the proceeds of the ward's real estate came to his hands. The title was taken by the guardian in his own name, its purchase was his own individual enterprise, and for his personal benefit, and can in no sense be considered a reinvestment of the proceeds of the ward's lands for his benefit or at his risk. All that can be claimed, in equity and good conscience, by defendants in regard to said lot, is that the conveyance of it by Jacob Weaver to his son ought to be considered as a partial payment, on account of his indebtedness to the son, on the cause of action sued on. In this light, from the facts and circumstances detailed in the evidence, we think it was regarded by the guardian and his ward, and so it ought to be treated. The evidence fails to disclose any other payment made by the father, or any sum received by the son which could be considered as a payment on such account, or any charge that would be proper to be considered in reduction of plaintiff's demand. The Portsmouth lot was deeded to the son in 1881, and was sold by him in the year 1882. The evidence in regard to its value is variant and conflicting. The relator seems to have diligently sought to obtain the highest price that could be realized for it, and succeeded finally in disposing of it for \$2,000, which, from all the facts in the case, was as much as it could have been sold for. Out of this amount the relator paid the incumbrances on the property, and legitimate charges for taxes and expenses in making the sale, the sum of \$1,128.25, leaving in his hands in the year 1882, say July 30th, (what time in the year the sale was made does not appear,) the sum of \$871.75 at that date, as to represent the only proceeds that ever came to his hands from his guardian, for his real estate sold on the thirtieth of July, 1874, by said guardian, as hereinbefore stated; which amount we think ought to have been allowed as a credit to defendants in the assessment of plaintiff's damages in this action, and, calculating interest at the rate of 6 per cent. per annum on \$2,160, the amount the

ward's land sold for on the thirtieth of July, 1874, from that date to the date of the judgment, November 19, 1884, and interest at the same rate on \$871.75, the amount realized by relator from the sale of the Portsmouth lot from July 30, 1882, to the date of the judgment, and deducting the latter from the former amount as thus ascertained, we have \$2,508.28 remainder; the amount at which plaintiff's damages ought to have been assessed.

For the error of the court in the assessment of the damages this cause will have to be reversed and remanded, with directions that the circuit court enter judgment in accordance with this opinion.

(All concur.)

SIDEKUM and others v. WABASH, ST. L. & P. RY. CO.

(*Supreme Court of Missouri. June 20, 1887.*)

1. NEGLIGENCE—EVIDENCE OF INJURY—EXAMINATION OF PERSON.

The denial of defendant's motion for a physical examination of a female plaintiff by physicians, in an action against a railroad company for damages for personal injuries, is discretionary with the trial court.

2. SAME—EVIDENCE—CONDITION OF TRACK.

Upon an action against a railroad company for damages for personal injuries sustained in an accident, evidence was given for plaintiff as to the condition of the track a mile and a half from the place of the accident. *Held* that, while such evidence was incompetent and inadmissible, yet the error was cured by an instruction limiting the consideration of the jury to the defects specifically charged in the petition.

3. DAMAGES—NEGLIGENCE—PERSONAL INJURIES.

In an action for personal injuries, an instruction, on the measure of damages, that it is the jury's duty to consider the plaintiff's physical condition before and since the injuries, the physical and mental pain suffered on account of the injuries during the same time, the amount of future pain to arise therefrom, *together with all other circumstances shown in evidence, and considering all the circumstances aforesaid*, is proper.

4. APPEAL—OBJECTION NOT TAKEN BELOW—REMARKS OF COUNSEL.

In a civil case, where the damages awarded by the verdict do not appear to be excessive, and no objection was made or exception saved, and no ruling of the trial court had, an appellate court will deem that an objection which might have been interposed to the remarks of opposing counsel in their closing argument was waived.

Appeal from circuit court, Buchanan county.

Woodson, Green & Burnes, for respondent. W. H. Blodgett, for appellant.

RAY, J. Plaintiffs, who are husband and wife, brought this action in the circuit court of Buchanan county, Missouri, to recover damages for personal injuries to the wife, while traveling, as a passenger, on a freight train of defendant, between the stations of Lathrop or Converse and Lawson, on the twenty-fourth day of July, 1883. Upon a trial of the cause, plaintiffs obtained a verdict and judgment in the sum of \$6,000, from which defendant has prosecuted this appeal to this court.

The grounds relied on for a reversal of the said judgment as stated by counsel for defendant are—*First*, that the court erred in overruling its application for a personal physical examination of the wife, the real plaintiff; *second*, that the court erred in admitting testimony concerning the bad condition of appellant's track at other places than that where the accident occurred; *third*, in giving instruction No. 3 at plaintiffs' request; and, *fourth*, in permitting plaintiffs' attorney, in his closing address, to remark upon things outside of the record calculated to excite the prejudices of the jurors, and to deceive and mislead them as to the law concerning the measure of recovery.

In a case involving a similar application as the one mentioned in said first exception, this court expressed the opinion, modifying a previous ruling had in *Loyd v. Railroad*, 53 Mo. 515, that while the party had no absolute right to such personal examination, and the court could not compel the party to sub-

mit thereto, the court may properly, in the exercise of its discretion, order such an examination to be made, in a proper case, and enforce its order in the several ways there specified; and that the exercise of its discretion in that behalf would not be interfered with by this court unless manifestly abused. *Shepard v. Missouri Pac. Ry.*, 85 Mo. 634. In that case the court say: "The order asked by defendant was unreasonable, in that it asked that this lady should submit to a personal examination, not by one skilled surgeon, but by at least three." This and other observations and rulings in said case would seem to control the application in this case, which was "for an order that said female plaintiff submit her person to an examination of physicians to be named by defendant, not exceeding four in number." It further appears, in this case, that said motion, having been filed on the day before the trial, was taken up and heard by the court when the cause was called for trial on the next day, and that the court denied the motion at that time; remarking that if, during the progress of the trial, it appeared necessary to ascertain the real condition of plaintiff, and the nature and extent of her injuries, he would then direct an examination by physicians.

The witnesses testifying for plaintiff upon the subject of her health and condition, both before and after the injury on the railroad, were the female plaintiff, Hannah Sidekum, in her own behalf; her step-mother, Mrs. Harrison; and the family physician, Dr. Bane. Omitting consideration of the testimony of the other witnesses, that of Dr. Bane, delivered before the trial judge, who was, we may assume, personally acquainted with him, and knew his reputation as a physician, was, in general and substance, that he had practiced in the family of Mrs. Sidekum for 12 years; that he was called to see her immediately upon her arrival in St. Joseph, and found her suffering great pain from introversion or dislocation of the womb; the womb pressing on the bladder; surrounding parts inflamed, and some external bruises, the more serious ones being located on the abdomen and back part of the body; that he attended at her house over two months, seeing her nearly every day; that an abscess formed in two or three weeks after the injury, with a discharge through the soft parts, which had not healed when he last saw her, some three or four weeks previous to time of giving his testimony; that her condition was much improved; that he did not regard her condition incurable, as it is curable in some cases, but that the probability was that the injury would be permanent; that she was still under treatment, although he was not visiting her at the time of the trial. He also testified that prior to the accident she had been sound and healthy; that, in the course of his 12 years' attendance as her physician, he had made, prior to the accident, several examinations of the womb, which examinations were occasioned by some symptoms of which she complained, and which he thought made such examinations necessary, but that upon personal examination he had found those organs healthy and strong.

The action of the trial court upon said motion, as we have seen, was merely a refusal to grant the same for the time being, and as defendant did not again renew its application for such order, at any other stage of the proceeding, the court may have well concluded that after hearing the said evidence in the cause introduced by plaintiff, including that of Dr. Bane, which we have given in substance, defendant did not deem it necessary to renew its motion, or to insist thereon, but had abandoned the same.

We will now proceed to the second of said exceptions, as to the admission of evidence, in plaintiff's behalf, as to the condition of the railroad at places other than that of the accident.

In the recent case of *Stoher v. St. Louis, I. M. & S. R.*, ante, 889, a somewhat analogous question was involved. This court there announced its disinclination to adhere to the rule in all its strictness, which is held in numerous cases, and which limits the party to the precise time or the exact place of the occurrence. The condition of the road-bed at the place, or in the imme-

diate vicinity, of the accident, may, we think, be shown. This is also declared in effect in the case of *Hipsely v. Kansas City & St. J. R.*, 88 Mo. 348, where Chief Justice NORRIS, speaking for the court, further observes that "the fact that the road in other places may not have been in good condition had no tendency to prove it was in a bad condition at the place where the accident in question happened." Tested by these decisions, the testimony of the witness Crowley as to the condition of the track a mile and a half from the place of the accident, and the testimony of other witnesses of like import, must, we think, be held incompetent and inadmissible. But, in view of the instructions given in the cause, this evidence must, we think, be held to have been withdrawn and excluded from the jury. The following, given by the court of its own motion, we think accomplishes that purpose:

Ninth. In this case defendant is only liable for injuries suffered by its passengers on its trains if such injuries were caused by its negligence in some one or all of the particulars charged specifically in the petition; and these particulars are alleged to be, at the place of the accident, when the train arrived there: (1) Defective rails; (2) imperfect fastenings thereof; (3) decayed and imperfect ties upon which said rails rested; (4) sunken condition of the ties and rails; and (5) that the ends of the rails in said track did not meet at the joints properly. *No other item or conjecture of negligence can be considered by the jury in this case;* and unless the jury find, from the evidence, that the injury occurred in consequence of defects in some one or all of these respects, the jury must find for the defendant.

The evidence in the record, which was competent and admissible, was amply sufficient to authorize the finding, independent of that erroneously received; and the above instruction was, we think, such as should be held to cure and make harmless the error committed in the admission of the evidence referred to.

The third exception taken to the instruction given upon the measure of damages, and which is as follows, is, we think, also untenable: "The court instructs the jury that if they find for the plaintiffs, in estimating the amount of damages, it is their duty to consider the physical condition of Hannah Sidekum before and since receiving the injuries sued for, and the physical pain and mental anguish suffered by her at the time of, and since, said accident, on account of said injuries, and the amount of pain she will likely suffer in the future on account of said injuries, *together with all other circumstances shown in evidence;* and, *considering all the circumstances aforesaid,* they will find a verdict for such sum as in their judgment will compensate for said injuries, not exceeding ten thousand dollars." The objection is not to any of the items or elements of damages specified in the instruction, which are conceded to be correct, but that the language which is put in italics authorized the jury, not only to consider the enumerated grounds of compensation, but other matters in addition, such, for example, as the bad condition of the railroad at other places than that of the accident; but, fairly considered, the instruction is not, we think, vulnerable to this or other similar criticism, and the exception taken to said instruction must be overruled.

The fourth, and remaining, exception, will now be noticed briefly. This, as already appears, pertains to the closing argument made in behalf of plaintiff. The cases to which we have been referred all recognize the difficulty and delicacy involved in any attempt to confine counsel to a strictly legitimate line of argument; and the restrictions and limitations which may be fairly imposed are, we think, necessarily somewhat indefinable. *Lloyd v. Hannibal & St. J. R.*, 53 Mo. 514. As was said in that case, "it is no doubt the duty of the judge who presides at the trial to prevent such departures from the proper and legitimate sphere of counsel;" and in criminal cases, some of which have been cited, this court has condemned, in strong terms, departures from the proper practices and usages in this behalf. In civil cases, ordi-

narly, this court cannot interfere with the discretion of trial courts, unless counsel is permitted, against objections, to make or persevere in such arguments; but where such objection is made, and the exception to such course in argument is duly taken, the same may be good ground for new trial or for reversal. We do not understand the case of *Brown v. Swineford*, 44 Wis. 282, to which we were referred, and in which Justice RYAN considers this question, to go to any greater length. We must necessarily defer, to a large extent, in any case, and especially in civil cases, to the action of the trial courts upon questions of this sort. In the present case there was no objection made or exception saved to the said closing argument of plaintiff's senior counsel at the time, or during its delivery, and no ruling of the trial court then asked in that behalf. In the absence of such timely objection and exception, we must, under our practice, deem the same waived, at least in a civil case; and, where the damages awarded by the verdict do not appear to be excessive, we cannot reverse the judgment upon this ground.

This leads to an affirmance of the judgment, and it is accordingly so ordered.

(All concur.)

STATE v. CHYO CHIAGK.

(*Supreme Court of Missouri. June 20, 1887.*)

1. CRIMINAL PRACTICE—EVIDENCE—ACCOMPLICE.

In a trial for murder it is error to permit one who is jointly indicted with the defendant and others to testify on behalf of the state, when the case against himself is not disposed of by conviction, acquittal, or *nolle prosequi*, though he is not put upon his trial.

2. SAME—EVIDENCE—ACCOMPLICE—CORROBORATION.

The testimony of an accomplice in a trial for murder in Missouri must be corroborated by other evidence in respect to the identity of the accused. Hence an instruction: "The testimony of an accomplice is admissible, yet, when not corroborated by the testimony of some person not implicated in the crime as to matters material to the issue, ought to be received with great caution by the jury,"—is erroneous, because it does not show that the words "matters material to the issue" include the identity of the accused. NORTON, C. J., dissenting.

3. SAME—EVIDENCE—CO-DEFENDANT.

Under Rev. St. Mo. 1879, § 1918, which provides that "no person shall be incompetent to testify as a witness in any criminal cause or prosecution by reason of being the person on trial or examination, * * * provided that no person on trial or examination * * * shall be required to testify, but any such person may, at the option of the defendant, testify in his behalf, or on behalf of a co-defendant," it is error to refuse to permit the co-defendants of the accused, jointly indicted with him, but not put on trial, to testify in his behalf. NORTON, C. J., dissenting.

4. OATH—CHINESE—"BURNING JOSS-STICKS."

Under Rev. St. Mo. 1879, §§ 3324, 3325, providing that the oath shall be administered to a person about to be sworn in the mode most binding on his conscience, and that every person believing in any religion other than the Christian religion shall be sworn according to the peculiar ceremonies of his religion, when a Chinese interpreter states that "the joss-stick burning is the true oath among the Chinese," it is error to compel him to be sworn in the usual way. NORTON, C. J., dissenting.

5. INDICTMENT—VALIDITY—WRONGFUL ARREST.

In Missouri the fact that the defendant has been wrongfully arrested and detained does not impair the validity of an indictment, otherwise valid, subsequently found against him. NORTON, C. J., dissenting.

Appeal from St. Louis criminal court. Indictment for murder.

Atty. Gen. Boone, for respondent. *Martin & Fauntleroy* and *H. D. Laughlin*, for appellant.

SHERWOOD, J. By a special grand jury at the May term, 1885, of the St. Louis criminal court, the defendant was indicted jointly with Chyo Pock, Hock Siagk, Cong Seng, Chyo Goom, You Sing, and Pock Sig, all Chinamen, for the murder of Lon Johnson, also a Chinaman, in the city of St. Louis on June

1, 1885. The defendant obtained a severance, and, being separately tried, was convicted at the January term, 1886, of murder in the first degree, and sentenced accordingly. The indictment contained three counts, all charging the same offense: "(1) That Chyo Pock, Chyo Chiagk, Hock Siagk, and Cong Seng stabbed and killed deceased with knives; (2) that Chyo Pock and Chyo Chiagk stabbed and killed deceased,—Hock Chiagk and Cong Seng being present aiding and abetting; and (3) that Chyo Chiagk (appellant) stabbed and killed deceased,—Chyo Pock, Hock Siagk, and Cong Seng being present aiding and abetting in the killing." In each and all of these counts the defendants Chyo Goom, You Sing, and Pock Sig were charged as accessories before the fact.

1. Was error committed in permitting Cong Seng, jointly indicted with defendant and others, but not put upon his trial, to testify on behalf of the state, and against the defendant? Was error committed in refusing to permit the co-defendants of the defendant, jointly indicted with him, but not put on trial, to testify in his behalf? Of these questions in their order.

As to the first. In the endeavor to ascertain the present *status* of the law in this state, as involved in this question, it is necessary to give a summary of what has been heretofore decided by this court, as well as to quote from the text writers, and to set forth certain statutory provisions bearing on the point in hand.

Bishop says: "One of two or more joint defendants cannot be a witness for or against another, even on a separate trial, until the case, as to himself, is disposed of by a plea of guilty, or a verdict of conviction or acquittal, or a discharge on a plea in abatement. Then he may be. Sentence need not be rendered. Of course, if the indictments are separate, he may be a witness, though the offense is supposed to be joint." "According to Lord Hale it was the usage in his time not to indict one who was to be a witness because this would disparage his testimony; but, in our day, no good reason appears for attempting to veil from a jury the real facts with a gauze so transparent. Hence with us one of the methods is for the prosecuting officer to require the accomplice to submit to be indicted with the rest. Whereupon the law is that a joint defendant cannot be a witness for or against the others, even on a separate trial, till the case is disposed of as to him by a conviction or acquittal, or by a *nolle prosequi*. But judgment on the conviction need not be rendered. Therefore the defendant who is to testify pleads guilty, and then testifies. If his testimony entitles him to be discharged, there is a *nolle prosequi* or other appropriate proceeding; or, if not, the court has only to render sentence on the plea of guilty." 1 Bish. Crim. Proc. §§ 1020, 1166, and cases cited.

In Best's Principles of Evidence, (by Chamberlayne,) 180, it is said: "Except as above stated, the incompetency of accused parties to give formal evidence in criminal proceedings still subsists; nor even can parties jointly indicted be called as witnesses for or against themselves, or against each other."

Another author says: "But as, in civil actions against several defendants, a co-defendant may sometimes be so circumstanced as to be a competent witness, so in criminal prosecutions one of several persons jointly indicted may be rendered competent to give evidence either for the prosecution or for his co-defendants. Thus, upon an information by the crown against two or more, if a *nolle prosequi* be entered by the attorney general, either before or at the trial, as to one of the defendants, such defendant may be called as a witness for the crown against his co-defendant. So where, upon a joint indictment against two, one had pleaded in abatement, and for want of replication judgment had been entered that he should be dismissed and discharged, he was admitted, without objection, as a competent witness for the other defendant, being himself no longer interested in the event of the prosecution." "It has been held, in a recent case, that a prisoner who has pleaded guilty to an indictment is a competent witness against other defendants joined in the same indictment. It was contended in this case that the defendant was not ad-

missible as a witness against two other prisoners included in the same indictment, because he was a party to the record; but ALDERSON, B., observed that he was not a party to the issues,—the only issues being whether the two other prisoners were guilty or not." 1 Phil. Ev. 64, 65.

Greenleaf says: "In regard to defendants in criminal cases, if the state would call one of them as a witness against others in the same indictment, this can be done only by discharging him from the record as by the entry of a *nolle prosequi*, or by an order for his dismissal and discharge, where he has pleaded in abatement as to his own person, and the plea is not answered, or by a verdict of acquittal where no evidence, or not sufficient evidence, has been adduced against him. In the former case, where there is no proof, he is entitled to the verdict; and it may also be rendered at the request of the other defendants, who may then call him as a witness for themselves, as in civil cases. In the latter, where there is some evidence against him, but it is deemed insufficient, a separate verdict of acquittal may be entered at the instance of the prosecuting officer, who may then call him as a witness against the others. On the same principle, where two were indicted for an assault, and one submitted and was fined, and paid the fine, and the other pleaded 'not guilty,' the former was admitted as a competent witness for the latter, because as to the witness the matter was at an end. But the matter is not considered as at an end, so as to render one defendant a competent witness for another, by anything short of a final judgment or a plea of guilty. Therefore, where two were jointly indicted for uttering a forged note, and the trial of one of them was postponed, it was held that he could not be called as a witness for the other. So, where two, being jointly indicted for an assault, pleaded separately 'not guilty,' and elected to be tried separately, it was held that the one tried first could not call the other as a witness for him." 1 Greenl. Ev. § 363. Elsewhere the same author states: "The usual course is to leave out of the indictment those who are to be called as witnesses; but it makes no difference, as to the admissibility of an accomplice, whether he is indicted or not, if he has not been put on his trial at the same time with his companions in crime. He is also a competent witness in their favor; and if he is put on his trial at the same time with them, and there is only very slight evidence, if any at all, against him, the court may, as we have already seen, and generally will, forthwith direct a separate verdict as to him, and upon his acquittal will admit him as a witness for the others. If he is convicted, and the punishment is by fine only, he will be admitted for the others, if he has paid the fine." 1 Greenl. Ev. § 379.

Wharton says: "An accomplice is a competent witness for the prosecution, although his expectation of pardon depends upon the defendant's conviction, and although he is a co-defendant, provided in the latter case his trial is severed from that of the defendant against whom he is offered." Whart. Crim. Ev. (9th Ed.) § 439. In another place he says: "At common law, an accomplice, not a co-defendant, is always a competent witness for the defendant on trial. But when indicted jointly with the defendant on trial, although he has pleaded and defended separately, he is not, at common law, a competent witness for his co-defendants, unless immediately acquitted by a jury, or a *nolle prosequi* be entered; and the same rule applies to accessories. Whether the trial be joint or several the rule is said to be the same." Id. § 445.

I now will briefly examine our own decisions. In *Garrett v. State*, 6 Mo. 1, it was ruled that an accomplice jointly indicted with others, who is not put on his trial with them, may be a witness for them. In *McMillen v. State*, 13 Mo. 30, this view of the admissibility of a witness in such circumstances was disapproved, though no ruling was made. In *Fitzgerald v. State*, 14 Mo. 413, where several were jointly indicted, it was ruled that it was discretionary with the trial judge whether a severance should be allowed the defendants. All were then put upon their trial, and it was then asked that the

jury be permitted to pass on the case of Ward, so that he might be used as a witness for his co-defendants. This request was also refused, and the result was that Ward was acquitted, and the other defendants convicted. And the second ruling was also approved by this court. This case was followed, in 1851, by that of *State v. Roberts*, 15 Mo. 29, where quite an extensive discussion of the point decided in *Garrett v. State*, *supra*, was had; and the conclusion reached, after an examination of the authorities, was that, where two defendants are jointly indicted, neither is admissible as a witness for his co-defendant, no matter whether they be jointly or separately tried. On this point SCOTT, J., dissented. In 1852 it was ruled to be the proper practice for the state to enter a *nol. pros.* in order to render one defendant a competent witness against his co-defendant. *State v. Clump*, 16 Mo. 385. In 1854 the ruling made, that jointly indicted parties cannot be witnesses for each other, whether jointly or severally tried, was again announced. *State v. Edwards*, 19 Mo. 674.

In 1855 the legislature enacted the following section: "When two or more persons shall be jointly indicted, the court may, at any time before the defendants have gone into their defense, direct any defendant to be discharged, that he may be a witness for the state. A defendant shall also, when there is not sufficient evidence to put him on his defense, at any time before the evidence is closed, be discharged by the court for the purpose of giving testimony for a co-defendant. The order of discharge shall be a bar to another prosecution for the same offense." 2 Rev. St. 1855, p. 1193, § 25. The section just quoted is now section 1917, Rev. St. 1879. This section, coming on the heels of so much discussion of the point already mentioned, may doubtless be regarded as a legislative regulation of the practice to be pursued where either the state or a co-defendant desires to use as a witness a co-defendant jointly indicted; and in view of the authorities cited, and the conflict they show, the section may be deemed declaratory of what was thought to be the correct rule at common law. So that, whether we follow the rule as announced at common law by eminent authors and judges, as already seen, or whether we pursue the statutory rule, the result will be to announce that Cong Seng, in the circumstances mentioned, was inadmissible as a witness against his co-defendant.

The second question propounded is to be considered in connection with another statutory provision, but for the existence of which it is clear that the co-defendants of the defendant on trial would not have been admissible as witnesses in his behalf. Section 1918, Rev. St. 1879, so far as necessary to quote, is as follows: "No person shall be incompetent to testify as a witness in any criminal cause or prosecution by reason of being the person on trial or examination. * * * provided that no person on trial or examination * * * shall be required to testify, but any such person may, at the option of the defendant, testify in his behalf, or on behalf of a co-defendant."

I do not find that this section has ever received construction, or to have been even so much as alluded to in the course of judicial investigation. The case of *State v. Martin*, 74 Mo. 547, (decided in 1881,) cited by the attorney general, makes no allusion to this section, but adheres to the rule announced in *State v. Roberts*, *supra*, declaring that such rule is recognized in the section already discussed.

Now, to the section under discussion. Taking this section in its literal acceptation it must be confessed that it only applies to "the person on trial or examination." "Such a person," *i. e.*, "on trial or examination," "may, at the option of the defendant, testify in his behalf, or on behalf of a co-defendant." Taken as it *reads*, this section would not only bear the meaning just attributed to it, but would allow a defendant "on trial or examination" to decide whether his *co-defendant* should testify in his behalf or not, which the legislature evidently did not mean. If the legislature, just after the words

"required to testify," had simply said "but the defendant himself may testify in his behalf, or on behalf of a co-defendant," there would not have been such ambiguity as that last mentioned. But, coming to the precise point, it is evident from what has been said that the section was very slackly drawn. At the common law, the central idea was to prohibit a *party to the record* from testifying. *People v. Bill*, 10 Johns. 95. That prohibition no longer prevails. On the contrary, the controlling principle of the section under discussion is to remove the ancient landmarks of evidence, and to make it entirely optional whether a defendant, in any given criminal case, shall bear witness for himself or for his fellows. Bearing this in mind, it is altogether inconceivable that the legislature intended that a defendant might testify in his own behalf and on behalf of those *tried with him*, and yet be denied the privilege of testifying for his co-defendant, or of having the latter testify for him when their trials are *separate*. Such a construction would be an absurdity,—contrary to reason, and which could not be attributed to a man in his right senses. *State v. Hayes*, 81 Mo. 585. On the other hand, if a different construction be given that section, such a construction accords well with its evident fundamental purpose,—that of being a *remedial* section, giving a testifying capacity where none existed before; therefore to be construed liberally; to receive an equitable interpretation which will enlarge the letter of the act so as more effectually to meet the beneficial end in view, and prevent a failure of the remedy. 1 Kent, Comm. 465; Smith, Comm. §§ 520, 547. In such cases the reason of the law prevails over its letter, and general terms are so limited in their application as not to lead to injustice, oppression, or an absurd consequence; the presumption being indulged that the legislature intended no such anomalous results. *U. S. v. Kirby*, 7 Wall. 482; *People v. McRoberts*, 62 Ill. 88; *St. Louis & S. F. Ry. Co. v. Evans*, 85 Mo. 329.

Viewing the matter in this light, it is ruled that error occurred in the refusal to permit the co-defendants of the defendant to testify in his behalf, notwithstanding the fact that they were not tried with him.

2. These errors are such as must needs accomplish a reversal of the judgment; and, since this is so, it is not thought necessary to go into any extended examination of this voluminous record, and of the many other errors which have also been assigned, because the errors already mentioned, being corrected on a new trial, will make such important changes in the presentation and aspect of the cause as will probably render any observations now made of but little worth. But, passing to a few points which are deemed proper to be briefly considered before closing:

3. However it may be in other jurisdictions, in this state the wrongfulness of the arrest of the defendant, or the wrongfulness of his detention after arrest, cannot affect or in anywise impair the validity of the indictment afterwards found against him. 1 Bish. Crim. Proc. § 239a. No constitutional right of the defendant was invaded. He was proceeded against by indictment in strict conformity to section 12 of our bill of rights, and the validity of that indictment could only be tested by proceedings immediately connected therewith, and not by unwarranted antecedent occurrences. The motion to quash was therefore properly overruled. This is enough to say on the point.

4. This cause was tried below in peculiar circumstances, and under peculiar difficulties. The defendant was sworn, and testified through the medium of an interpreter. He was a stranger in a strange land. He was put on trial for his life before a court; "its records were kept in unknown characters; its sentences were pronounced in unknown sounds." If, in ordinary circumstances, where one is arraigned and placed on trial, the alternative being his life or death, the situation is embarrassing, though he be one of our own people, conversant with our language, our customs, our institutions, and our laws, what must be the hapless state of one who, lacking all such immense advantages, is compelled to undergo a similar dread ordeal; to tes-

tify to his innocence and his *alibi* by *substitution*; to see as through a glass, darkly; and to hear, without perceiving what to him are matters of most momentous interest? In circumstances such as these, this cause was tried. Placed in such a situation, the defendant had peculiar claims to protection. He was in some sense the ward of the court; and if ever the humane maxim of the common law should apply, that the court is counsel for the prisoner, it ought to apply in instances like the present. Our statute provides: "Whenever the court or officer by whom any person is about to be sworn shall be satisfied that such person has any peculiar mode of swearing connected with or in addition to the usual form of administering oaths which is to him of more solemn and binding obligation, the court or officer shall adopt that mode which shall appear to be most binding on the conscience of the person to be sworn." Section 3324. And it is further provided that "every person believing in any other than the Christian religion shall be sworn according to the peculiar ceremonies of his religion, if there be any such ceremonies." Section 3325. This was the rule at common law. Whart. Crim. Ev. § 354; 1 Greenl. Ev. § 371; 1 Phil. Ev. (4th Amer. Ed. Cow. & H. notes,) 17, 18.

The statute just quoted is an emphatic declaration of the common-law rule. Against the objection of the defendant's counsel, the interpreter, Wong Clim Foo, was sworn in the ordinary way. They proposed to show, before he began his duties as interpreter, that the oath administered was not binding on his conscience; that there was a form of oath which the witness did regard as binding,—one according to the forms of his religion. He had said that he had always taken the Christian oath because he believed in the Christian God, but he did not deny that he still retained the religion of his country, nor state that he regarded the form of oath taken as binding. Indeed, he stated that "the joss-stick burning is the true oath among the Chinese; they take the joss-stick in their hand and swear to it."

Phillips says: "But, although a witness may not be questioned as to his particular religious opinions, he may be asked whether he considers the form of administering the oath to be such as will be binding on his conscience. The most correct and proper time for asking a witness whether the form of administering the oath is such as will be binding upon his conscience is previous to the administration of the oath. But it may occasionally happen that the oath is administered in the usual form, unobserved by the court or the counsel. The question in such case may properly be asked afterwards."

Owing to the great importance to the defendant, in his peculiar situation, of having every formula of the law strictly adhered to, I am of opinion that a reasonable opportunity should have been afforded counsel to establish the position they had taken. And the like opportunity ought to have been afforded them to show that the interpreter was incompetent, and that he was not impartial. It must be obvious that both these questions, the latter especially, are preliminary to an interpreter entering upon the discharge of his duties. The defendant was entitled to an interpreter at once capable and impartial; one who could and would be the medium and conduit of an accurate and colorless transmission of questions to and answers from the witnesses. All the precautions necessary to attain this end should have been taken; for otherwise an interpreter might do the defendant incalculable mischief,—mischief which no subsequent testimony could entirely eradicate from the minds of the jury. A similar objection to the form of oath administered to other Chinese witnesses was made, and likewise overruled. There was error in all these rulings.

5. But for the testimony of Cong Seng, the accomplice, the defendant could not have been convicted. It was his testimony that fastened the crime upon him. Cong Seng, at about half past 8 o'clock on the morning of the murder, was seen coming down the steps from Lon Johnson's house, having in one hand a satchel, and in the other a handkerchief up to his nose. There

was blood on the handkerchief, blood on his fingers, and blood on the satchel. He turned, ran past the witness into the gangway leading into witness' house, went to the hydrant, washed his face and hands, wiped off the satchel, and then disappeared, going into the rear of a saloon on Seventh street. He was afterwards arrested, on the third day of June, two miles south of Murphysborough, Illinois, having with him a satchel, which, when opened, contained two revolvers and a dirk knife. Taking off his pants, the constable who arrested him found blood on his drawers, and a cut on one finger tied up with a rag. Cong Seng told this witness that Lon Johnson, a cousin of his, in St. Louis, owed him some money; that they were sleeping together in the same room, when a quarrel arose between them concerning this money, and his cousin was about to shoot him, upon which he stabbed and killed him with a knife in self-defense. He also told the officer that the long pistol belonged to the man he killed. Similar testimony as to the blood on the drawers, the satchel and its contents, the cut finger tied with a rag, was given by the marshal of Murphysborough, John Fitzgerald, who also testified that, when they approached St. Louis, Daniel McLaughlin, the constable, remarked, "This is St. Louis;" and Cong Seng replied: "I know it. Over there I will die." Also, when asked by the officer who arrested him, "How many do this?" he said: "Nobody. You got the right man now." The satchel and large pistol were proven to have been those of Lon Johnson. In fact, Cong Seng admitted as much. These facts alone, aside from the testimony of Lena Lee, and aside from any confessions by Cong Seng, would have been amply sufficient to have convicted him of the crime charged. As to the defendant, so far as the act of killing was concerned, he established, by his own testimony, as well as that of Als Ngan and Als Bun, a clear *alibi*. The good character of the defendant was also established.

The court, in regard to the testimony of Cong Seng, gave this instruction: "The court instructs the jury that the testimony of an accomplice in the crime—that is, a person who aids, assists, encourages, and abets in the committing of the crime—is admissible; yet the evidence of an accomplice in the crime, when not corroborated by the testimony of some person or persons not implicated in the crime, as to matters material to the issue, ought to be received with great caution by the jury, and they ought to be fully satisfied of its truth before they should convict the defendant on such testimony."

Touching the testimony of an accomplice, Greenleaf observes: "The degree of credit which ought to be given to the testimony of an accomplice is a matter exclusively within the province of the jury. It has sometimes been said that they ought not to believe him unless his testimony is corroborated by other evidence; and, without doubt, great caution in weighing such testimony is dictated by prudence and good reason. But there is no such rule of law; it being expressly conceded that the jury may, if they please, act upon the evidence of the accomplice without any confirmation of his statement. But, on the other hand, judges, in their discretion, will advise a jury not to convict of felony upon the testimony of an accomplice alone and without corroboration; and it is now so generally the practice to give them such advice that its omission would be regarded as an omission of duty on the part of the judge." 1 Greenl. Ev. § 380.

In regard to these observations, Judge HENRY, in *State v. Jones*, 64 Mo. 391, says: "It being the law, as Mr. Greenleaf in the above paragraph states, that one may be convicted of a felony on the uncorroborated testimony of an accomplice, makes it the more necessary that juries should be properly cautioned by the court in regard to such testimony."

Relative to the extent of corroboration necessary in order to convict, Greenleaf states: "But though it is thus the settled practice, in cases of felony, to require other evidence in corroboration of that of an accomplice, yet, in regard to the manner and extent of the corroboration to be required, learned

judges are not perfectly agreed. Some have deemed it sufficient if the witness is confirmed in any material part of the case; others have required confirmatory evidence as to the *corpus delicti* only; and others have thought it essential that there should be corroborating proof that the prisoner actually participated in the offense, and that, when several prisoners are to be tried, confirmation is to be required as to all of them, before all can be safely convicted, —the confirmation of the witness, as to the commission of the crime, being regarded as no confirmation at all as it respects the prisoner. If two or more accomplices are produced as witnesses, they are not deemed to corroborate each other; but the same rule is applied, and the same confirmation is required, as if there were but one." 1 Greenl. Ev. § 381.

In *King v. Farler*, 8 Car. & P. 106, Lord ABINGER, C. B., said: "It is a practice which deserves all the reverence of law that judges have uniformly told juries that they ought not to pay any respect to the testimony of an accomplice unless the accomplice is corroborated in some material circumstance. Now, in my opinion, the corroboration ought to consist in some circumstance that affects the identity of the party accused. A man who has been guilty of a crime himself will always be able to relate the facts of the case; and if the confirmation be only on the truth of that history, without identifying the persons, that is really no corroboration at all. The danger is that when a man is fixed, and knows that his own guilt is detected, he purchases impunity by falsely accusing others."

On one occasion, a case of great importance, when an accomplice, having sworn positively as to several prisoners, was confirmed as to some but not as to others, VAUGHAN, B., advised the jury to acquit the latter. This was done; but those as to whom the accomplice was confirmed were convicted and executed. *Rex v. Fild*, Berks Sp. Ass. 1828.

In another case, ALDERSON, B., said to the jury: "You may legally convict on the testimony of an accomplice alone, if you can safely rely on his testimony; but I advise jurors never to convict on the evidence of an accomplice, unless he be confirmed as to the particular person who is charged with the offense." *Rex v. Wilkes*, 7 Car. & P. 272.

Shortly after, GURNEY, B., said: "I think it would be highly dangerous to convict any person of such a crime [larceny] on the evidence of an accomplice unconfirmed with respect to the person accused." *Rex v. Dyke*, 8 Car. & P. 261.

After quoting from these cases, Wharton remarks: "In the United States, although we have occasionally expressions to the effect that technically an accomplice's unsupported testimony will sustain a conviction, the rule is generally adopted that, when a verdict is rendered exclusively on such testimony, it should be set aside by the court, and that it is the duty of the judge on trial to advise the jury not to convict on the evidence of an accomplice who is uncorroborated as to the essential elements of the case." Whart. Crim. Ev. (9th Ed.) § 441. In the next succeeding section, the learned author, continuing the subject, says: "The corroboration requisite to validate the testimony of an alleged accomplice should be to the person of the accused. Any other corroboration would be delusive, since, if corroboration in matters not connecting the accused with the offense were enough, a party who, on the case against him, would have no hope of an escape, could, by his mere oath, transfer to another the conviction hanging over himself." Thereupon he quotes with approval from Roscoe, Crim. Ev. (7th Ed.) 130, where that eminent text writer, after an able discussion of the authorities, and the reasons, says: "There may be many witnesses, therefore, who give testimony which agrees with that of the accomplice, but which, if it does not serve to *identify* the *accused parties*, is no corroboration of the accomplice; the real danger being that the accomplice should relate the circumstances truly, and at the same time attribute a share in the transaction to an innocent person. It may, indeed, be taken that

it is almost the universal opinion that the testimony of the accomplice should be corroborated as to the person of the prisoner against whom he speaks." Supporting the same view of the law, another author of distinction says: "Again, notwithstanding some old cases to the contrary, it seems now settled that the corroboration should * * * go to some circumstances affecting the identity of the accused as participating in the transaction." Best, Ev. (Chamberlayne's Ed.) 171.

Tested by these authorities, the instruction under discussion cannot be held to fully meet legal requirements. It is faulty in at least two particulars: It fails to explain to the jury what is meant by the words "matters material to the issue." What those matters were the jury were left to grope in the dark. It fails to tell the jury that, in order to the corroboration of the testimony of an accomplice, such corroboration should go so far as to identify the person of the prisoner against whom the accomplice speaks. And, speaking for myself alone, I believe that the jury should be flatly instructed not to convict the accused on the uncorroborated testimony of an accomplice. This position is supported by abundant authority. Wharton observes: "Where there is corroboration as to a part only of the defendants, the later practice, as is elsewhere seen more fully, is to direct an acquittal of the defendant to whom the corroboration does not extend." Whart. Crim. Ev. § 442. On the point of the admission of an accomplice to testify, Chitty aptly says: "The law confesses its weakness by calling in the assistance of those by whom it has been broken. It offers a premium to treachery, and destroys the last virtue which clings to the degraded transgressor. Still, on the other hand, it tends to prevent any extensive agreement among atrocious criminals, makes them perpetually suspicious of each other, and prevents the hopelessness of mercy from rendering them desperate." 1 Chit. Crim. Law, 769. Whatever of probative force the testimony of an accomplice ordinarily ought to have is greatly weakened by the testimony of Cong Seng in this particular instance, by his numerous evasions, contradictions, and by the physical facts immediately attendant on the murder. If, in any case, a jury ought to be directed to acquit, except the testimony of the accomplice be corroborated touching the guilt of the defendant on trial, this is a case where such direction should be given.

In passing by *sub silentio* numerous other errors assigned, we are not to be regarded as giving either sanction or disapproval to any other points than those specially noticed. Several of them, however, are absolutely frivolous.

The judgment is reversed, and the cause remanded.

(All concur but NORTON, C. J., who concurs on the first point, but dissents as to the others.)

STATE v. CHYO GOOM.

(Supreme Court of Missouri. June 20, 1887.)

CRIMINAL PRACTICE—EVIDENCE—ACCOMPLICE.

In a trial for murder, a person jointly indicted with the defendant, but as to whom a *nolle prosequi* had been entered, is a competent witness against the defendant. NORTON, C. J., dissenting.

Appeal from St. Louis criminal court. Indictment for murder.

Atty. Gen. Boone, for respondent. Martin & Fauntleroy and H. D. Laughlin, for appellant.

SHERWOOD, J. The defendant, with others, was indicted for the murder of Lon Johnson, in the city of St. Louis, on June 1, 1885. The facts in this case are identical with those of *State v. Chyo Chiagh*, ante, 704, (decided at the present term,) the defendant being jointly indicted with Goom and others. The result of the trial in this case was the conviction and sentence of the defendant, and he has appealed to this court.

1. The circuit attorney in this case obviated the error which occurred on the trial of the case, already referred to, by entering a *nolle prosequi* as to Cong Seng, a co-defendant and alleged accomplice of the present and other defendants, thus rendering Cong Seng a competent witness against the defendant.

2. But error of the same nature was committed in this, as in the former case, by refusing permission to the defendant's counsel to call his co-defendants, not on trial, to testify in his behalf.

3. And errors of a similar nature, except as aforesaid, were committed on the trial of this case as in *Chiagh's Case*, ante, 704.

For the errors mentioned and referred to, the judgment is reversed, and the cause remanded.

(All concur but NORTON, C. J., who dissents.)

CRAWFORD v. SPENCER and others.

(*Supreme Court of Missouri. June 20, 1887.*)

1. GAMING—OPTION DEALING.

A contract for the delivery of goods in the future is valid, though there is an option as to the time of delivery; but if the real purpose of both parties is merely to speculate in the rise or fall of prices, and to adjust the differences between the contract and market prices, and no goods are to be delivered, such transaction becomes a wager and void.¹

2. SAME—OPTION DEALING—BURDEN OF PROOF.

The burden of showing that a contract between speculating brokers and their customer, apparently valid on its face, is in reality a gambling contract, and invalid, rests upon the party asserting the invalidity.

3. SAME—BONA FIDE HOLDER OF NOTE.

C. gave to a firm of speculating brokers his note, secured by a deed of trust covering certain real estate, to save the brokers harmless in certain wagering transactions in futures, then pending and thereafter to be made between the parties. The brokers assigned the said note to F. before maturity, who took same without notice of the infirmity, and in payment of an existing valid debt between said brokers and F. In a suit by C. to restrain F. from selling the real estate under said deed of trust, *held*, that F. took the note free from the equities existing, as against C. and the brokers, and that F. was entitled to enforce the security to the extent of the amount due from the brokers to him.

4. SAME.

The statutes (Rev. St. Mo. 1879, §§ 5721-5723,) making all notes, where the consideration is money or property, won at any game or gambling device, void, and providing that assignment of such a note should not affect the defense, is designed to aid the criminal law, and do not affect the validity of such a note in the hands of a *bona fide* holder without notice.

5. EXCEPTIONS, BILL OF—SKELETON BILL.

A skeleton bill of exceptions, attached to the evidence, depositions, and exhibits, so arranged that the matter may be easily identified; the evidence of the witnesses sworn, in open court, written out and before the judge, actually attached to the skeleton bill, is in compliance with the Missouri practice.

Appeal from circuit court, Jefferson county.

Dinning & Byrnes, W. H. H. Russell, and Geo. D. Reynolds, for respondent. *Given Campbell*, for appellant.

BLACK, J. The plaintiff brought this suit to enjoin the proposed sale of real estate under a deed of trust, given by him to secure his note, dated the ninth of November, 1881, for \$5,000, due in 100 days, and payable to the or-

¹Contracts purporting on their face to be contracts for the sale of grain or other property, to be delivered at a future day, but under which neither of the parties intends to buy or sell real products, but intends to close them by a settlement of differences merely, are gambling or wagering contracts. *Dunn v. Bell*, (Tenn.) 4 S. W. Rep. 41.

As to the validity of contracts for dealing in futures, see *Bangs v. Hornick*, 30 Fed. Rep. 87; *Beadles v. McElrath*, (Ky.) 3 S. W. Rep. 152, and note; *Ward v. Vosburgh*, 81 Fed. Rep. 12.

der of Harlow, Spencer & Co. The members of this firm were made defendants by the petition, but it appearing that the note had been assigned to D. R. Francis & Bro., the members of that firm were brought in by amendment, and the suit proceeded against all these parties and the trustee to a final decree, as prayed for by the plaintiff. The ground for relief is that the note grew out of alleged gambling contracts for the purchase and sale of wheat and corn. The evidence shows that the plaintiff, who resided at De Soto, in this state, had been, for some months prior to the date of the note, speculating in option deals in grain through Harlow, Spencer & Co., brokers at St. Louis, and through them he became a member of the Merchants' Exchange. At the date of the note the brokers called upon the plaintiff for \$2,000 margin, in addition to what he had before paid. At that time they were indebted to him in the sum of \$2,536, on account of closed transactions, but they were then carrying unclosed deals upon which margins were due to them. On the entire account it is clear that plaintiff owed them as much as \$2,000, and perhaps as much as \$5,000. Plaintiff was about to leave the state on matters connected with his business as railroad contractor, and he states that he gave the note and deed of trust to them, that they might use it to raise money, if it became necessary so to do, on account of pending or future deals. Harlow, Spencer & Co. say the note and deed of trust were given to them to secure them against loss, as the plaintiff desired to use his money in other business; and this we conclude was the real nature of the transaction, for it cannot be claimed but the brokers, at the date of the note, were entitled to at least \$2,000 on account of the face of the then past and pending transactions.

Harlow, Spencer & Co. failed on February 10, 1882. They then had contracts for 20,000 bushels of May corn, and 30,000 bushels of May wheat, which they had bought for plaintiff. They instructed the persons from whom they had purchased the grain to close out the deals, which was done, and an account rendered for the loss, which was settled by the brokers. Harlow, Spencer & Co. then rendered an account to the plaintiff, showing a balance due to them of \$7,128. When Harlow, Spencer & Co. failed, they owed D. R. Francis & Bro., who were also brokers, some \$26,000, and they turned the plaintiff's note over to the latter firm on account of that indebtedness. There is much conflict in the direct evidence of the plaintiff and the members of the firm of Harlow, Spencer & Co. as to the real character of these transactions. The plaintiff says he became acquainted with a member of the firm, and, after frequent conversations as to the speculation then going on, he concluded to make some deals; that it was the distinct understanding between him and the brokers that no grain would be delivered or received, but that differences only would be settled, and in this he is corroborated by the evidence of Mr. Norton, who was interested with the plaintiff in some of the early transactions. Harlow, Spencer & Co. say there was no such understanding, and that the deals were to be and were all made in good faith, and contemplated an actual delivery of the commodity, though delivery might be dispensed with.

The brokers did buy and ship to plaintiff a small quantity of corn for use, but that was paid for at the time, and does not enter into the transactions in question. The difference between the manner that transaction was conducted and these in question is of some significance. It is an undisputed fact in the case that not a grain of wheat or corn was ever delivered under any of the contracts in question. They were all closed out and settled by the adjustment of differences, and in all cases before the maturity of the contracts. That they were all mere speculations is not denied. The plaintiff made, and intended to make, no arrangement for the delivery or reception of any of the grain, and this was at all times well known to the brokers. The brokers were engaged in an extensive business, many times in excess of the amount of produce handled by them. It was the special duty of one of the firm to look after transactions like those in question. If we look to the bare assertion of

the parties on the one side and the other, we might well conclude that plaintiff has failed to make out a case; but if we look to the attending circumstances, which we must do, we can but conclude that these transactions, as between the plaintiff and the brokers, were mere speculations upon the future price of wheat and corn, with a complete understanding on the part of both that no grain was in any case to be received or delivered.

It is true the contracts were all made in the names of the brokers, the name of the real principal not appearing; that they were in writing, and, under the rules of the exchange, the purchaser had the right to call for the commodity; but they were made by the plaintiff's brokers in compliance with their understanding with him, and it is believed with an implied understanding with the persons with whom the deals were made that no grain was to be delivered. The law is now well settled that a sale of goods to be delivered in the future is valid. Such a contract is valid, though there is an option as to the time of delivery, and though the seller has no other means of getting them than to go into the market and buy them. But if, under the guise of such a contract, valid on its face, the real purpose and intention of the parties is merely to speculate in the rise or fall of prices, and the goods are not to be delivered, but the difference between the contract and market price only paid, then the transaction is a wager, and the contract is void. It is not enough to render the contract void that one party only intended by it a speculation in prices. It must be shown that both parties did not intend a delivery of the goods, but contemplated and intended a settlement only of differences. The burden of showing the invalidity of the contract rests upon the party asserting it. *Irwin v. Willmar*, 110 U. S. 499, 4 Sup. Ct. Rep. 160; *Cockrell v. Thompson*, 85 Mo. 510.

With respect to a suit by the brokers for services rendered and moneys advanced for the principal in procuring these wagering contracts, it was said in *Irwin v. Willmar*, *supra*: "It is certainly true that a broker might negotiate such a contract without being privy to the illegal intent of the principal parties to it which renders it void, and in such a case, being innocent of any violation of law, and not suing to enforce an unlawful contract, has a meritorious ground for the recovery of compensation for services and advances. But we are also of the opinion that when the broker is privy to the unlawful design of the parties, and brings them together for the very purpose of entering into an illegal agreement, he is *particeps criminis*, and cannot recover for services rendered or losses incurred by himself on behalf of either in forwarding the transaction."

In the present case the note was given by the plaintiff to the brokers, to protect and save the latter harmless because of these illegal transactions then pending and thereafter to be made. The illegal ventures were carried on by the brokers in their own names, and they were parties thereto from first to last,—parties to the agreements which made the contracts illegal. The case comes clearly within the principles asserted in the case last cited, where it is said the brokers cannot recover.

In the case of *Cockrell v. Thompson*, 85 Mo. 513, Cole Bros. were the brokers or factors. They made the ventures for Cockrell & Thompson. The deals were closed out, and Cockrell then settled with the brokers, and sued Thompson for one-half of the losses thus paid to Cole Bros. From the report of the case, it would seem that the contracts for the purchase and sale of the wheat were made in the name of Cockrell & Thompson by the factors. At all events, it was not alleged or shown that Cole Bros. did not make for Cockrell & Thompson valid contracts. There was no charge that any seller or buyer who dealt with Cockrell & Thompson, through the brokers, did not intend to deliver or receive the wheat. It did not, therefore, appear, nor was it alleged, that the contracts made were illegal.

In the present case we are satisfied that it was not only the understanding with plaintiff and his brokers that the deals were mere speculations on prices,

but that such were also the character of the contracts as between the brokers and the persons with whom they made the contracts. There is therefore nothing in the *Cockrell-Thompson Case* inconsistent with the principle of law before asserted. It follows that the plaintiff is entitled to the relief demanded, as against Harlow, Spencer & Co.

It remains to be seen whether he is entitled to the relief as against Francis & Bro. We do not agree with counsel for the plaintiff that the note is void in the hands of a *bona fide* indorsee because of our statute upon the subject of gambling. These statutes (sections 5721-5723, Rev. St. 1879) make all notes, "where the consideration is money or property won at any game or gambling device," void. The assignment of such a note, the statute says, shall not affect the defense. Under these statutes, it was held in *Hickerson v. Benson*, 8 Mo. 8, that a wager on the result of an election was not within their meaning. Subsequently the statute was so amended (section 5726) as to include bets and wagers on elections, but the amendment does not include such contracts as those here in question. The sections of the statute before noted are evidently designed to be in aid of the criminal law. This much is said in the case of *Williams v. Wall*, 60 Mo. 820. It cannot be said that contracts like those in question come within the provisions of the criminal statutes. These wagering contracts are void, not because prohibited by statute, but because they are against public policy. The note is not void in the hands of an indorsee before maturity, simply because based upon such a consideration. This is the view taken of the statute in *Third Nat. Bank v. Harrison*, 10 Fed. Rep. 243, and we believe it to be the correct one.

The evidence does not show that Francis & Bro. had notice of the infirmity existing in the note when they took it, which was before maturity; nor is the validity of the debt due to them from Harlow, Spencer & Co. fairly impeached. But the further claim is that they took the note as collateral security for a pre-existing debt, and therefore hold the note subject to any defense existing between the original parties. The proof is that Harlow, Spencer & Co. owed Francis & Bro. \$26,000 on open account. The day before Harlow, Spencer & Co. failed they gave to Francis & Bro. notes, including the one in question, amounting to \$12,000, in payment for that amount of the indebtedness. This left \$14,000 unpaid, which was settled and paid at 50 cents on the dollar, and the entire account receipted in full. Afterwards, Harlow, Spencer & Co. took up half of the notes by a cash payment. This left \$6,000 of the notes, including the one in question, in the hands of Francis & Bro. Some of the notes were small, and, to avoid protest fees, Harlow, Spencer & Co., who were indorsers, gave Francis & Bro. their note, also for \$6,000, the latter retaining plaintiff's note. There is still due on this note from \$600 to \$2,000. The evidence is not definite in this respect.

In *Goodman v. Simonds*, 19 Mo. 107, it was said: "We do not say that a bill of exchange passed to a person in payment of a pre-existing debt would be liable in his hands, without notice, to the equities or defenses of the original parties; but that the holder of a bill merely as collateral security for a pre-existing debt, having given no value for it,—no consideration for it,—holds it liable to such equities." This case was cited, but not mentioned, in the opinion in subsequent case of *Boatman's Sav. Inst. v. Holland*, 38 Mo. 51. Subsequently it was held that one who takes a note as collateral security for a debt then created is a holder for value, (*Logan v. Smith*, 62 Mo. 455;) and still later it was held that, if the creditor extends the time of the payment of the principal debt until the collateral shall become due, the agreement to delay constitutes the transferee of the collateral a holder for value. *Deers v. Marsden*, 88 Mo. 512. Where there is a new consideration at the time the collateral is given, such as the extension of the time of the payment of the principal debt, there can be no doubt but the transferrer of the collateral takes it freed from equities existing between the original parties of which he has

no notice, the collateral not being due when transferred. Where there is no such new consideration, there is much conflict in the authorities. But in this case we are satisfied that the notes, amounting to \$12,000, were taken in actual payment of that amount of the indebtedness of Harlow, Spencer & Co., and, that being so, Francis & Bro. took the note freed from the equities existing as between plaintiff and Harlow, Spencer & Co. Daniel, Neg. Inst. (3d Ed.) § 332.

It is true that after Harlow, Spencer & Co. gave Francis & Bro. their note for \$6,000, the plaintiff's note for \$5,000 is spoken of as a collateral to the \$6,000 note; but we do not see that the giving of the new note by Harlow, Spencer & Co., as a substitute for their indorsement, puts Francis & Bro. in any worse condition than they were when they took plaintiff's note in payment of \$5,000. In any possible view of the case, payment of \$5,000 of the indebtedness of Harlow, Spencer & Co. to Francis & Bro. was extended until the note in question matured; and had it been received by Francis & Bro. as collateral security, and not in payment, the extension of time, under the authorities before cited, would have constituted them holders for value, for a new consideration. On the evidence as it now stands in this case, Francis & Bro. are entitled to enforce this security to the extent of the amount due to them from Harlow, Spencer & Co.

It is insisted by the plaintiff, respondent here, that the evidence is not preserved by the bill of exceptions, and for that reason the judgment should be affirmed. In obedience to a writ of *certiorari* issued at the instance of the plaintiff, the clerk has sent up an exact copy of the bill of exceptions as it was when signed by the judge and filed in the court below. It consists of 172 pages of testimony of witnesses, letters, and the like, as taken down and copied by the stenographer, attached together by means of strings. Then follows a skeleton bill of exceptions. As an example, it states: "Plaintiff was then sworn as a witness, and testified as follows: [Here insert testimony of Samuel W. Crawford;]" and so with the various witnesses and depositions and written motions, except the motion for new trial, which is copied in full; and then follows the signature of the judge. All these papers are attached together by another fastening. The skeleton bill was made out in compliance with the practice which prevails in this state, the depositions and motions were sufficiently identified, and the evidence of the witnesses sworn in open court was written out, and, before the judge, actually attached to the skeleton bill. No more could be desired. The bill is sufficient in all respects. Under these circumstances, the clerk was authorized to fill up the skeleton bill with the evidence, depositions, and motions, when called for.

There is no need of a new hearing, so far as the members of the firm of Harlow, Spencer & Co. are concerned, and the judgment is therefore, as to Corwin H. Spencer, John F. Carpenter, and Thomas H. Morgan, affirmed; but as to the other defendants the judgment is reversed, and the cause remanded for a new hearing on the issues between them and the plaintiff.

(All concur.)

SALISBURY v. SALISBURY.

(Supreme Court of Missouri. June 20, 1887.)

DIVORCE—DECREE—ACTION TO SET ASIDE.

A petition in a suit, the main object of which is to set aside a decree of divorce rendered against petitioner at a term of court prior to that at which said suit was brought, is prohibited by Rev. St. Mo. § 2185, which provides that "no petition for review of any judgment for divorce rendered in any case arising under this chapter shall be allowed, any law or statute to the contrary notwithstanding." *SHEPHERD*, C. J., dissenting.

Appeal from circuit court, Jackson county.

Andrews & Adams, for appellants. *J. W. Wafford*, for respondent.

BLACK, J. This suit was commenced on the nineteenth May, 1884, in the circuit court of Jackson county. The case is here from a judgment sustaining a demurrer to the petition. The petition is lengthy, but the facts stated are in substance as follows: The plaintiff and defendant were married in the state of New York in 1880, and in January of that year moved to Kansas City, Missouri, and commenced boarding with Isaac Westrope and his wife, Kate Westrope, who lived in a house owned by the defendant. The defendant at once began a systematic course of neglect towards plaintiff, and devoted his attentions to Mrs. Westrope. This conduct became so open and shameful that Mr. Westrope abandoned his wife, and defendant furnished her with house and support. In June, 1880, the plaintiff, partly from the persuasions of her husband, and partly because he failed to provide a furnished home, which he was able to do, went to New York to her parents. She did not hear from her husband, and returned to Kansas City in September of the same year, when she found him and Mrs. Westrope living together. The three remained in the same house for two or three weeks, when Mrs. Westrope went to Lindley, in this state, to open a millinery establishment. She remained there but a short time, and then returned to defendant, who took her to his house; but plaintiff resisted the outrage, and she went back to Lindley, where she remained until March, 1881, at which time she again returned to Kansas City. In November, 1881, the plaintiff and defendant went to New York with the avowed purpose, on his part, to remain there, but in the course of two or three weeks he left the plaintiff, saying he intended to go to Pennsylvania; but it is alleged that he returned to Kansas City, and from that time to the filing of this petition lived in adultery with Mrs. Westrope, supporting and maintaining her.

At the term of the Jackson county circuit court preceding the one to which this suit was brought, the defendant procured a decree of divorce in a suit against the plaintiff, on a charge of desertion. Plaintiff had no notice of that suit save that by publication in a newspaper. Upon the facts detailed, it is alleged that the decree was procured by fraud upon the court, and defendant in that suit, plaintiff in this suit. It is alleged that at the date of the marriage defendant owned certain real estate, which is described, but, to defraud plaintiff of her marital rights, induced her to join in a deed to his brother; that he subsequently acquired other property, but, for a like purpose, had the same conveyed to the brother. The prayer of the petition is that the decree of divorce be set aside; that the plaintiff be divorced from the defendant; that she be awarded alimony pending the suit, and in gross on final hearing, to be levied of the described lands.

Besides the facts before detailed, it is alleged that plaintiff and defendant corresponded by letter within the year next preceding the date at which the latter procured the divorce. The general allegation is, and the detailed facts show, that defendant's course of conduct was a systematic contrivance to get rid of his wife; that he was not entitled to the decree, but procured the same by a shameful deception and fraud on the plaintiff. No marriage relation has been contracted by either party since that time, and it will be taken without further discussion that plaintiff on the petition, confessed as it now stands, is entitled to relief, unless she is shut out and deprived of it by reason of our statute.

By section 2184 appeals in these divorce suits must be allowed at the term at which the judgment or decree appealed from was rendered, or a writ of error must be sued out within 60 days after the rendition of the judgment. Section 2185 is as follows: "No petition for review of any judgment for divorce, rendered in any case arising under this chapter, shall be allowed, any law or statute to the contrary notwithstanding; but there may be a review of any order or judgment touching the alimony and maintenance of the wife, and the care, custody, and maintenance of the children, or any of them, as in other cases."

The case of *Smith v. Smith*, 20 Mo. 167, came before the court in 1854. There the husband had procured a decree of divorce on an order of publication, and had married another woman. The former wife, under sections 1, 2, 3, and 4 of article 6 of the Chancery Code of 1845, filed her petition for review, which was sustained. SCOTT, J., dissented, and made some strong observations against the right of the court to interfere in such cases, as the law in terms allowed the party at whose instance the decree was procured to immediately marry again. Following this case, and at the revision of 1855, section 2185 was adopted. This section, it was held in *Mansfield v. Mansfield*, 26 Mo. 163, did not apply to divorce suits commenced prior to May 1, 1856, and that is all the case decides, for that case came under the law as it previously existed. The policy of the statute is there severely criticised, but it has remained upon the statute books from that day to this, since which time no case, until this one, has come before this court for review, otherwise than on appeal or writ of error.

The sections of the Chancery Code of 1845 before mentioned provided that when a final decree had been rendered against a defendant who has been summoned, and had not appeared to the suit, such decree might be set aside by bill of review, filed within a designated time, showing that the decree was against equity. These sections are substantially re-enacted in the present practice act, (sections 3684-3686, Rev. St. 1879;) and it is contended by counsel for appellant that the petition for review which is prohibited is that only which is provided by the statute, and that a court of equity always has the power, independent of the statute, to set aside its own decrees for fraud in procuring them. But the statute declares that no petition for review shall be allowed, any *law or statute* to the contrary notwithstanding. It is clear we cannot limit the prohibition to this statutory review. In chancery practice, bills of review might be brought upon the discovery of new matter; such, for example, as the discovery of a release or receipt, which would change the merits of the claim upon which the decree was founded. Story, Eq. Pl. (9th Ed.) § 412. So a bill to impeach a decree for fraud is an original bill in the nature of a bill of review. Id. § 426; 2 Daniell, Ch. Pr. 1584, note 4.

The present petition is essentially a bill of review, or, as it is said, in the nature of a bill of review. Its first and foremost object is to set aside the former decree; and we cannot escape the conclusion that it is within the statute, and clearly prohibited. It was the evident purpose of the legislature, with the example of *Smith v. Smith*, *supra*, before it, to deny a review in all cases, whether based upon a charge of fraud or not. The breaking up of second marriage relations, which must often result in disaster to innocent persons and children, doubtless led to the enactment. It would seem the statute might allow a review of these divorce decrees rendered on publication of notice, where no new marriage relation has been contracted, without violating any principle of sound public policy. But a criticism of the law avails nothing. The statute is clear and emphatic. It makes no exception. The courts are powerless to legislate one into it. It asserts broadly a principle of public policy which has found recognition elsewhere. *Parish v. Parish*, 9 Ohio St. 534; *Greene v. Greene*, 2 Gray, 361. The St. Louis court of appeals reached the same conclusion in a case not materially different from the one in hand. *Childs v. Childs*, 11 Mo. App. 395.

The court, in the divorce suit, had jurisdiction of the parties and the subject-matter; and the decree of divorce, after the expiration of the term at which it was obtained, became final and conclusive, as against a petition for review, whether under the statute, or based upon the ground of fraud. The judgment is affirmed.

(All concur, except SHERWOOD, J., who dissents.)

IRON MOUNTAIN BANK v. ARMSTRONG.*(Supreme Court of Missouri. June 20, 1887.)***1. APPEAL—WHEN LIES.**

In an action against an indorser to recover the amount due upon a negotiable promissory note, a verdict for the plaintiff was set aside by the court, and a new trial was granted. Plaintiff tendered his bill of exceptions, and refused to take part in the new trial, and judgment of dismissal was ordered. *Held* that, having excepted to such judgment, plaintiff may take and support an appeal.

2. TRIAL—INSTRUCTION—ISSUES.

Where the issue made by the pleadings in an action against an indorser to recover the amount due on a negotiable promissory note is whether the note sued on, as described in the petition and offered in evidence, was indorsed by the defendant, an instruction that "if, when plaintiff received the note, it contained a clause providing for the payment of interest inserted in said note in the usual way, and in such a way as not to raise the suspicion that it had been inserted after the note was indorsed to plaintiff, and if plaintiff purchased the note for value, in the usual course of business, before maturity, and without notice that it had been altered, the note is not necessarily invalid against the indorser, in plaintiff's hands," cannot be complained of by the defendant on the ground that it submits to the jury an issue not made by the pleadings, since he requested the instruction, which was given, that, "if the jury believe that the appearance of the note was such as to put a prudent person on inquiry, then failure to make inquiry as to the circumstances of the indorsement was negligence on the part of the plaintiff," which is the converse of plaintiff's request, and having gone to trial on that theory, and lost, a new trial should not be granted on that ground.

3. NEW TRIAL—GRANTING—DISCRETION.

The matter of granting new trials lies peculiarly within the discretion of the trial court. Hence, where it appears that the facts relied on, and upon which a verdict is based, are not pleaded, but appear in an instruction requested by plaintiff, and given by the court, and that the instructions given at the trial are inconsistent with each other, the ruling of the court in granting a new trial will not be reversed.

Appeal from circuit court, city of St. Louis.

Broadhead & Haussler, for appellant. Krum & Hicks, for respondent.

RAY, J. This is a suit by the plaintiff, as holder, against the defendant, as indorser, of a negotiable promissory note, wherein the makers, Murdock & Dickson, promised to pay \$5,000, with interest at 10 per cent. per annum after maturity. The case has been in this court once before, and is reported in 62 Mo. 70, when it was reversed and remanded on account of erroneous instructions. On a retrial of the cause, plaintiff filed an amended petition, as follows: "By leave of court now comes plaintiff, and for amended petition states that, at the dates hereinafter, it was a corporation duly incorporated under and by virtue of the laws of Missouri; and John J. Murdock was doing business under the style of Murdock & Dickson. And, for its cause of action, plaintiff states that on the sixth day of August, 1873, said John J. Murdock, by his said firm style of doing business, made, executed, and delivered, for value received, his promissory note of that date, herewith filed, whereby, for value received, he promised to pay, sixty days after said date, to the order of David H. Armstrong, the defendant herein, the sum of five thousand dollars at the Third National Bank, St. Louis, Mo., with interest at 10 per cent. after maturity; that thereupon the said defendant, Armstrong, did, for a valuable consideration, indorse, transfer, and deliver said note by and through his duly-authorized agent, to one F. Sieberman, who for value did indorse and deliver same to plaintiff, who is still the lawful holder thereof, for value before maturity; that afterwards, at the maturity of said note, the plaintiff caused same to be presented to the maker thereof, and payment demanded, which was refused, and due protest was made, and notice of all which was given duly to defendant, Armstrong, and payment thereof demanded of him, which he failed to make, and said note remains wholly due and unpaid. Wherefore plaintiff prays judgment for the sum of \$5,000, with interest

thereon from the eighth day of October, A. D. 1878, the date of demand and protest aforesaid, together with statutory damages and all costs."

To which defendant filed his answer, duly verified by oath, as follows: "For answer to the petition as amended by interlineation, the defendant denies that he indorsed, transferred, or delivered the note sued on to one Sieberman, or to any one, or that said Sieberman delivered the said note, as indorsed by said defendant, unto said plaintiff. The defendant denies that he ever indorsed the note sued on, and denies that notice of the non-payment of such note was ever given him."

The retrial was had before a jury upon these pleadings and the evidence and instructions hereinbefore noticed, and resulted in a verdict for plaintiff (October 31, 1884) for \$8,318.35. Whereupon defendant filed his motion for a new trial, the parts of which deemed material are as follows: "Because the court erred in giving instructions to the jury; because the instruction asked by plaintiff, and given by the court, was not based upon any issue in the pleadings, or upon any evidence adduced at the trial; because the instructions given were inconsistent and incompatible with each other; because the verdict was against the evidence, and also against the weight of evidence; because the verdict was contrary to the law and the evidence; and because upon the evidence the verdict should have been for defendant." Which motion was by the court sustained.

Thereupon plaintiff excepted to this ruling of the court, and filed its declaration to retry said cause, or to proceed further therein, as follows: "The court having granted a new trial in this cause, plaintiff comes, and refuses to further proceed with said cause in this court, preferring to stand on its rights, and excepts to the action of the court in setting aside the verdict and granting a new trial. This plaintiff accordingly, in order to comply with the law and the decisions of the supreme court of this state, now demands and asks the court to enter such final judgment *instantly* herein as it may see fit, so that it may be able to file its bill of exceptions, and appeal to the supreme court as speedily as possible." Whereupon the court ordered the cause dismissed for want of prosecution, which was accordingly done, and thereupon the plaintiff filed his motion to set aside said judgment of dismissal, the parts of which deemed material are as follows: "Because the said verdict in its favor was in all respects valid and proper, and should not have been vacated, set aside, or disturbed; because no error appears in the record of or was committed in the proceedings upon the trial of the cause warranting or entitling defendant to a new trial of said cause; because the instructions given by the court to the jury were in all respects proper and legal under the pleadings and evidence adduced upon the trial of said cause; because the evidence at the trial was competent, relevant, and fully supported the verdict; because the plaintiff, after a just and fair observance of all legal forms and requirements, and the proper administration of the law, by the court and jury, had obtained said verdict, and should not have been deprived of its rights to enjoy its fruits, unless for manifest error, and as none such appeared, or was committed therein, the same should have stood, and because the final judgment entered herein, on plaintiff's refusal to proceed further, precludes plaintiff from any and all recovery upon or by reason of the cause of action set forth in its petition, and the same will be wholly lost to plaintiff if said judgment be allowed to stand." This motion of plaintiff the court also overruled, and plaintiff excepted, and brings the case here by appeal.

Upon this state of the record two questions arise: (1) Is the plaintiff in a position to call for a review of the rulings of the trial court in setting aside said verdict and granting said new trial; and (2) if it is, did the trial court err in its said rulings. This calls for a review of the evidence and instructions given at the trial, which we will proceed to notice as far as deemed material to a proper disposition of the cause.

The plaintiff, to sustain the issues on its part, after reading in evidence the certificates of its incorporation, offered Frank Sieberman as a witness, who testified substantially as follows: "Know the plaintiff and defendant. [The note in suit was shown witness.] In 1873, I got the note in suit from the hands of one Renick, a broker, to discount. It was a renewal of an old note. I brought the note in suit down to the plaintiff, with the discount money, and renewed it the very way it is here. I brought back the old note that I got for the note in suit. It was similar to this. I paid plaintiff the discount on note now in suit. The old note was made by same parties; indorsed by same parties; same amount. Only had this note in my hand that one time. There was not a bit of change made in this note from time I first saw it until I gave it to the bank. I was then a broker in money transactions. I was a bank clerk from 1856 to 1870. Have held all stations in bank except that of president. In notes that are printed like this one, when an interest clause was inserted, it was customary usually to insert it where this clause is. The note sued on is written exactly in the usual and customary way as it generally went into the bank. This was also the case with the interest clause. Never had any conversation with Col. Armstrong in regard to it. Renick & Co., who gave me the note, were at that time brokers."

The evidence of R. J. Schneck, who was admitted to be dead, was also offered and read in evidence by plaintiff, from bill of exceptions found in record of case in 62 Mo. 70, *supra*, and is substantially as follows: That he was cashier of plaintiff since April 7, 1883. On being handed note in suit he said: "This note was offered by Mr. Sieberman to plaintiff for discount, and it was discounted August 6, 1873. When I received it, the same was in exactly the same condition as it is now. The first I saw of the note was when we took it for discount. It was precisely the same as now, except, of course, the protest. The clause "with interest after maturity at 10 per cent. per annum" was not put there by any one after it came to plaintiff's hands. It never went out of my hands after it was discounted. Consequently it could not be put in after I saw it. If any change was made in that respect after it was indorsed by Armstrong, the bank, or any of its officers, had no knowledge or notice of it when they took it. I was the officer through whom it was discounted. No one had the handling of that paper before I did. If there was any change made, it was before I and the bank got it, or ever saw it. I never saw or heard of the note before it was offered for discount by Mr. Sieberman."

Thereupon one Renick not appearing as a witness, although duly summoned, plaintiff asked cause to be laid over, whereupon defendant, to expedite case, admitted that name, "D. H. Armstrong," on back of note sued on, *was in handwriting of defendant*, and he assumed burden to prove that, at time when he indorsed the paper, it was not in the condition in which it was now. It was also admitted that Murdock delivered the note to Renick, and that Renick delivered it to Sieberman for purpose of discount.

The note and protest was then read in evidence by plaintiff, the first of which, as found in the transcript before us, read and appears as follows:

"\$5,000.

St. Louis, August 6, 1873.

"Sixty days after date we promise to pay to the order of David H. Armstrong five thousand dollars at 3d National Bank of St. Louis, Mo., value received, with interest at 10 per cent. after maturity.

"MURDOCK & DICKSON, Without Recourse.

"F. SIEBERMAN."

"Due October 5-8, 1873.

"Indorsed: D. H. Armstrong."

Here the plaintiff rested.

The defendant, to support the issues on his part, then testified as a witness "to the effect that, when he signed his name on back of note, the words with

interest at 10 per cent. after maturity, were not there; that those words are in handwriting of Osborn, Murdock & Dickson's clerk; that he had no authority from defendant to put them there; that the defendant had no knowledge of it until he was sued. When he signed it, the makers' names were on it. He indorsed it in reading-room of Planter's House. Murdock brought it to him. Murdock took it with him after he indorsed it. Defendant never authorized any one or consented to anybody's adding these words. No one asked him to do so." Being cross-examined, he said: "As far as he could remember the amount and where payable, and date were same as now. *All the writing in note* (except protest) are in Osborn's handwriting." That defendant was on a good deal of Murdock & Dickson's paper. He did not ask Murdock what it was for when he indorsed it; had implicit confidence in Murdock's rectitude and honesty, and *he signed anything asked him* to. Defendant handed the note back to Murdock for him to use it; presumed he was going to use it for his purposes. I indorsed it to enable him to *raise money from the bank or renew note*. I remember seeing Haeussler at his office before suit. I saw what he said was the note on the table. I never took it up or touched it."

The evidence of W. H. Osborn and the deposition of John J. Murdock were then put in evidence by defendant, and are "both to the effect that writing in body of note in suit was in handwriting of Osborn; that Osborn was at the time the book-keeper of Murdock; that, when note was signed by Murdock in his firm-name, it had not the interest-clause in it; that it was drawn up at office of Murdock & Dickson, and there signed by Murdock, and he took possession of it, and had it indorsed by respondent, Armstrong, after which Osborn, at Murdock's request, inserted the clause 'with interest at 10 per cent. after maturity' with the same ink and with the same pen as remainder of body of said note; that Osborn had no authority from Armstrong to do it; that he wrote the interest clause; he did it so as to avoid writing over the 'D' in name of 'Dickson;' that Osborn at many times did same thing, and knew Armstrong objected to it; that he did not know that Murdock had no authority to have it done; that Osborn deliberately and knowingly put it there because he did not know Murdock had no instructions not to do it; that the note was to take up a similar note made and indorsed by same parties due that day. Renick was employed as broker. Murdock deeded his residence to defendant Armstrong in order to protect him as indorser." This was all the evidence.

At the instance of the plaintiff the court gave the following instructions: "The court instructs the jury that if they believe from the evidence that the interest clause in the note sued upon was inserted by the same person who filled up the other written parts of said note before the plaintiff received the same, and in such manner that said interest clause was apparently written simultaneously with the residue of the written words of said note, and that the blank note was so printed as to give apparent authority to fill the blank space with said interest clause, and said blank space so filled was ample, and occupied the same relative position to the body of the note that an interest clause usually did in notes at the time, and, further, that said interest clause was inserted in a manner not calculated to excite suspicion, or any inquiry upon the part of a prudent and careful person, and that said note was purchased by plaintiff for value, in the usual course of its banking business, before the maturity thereof, and without notice or knowledge of said alteration, then the fact that said interest clause was inserted after the indorsement of defendant, Armstrong, does not necessarily render said note invalid against said indorser, in plaintiff's hands."

At the request of defendant the court gave the following instructions: "(1) If the jury believe that the appearance of the note at the time it was offered for discount to the plaintiff was of such a character that it would have put a prudent person upon inquiry as to the circumstances of the indorsement, then

it was the duty of the plaintiff to have informed itself as to the facts attending such indorsement, and failure to make such inquiry was negligence on the part of plaintiff. (2) The court instructs the jury that, if they believe from the evidence that after the defendant indorsed the note sued on, the words 'with interest at ten per cent. after maturity' were inserted upon the face of the note, without the knowledge, consent, or authority of the defendant, then there can be no recovery in this action, and the jury will find for the defendant."

The court, of its own motion, gave the following instruction: "The court instructs the jury, if they find for plaintiff, to state in their verdict the amount the jury find to be due, up to date of the verdict, including interest."

The jury rendered a verdict for plaintiff, October 31, 1884, for \$8,318.35.

At the outset it may be well to premise that the case, although the same as that in 62 Mo. 70, *supra*, yet it is now before us on pleadings and evidence other and different from those when here before. The petition and answer, as we have seen, were both amended in the progress of the retrial. When the case was here before, it also appears that the original note was before the court and a fac-simile of its exact form and appearance is preserved in the opinion in that case. Now, we have not the benefit of the presence and inspection of the original note; nor is any fac-simile of its exact form and appearance in any way preserved in this record. There is nothing in the transcript now before us, as to the form and appearance of the note, beyond a simple copy thereof, in writing, which fails to show or even intimate the existence of any of its peculiarities, if such it has, as to printing and writing, or as to position occupied by the "interest clause" with reference to the blank space at the end of the printed form, and the signatures of the maker thereof. This is manifest by simple reference to the form and appearance of the note heretofore copied in the statement herein. But concede that we may, from remarks of counsel made at the argument, accept the fac-simile as shown in 62 Mo. in lieu of the original, still the evidence in other particulars is not the same in both cases, nor is the case brought before us in the manner as when here before.

As to the first question presented by this record, as hereinbefore stated, we are of opinion that under numerous decisions of this court, it must be answered in the affirmative. While those authorities hold that a judgment setting aside a verdict, and granting a new trial, is not a final judgment, and will not, therefore, support an appeal or writ of error, still they all, in effect, hold that, when the trial court improperly grants a new trial, the party complaining may avail himself of the error by tendering his bill of exceptions, and abandoning the case at that point, and that, when a final judgment is thereafterwards rendered in said cause, he may then, by excepting thereto, take and support an appeal, and in this way secure a review of errors committed, if any, in setting aside said verdict and granting said new trial. These authorities also hold that, if such a party participates in the new trial awarded, he will not afterwards be heard to complain of the errors committed in the first trial. *Hill v. Wilkins*, 4 Mo. 87, 88; *David v. Davis*, 8 Mo. 56, 58; *Martin v. Henley*, 13 Mo. 312, 313; *Bowle v. Kansas City*, 51 Mo. 459; *Gulstrap v. Felts*, 50 Mo. 431.

A proper construction of the record now before us will show, we think, that that, in substance, is precisely what the plaintiff did in the case at bar. It thereupon excepted to said rulings, filed its declination to retry the case, or to proceed further therein, and asked the court to enter up *instantly* such final judgment as it might see fit, so that it might be able to file its bill of exceptions and take its appeal; whereupon the court ordered the cause dismissed for want of prosecution, to which the plaintiff also excepted; that is, to the dismissal of the cause, which, to all intents and purposes, is a final judgment or disposition of the case, from which the plaintiff, under authori-

ties cited, might and did appeal. Under the circumstances, it cannot fairly be urged that plaintiff's declination to further prosecute the suit was in any just sense voluntary and unnecessary. At most, it may have been voluntary as to the time at which such final judgment as the court might see fit to render should be entered up, but not voluntary as to the result of such rulings which the court must necessarily render when the cause should be reached in due course of its business. But, even if that were so, the plaintiff had the authority of this court for so doing, in the case of *Gilstrap v. Felts*, 50 Mo. 431, where the plaintiff had judgment, which, on motion of defendant, was arrested, and it was said: "When the judgment was arrested, and a new trial ordered, the plaintiff should have refused to proceed further, and should have demanded final judgment against him to enable him to bring up the case."

The second question, however, is one of greater difficulty; that is, did the court err in setting aside the verdict and granting the new trial complained of? The plaintiff, being appellant, has the burden of showing that the trial court erred in its said rulings. The motion for setting aside said verdict, and granting said new trial, assigns several grounds of error. The plaintiff insists that none of these grounds are well taken. One ground of error, as we have seen, was that the instruction given for plaintiff submitted an issue not made by the pleadings; another was that the instruction given were inconsistent and contradictory; another, that the verdict was unsupported by the evidence, and in direct conflict with it; another, that the verdict was contrary to the law and the evidence; and another, that upon the whole evidence the verdict should have been for the defendant. If any of these objections are well taken, the plaintiff must fail, and in that event the judgment appealed from affirmed. The issue tendered by the pleadings, as we have seen, was whether the note sued on, *as described in the petition and offered in evidence*, was indorsed by defendant. The issue submitted by the instruction is, conceding that the "interest clause" was inserted after the indorsement by defendant, or which, in effect, is the same thing, that said note was not indorsed by defendant, still, if the jury believe the facts hypothetically stated in said instruction, then they may find for plaintiff. If we concede that the grounds upon which the plaintiff's right of recovery is placed in the instruction is different and distinct from that upon which it is placed by the pleading, it must still be held that defendant in this instance will not be heard to complain, since he committed a like error by submitting, on his part, the converse or opposite of the fact so hypothetically stated in plaintiff's instruction. Having thereby adopted the same theory, gone to trial thereon and lost, he will not, under the authorities, afterwards be heard to complain. *Crutchfield v. St. Louis, K. C. & N. Ry. Co.*, 64 Mo. 255; *Davis v. Brown*, 67 Mo. 313; *McGonigle v. Daugherty*, 71 Mo. 259.

While this is so, the objection that the verdict is unsupported by the evidence, or against the weight of evidence, even on that theory, is still open to the defendant. It must also be remembered that, while appellate courts may not and will not review the action of trial courts in granting or refusing new trials (when there is any evidence to support it) on the ground that the verdict is contrary to the weight of evidence, no such rule applies to the trial courts in that regard. On the contrary, it has been repeatedly held that the trial court may, and when it appears that the verdict is unsupported by the evidence, or the weight of evidence, or that injustice has been done, it is its duty to, interfere, and set the same aside, and grant a new trial, on that account. It has also been further held "that the granting or refusing of new trials on the ground that the verdict is against the weight of evidence rests peculiarly with the judge presiding at the trial, and that his discretion in this particular will rarely be interfered with unless it plainly appears that injustice has been done, or that it has been unsoundly or arbitrarily exercised." In the case of *McKay v. Underwood*, 47 Mo. 187, it was said that "the granting

of a new trial for the reason that the verdict is against the weight of evidence rests peculiarly with the judge presiding at the trial." In the case of *McDonough v. Nicholson*, 46 Mo. 86, it is said that "it has always been the settled law in this state that an order granting a new trial is a matter mainly resting in the discretion of the judge presiding at the trial." In the case of *Eidemiller v. Kump*, 61 Mo. 342, it is said: "No general rule can be established which will be applicable to all cases where motions are made to set aside judgments and grant new trials. The questions presented in such motions are so variant that each case must necessarily depend, to a great extent, upon its own particular facts, and is generally addressed to the discretion of the court that hears the same. It may be said that where the trial court refuses to grant a new trial, or to vacate a judgment previously rendered, this court would scarcely ever interfere with the discretion of a trial court, unless it plainly appears that injustice has been done, and that the discretion of the court had been exercised in an arbitrary manner." In *Cook v. St. Louis & K. Ry. Co.*, 56 Mo. 384, it is said: "The granting of new trials because of evidence subsequently discovered rests for the most part with the trial court; and any doubt as to whether the discretion vested in this regard in that tribunal has been soundly exercised is to be resolved in favor of its rulings. It is only in a case entirely free from any element of uncertainty as to the impropriety of such rulings that appellate courts feel themselves called upon to interfere." In the case of *Reid v. Piedmont & A. Life Ins. Co.*, 58 Mo., on rehearing, at pages 429 and 430, this court uses this language: "Defendant has filed its motion for a rehearing in this case on the ground that the verdict of the jury was unsupported by the evidence, and in direct conflict with it. It is needless to repeat what has been so often said, that this court will not undertake to weigh the evidence. Such a course would be entirely inappropriate in an appellate tribunal. The opportunity for judging of the credibility of witness is entirely denied us. Hence, where there is any evidence to support the verdict, we cannot interfere. * * * But, in this connection, it is well enough to make another remark. Constant complaints are reaching us that in some of the circuits the rule adopted here is followed, and that the judges consider themselves bound thereby. But this is founded in an entire misapprehension. The trial courts have opportunities which we have not. In witnessing and presiding over the trial, they are put in possession of facts which we cannot possibly attain. * * * All these considerations render it peculiarly proper that the question of granting new trials on account of the verdict being against the weight of testimony should be exclusively exercised by the court trying the cause; and where the trial court is of the opinion that the verdict is not supported by the evidence, or is against the weight of evidence, it should never hesitate in exercising the power, and giving the aggrieved party a new trial." The law is well settled, also, that, if the trial court decides the question before it correctly, its judgment will not be disturbed although it may have assigned the wrong reason.

In the case at bar it appears that the trial court set aside the verdict, and granted the new trial, mainly upon a question of pleading and instruction combined. It seems to have thought there had been a double error; one in submitting by instruction an issue not based upon the pleadings, and one in the matter of pleading itself. It seems to have held that correct pleading required that the defendant should have admitted the signing, and alleged the alteration, without his knowledge or consent, and that the reply should have either denied the alteration or admitted it, and set forth the averments showing that the plaintiff acquired the note without notice of the change, and that defendant had negligently signed the note in such condition as to permit a deception to be practiced upon plaintiff. We are not entirely satisfied with this view of the trial court. It is perfectly manifest from this entire record that the true grounds upon which the plaintiff relied for a recovery against

the defendant was not upon the fact, charged in its amended petition, that defendant had in fact indorsed the note in suit, but upon the facts indicated in the instruction asked and given at its request. It is also perfectly manifest from the entire record, and the history of this case, that the plaintiff, when it filed the amended petition on which the case was tried, knew perfectly well what the facts were, (the case having been tried once before,) and the grounds upon which it would be compelled to rely for a recovery in the case. If that be so,—and of this we have no question,—good pleading, we are inclined to think, would have required of it, in amending its petition, to have stated the facts truly as it understood them and expected to prove them. Our practice act requires that the petition, after stating formal matters, should contain “a plain and concise statement of the facts constituting a cause of action without unnecessary repetition.” This requirement of the statute, (section 3511, Rev. St. 1879,) if complied with, would render it an easy matter in drawing instructions to state hypothetically the facts necessary to a recovery, and thus avoid the danger of a departure from the issues tendered in the pleading.

In the matter of instructions the motion for a new trial also charged that the instructions given were inconsistent and incompatible with each other. It is, to say the least of it, difficult to see how the second instruction given for defendant can be reconciled with that given for the plaintiff. Under the evidence the proof is uncontradicted that the “interest clause” was inserted in the note after defendant’s indorsement, and without his knowledge or consent; and, if so, the jury are told by second instruction for defendant that they will find for defendant; and yet plaintiff’s instruction, while conceding that defendant did not indorse the note sued on, authorizes a finding against him if the jury believe another state of facts. How can this be? If they believe one state of facts, of which, under the evidence, there is no question, they are required to find for defendant. How, then, can they at the same time find against him under the facts hypothetically stated in plaintiff’s instruction, which itself concedes that defendant did not indorse the note sued on. From all which it does not clearly appear, and we, as an appellate court, do not feel authorized under all the circumstances, including the questionable, if not suspicious, appearance of the original note itself, (which as we have seen was before the trial judge,) to say that the discretion which, to a large extent, under all the authorities, is conceded rightfully to belong to the trial courts in such matters, has been arbitrarily or unsoundly exercised in this instance in setting aside the verdict and granting the new trial complained of.

The language quoted from *Cook v. St. Louis & K. Ry. Co.*, *supra*, is peculiarly applicable to the case at bar.

This leads to an affirmance of the judgment; and it is accordingly so ordered.

(All concur; SHERWOOD, J., specially.)

BOOKER, Adm’r, etc., v. ARMSTRONG, Adm’r *d. b. n.*, etc.

(*Supreme Court of Missouri. June 20, 1887.*)

1. EXECUTOR—NEGLIGENCE IN CARE OF ESTATE.

Among the assets which came to the hands of B., sole executor of G., was a note secured by deed of trust. B. qualified in 1867, and at that date, and for 5 years thereafter, the land conveyed by the deed of trust was worth the full amount of the note, but it then depreciated 50 per cent. B. paid taxes on the land for several years, but took no steps to foreclose, and suffered the bar of the statute of limitations to fall as to the note. The maker of the note was insolvent at the time B. filed his inventory, and continued so. During the whole period the land was not in the actual occupancy of any one. *Held*, in an accounting between the administrator of B. and the administrator *de bonis non*, etc., of G., under Rev. St. Mo. 1879, § 48, providing, in effect, that, upon the death of a sole executor, unadministered assets pass to his successor, and not to his personal representatives, (1) that B. was negli-

gent in failing to foreclose, and that his estate should account to the estate of G. for the loss that it had sustained by reason of the depreciation of the land; (2) that he should not be allowed credit for the taxes paid on the land, because, if he had done his duty, and foreclosed the mortgage, it would not have been necessary to pay the taxes; and (3) that his estate could not be held accountable for the whole of the note by reason of the fact that his delay had not, under the law of Missouri, barred the right to sell under the deed of trust.

2. SAME—COMPENSATION.

An executor who has been allowed the regular commissions, and a fair compensation for leasing property of the estate and similar work, is not entitled to a *per diem* for general services.

3. SAME—ACCOUNTING—WILL CONTEST—COSTS.

Where there is a contest over the will, the executor should not be charged interest on monies retained by him to meet the expenses of the contest, when the amount so retained is reasonable and proper.

4. SAME—ACCOUNTING—ADVANCEMENTS BY EXECUTOR.

When, by excluding from the executor's credits other unwarranted credits, it appears that there was no necessity for the executor's advancing money to the estate, he will not be allowed interest on the amount so advanced.

Appeal from circuit court, Marion county.

W. P. Harrison and *W. M. Boulware*, for Booker, appellant. *G. P. Strong* and *Edw. McCabe*, for Armstrong, respondent.

BLACK, J. Jacob E. Grove died testate in 1867, and William Booker qualified as executor in October of that year, and continued to act as the executor of the Grove will until his death, in 1878, a period of 10 years and some months. During all this time there was a suit pending in the courts in which the validity of the will was contested. Samuel F. Booker took out letters of administration on the estate of William Booker, in April, 1878, and at the same time R. Lakenan was appointed administrator of the Grove estate pending the will contest. On the fifteenth of July, 1879, Samuel F. Booker, as administrator of William Booker, filed in the probate court of Marion county a settlement of the Grove estate. From the judgment of the probate court an appeal was prosecuted to the circuit court, where, upon a trial anew, there was a judgment in favor of the Grove estate for \$7,732.10, and Booker appealed to this court. While this suit was pending in the circuit court, Lakenan died, and the defendant Armstrong was appointed in his place. The settlement filed in the probate court by Samuel F. Booker, as administrator of William Booker, is a copy of the eleventh annual settlement made by the late executor. Attached to this is a recapitulation.

The annual settlements are accounts current of money received and paid out, and they show the total receipts to have been \$41,514.24. The disbursements amount to the aggregate sum of \$52,640.60 leaving a balance of \$11,126.36 due to the executor. The recapitulation, on the one hand, charges the executor with all the notes and accounts included in the inventory, and on the other hand credits the executor with worthless notes, and other evidences of indebtedness, turned over to Lakenan. Among the notes thus turned over is one known as the Pogue note. The debits of this exhibit amount to \$66,313.47, and the credits to \$77,439.83; thus again showing a balance due executor of \$11,126.36.

1. The executor in his second annual settlement took a credit for services from October, 1867, to October, 1868, \$900. A like credit, differing in amount, is found in each subsequent settlement,—in all, \$8,699. These items are brought into the final settlement. These charges are generally made as for services, at three dollars per day. The executor is entitled to the commissions of 5 per cent. on disbursements allowed by statute, but there is no authority in law for the *per diem* charges. The bare statement of the claim condemns it. The executor received fair allowances for leasing property, and such like services, which are not controverted here; and it is, perhaps, enough to say

that these credits for *per diem* services were not urged here in the oral argument, and they will be disallowed, as they were by the circuit court.

2. The item of \$950, for which a credit is claimed as interest on moneys advanced for the estate, appears in the settlement of 1877. Excluding from the executor's credits the unwarranted credits before mentioned, it then appears there was no necessity for advancing money to the estate. It had enough of its own in the hands of the executor for all proper disbursement required to be made. It follows that this claimed credit must be excluded.

3. The next question arises over the Pogue note, and taxes paid on the Wardlaw land, for which a credit is claimed. The executor inventoried a note dated March 1, 1865, made by George B. Pogue, for \$4,113, due in one year, with 10 per cent. interest, and payable to Mr. Grove, the deceased. A credit placed on the note on August 9, 1867, shows that the interest had been paid to April 20, 1867. The note was secured by a deed of trust of even date, made by Pogue and wife and H. H. Wardlaw and wife, upon 50 acres of land known as "Wardlaw's addition to the city of Hannibal." This deed of trust was recorded in December, 1867. From 1867 to 1872 this land is shown to have been worth from 100 to 125 dollars per acre, but after that it was of no greater value than 40 or 50 dollars per acre. At the date of the inventory Pogue was, and ever since has been, insolvent. Neither Wardlaw nor his heirs have ever made any claim to the land. In 1871 the late executor took some steps to prevent persons from trespassing upon it, but the land was not in the actual occupancy of any one. From and after November, 1875, but not before, the executor paid taxes on the land, in all amounting to \$2,415.68. He never foreclosed, or made any effort to foreclose, the deed of trust. On August 1, 1878, which was before this final settlement was presented to the probate court, Samuel F. Booker, as administrator of the estate of the late executor, turned over to Lakenan, administrator of the Grove estate, certain notes, including the Pogue note and Wardlaw's deed of trust. Lakenan receipted for them as "worthless or in litigation," and subsequently, and in December, 1881, tendered the note and deed of trust back to Booker, but he refused to accept them. It will be seen that the executor allowed the note to become barred by the 10-year statute of limitations relating to personal actions. But the Grove estate could not have suffered any loss by reason of the failure of the executor to prosecute a personal action against Pogue, for he was and still is insolvent. In some states it is held that when the note is barred the mortgage lien is barred. 2 Jones, Mortg. § 1207. The same author, however, says, at section 1204, that "the fact that a debt secured by a mortgage is barred by a statute of limitations does not necessarily, or as a general rule, extinguish the mortgage security, or prevent the maintaining of an action to enforce it." Many authorities are cited by counsel for appellant in the supplemental brief in support of this doctrine, but they need not be specially mentioned. It has been held in this state that though the note or bond, secured by a mortgage or deed of trust, may be barred, so that no action can be maintained thereon, yet the mortgage may be enforced by foreclosure or a sale under the deed of trust. *Chouteau v. Burlando*, 20 Mo. 483; *Cape Girardeau v. Harrison*, 58 Mo. 90; *Wood v. Augustine*, 61 Mo. 46; *Lewis v. Schwenn*, 2 S. W. Rep. 391. In the cause last cited it is held that, to bar a foreclosure under a deed of trust or mortgage, it must appear that there has been 10 years' possession of the property adverse to the mortgagee. In this case there has been no such possession, and the deed of trust was available to the estate for what the land was worth, though the debt was barred by the statute of limitations.

The law holds an executor or administrator responsible for the want of due care in protecting the property of the estate from theft or loss, and the measure of the care and skill which they are required to use is that which a prudent man exercises in the direction of his own affairs. *State v. Mcagher*, 44

Mo. 357; *Foster v. Davis*, 46 Mo. 268; *Fudge v. Durn*, 51 Mo. 264. So an administrator or executor is responsible for loss by the insolvency of the debtor to an estate when he has failed to exercise the same care that a prudent man would exercise in the conduct of his own affairs. 3 Williams, Ex'rs, (American notes by Perkins,) top page 1910, and notes. There can be no doubt but the executor must use all reasonable diligence in collecting the assets of the estate; and the burden of proof is upon him to show that the debt due the estate could not have been collected by the exercise of proper diligence. *Williams v. Petticrew*, 62 Mo. 471.

It appears that Pogue, who was engaged in the tobacco business, was prosecuted by the United States in 1864 or 1865, and sentenced to imprisonment for six months, and there is evidence that it was the impression in the community that the government had some claim or lien on the land. It may be that such was the fact, and for that reason the executor would be justified in not making a sale of the land; but no certain proof is made that the government had, or claimed to have, any lien on the property, and we cannot accept the evidence of such a rumor as proof of the fact. For five years the proof is, the land was of the value of the debt, and it was great negligence on the part of the executor not to foreclose the deed of trust during that time. Thereafter the security became reduced in value at least 50 per cent. Had there been a total loss of the security, there can be no doubt but the estate of William Booker should be charged with the amount of the rent, and also the taxes paid on the land, and that, too, even in this proceeding. But there was not a total loss, and it is not a final settlement of the Grove estate. It is a settlement under section 48, Rev. St. 1879, which, in substance, provides that, if any executor or administrator die, his legal representatives shall account for, pay, and deliver to his successor all money, real and personal property of every kind, and all rights, credits, deeds, evidences of debt of the deceased, at such times and in such manner as the court shall order, on final settlement with such representatives, to be made on motion of the successor. In view of this and other provisions of our administration law, it has been constantly held that on the death of an executor the property of the estate remaining in his hands does not go to his representatives, but goes to the administrator *de bonis non*. *State v. Hunter*, 15 Mo. 490; *State v. Dulle*, 45 Mo. 269; *Scott v. Crews*, 72 Mo. 261; *State v. Heinrichs*, 82 Mo. 544.

Mr. Lakenan occupies the position of an administrator *de bonis non* here, at least so far as this settlement is concerned. It is said there was an order of the probate court on Samuel F. Booker, administrator of the late executor, to turn over the assets to Lakenan, made in August, 1878; but if any such order was made it is not preserved in this record, and therefore not before us. It does appear that on the first of August, 1878, Samuel F. Booker, as administrator of William Booker, turned over to Lakenan a long list of notes, accounts, and stocks, among which were this note and deed of trust. It was not until December, 1881, that Lakenan tendered them back, a period of over three years. It may be that circumstances will arise where the estate of a deceased executor or administrator should be charged with the full amount of a note, as other evidence of indebtedness, because of depreciation in value of the security by his negligence, though there is not a total loss. Here the note at all times, as a personal demand, was worthless. The note had a value to the extent of the market value of the land when it was turned over to the administrator *de bonis non*. He retained it for a period of three years and over, during which time the land might have been sold by a simple sale made by the trustee. In view of all this, and the principle of law before stated, we are of the opinion that the Booker estate should be held accountable for the depreciation in the value of the security, instead of the full amount of the note and interest. The Booker estate should be charged with, or rather have, no credit for the taxes paid on this land, for it should have been converted

into money long before 1875. The Booker estate will therefore stand charged with the note and interest as stated in the inventory, \$4,318.50, but no more; for we are not satisfied that there ever was a time when a sale of the land would have produced a greater amount. The estate, instead of being credited with the above amount, will be credited with \$2,000, the market value of the land in 1878, when Lakenan received the note. The Booker estate is entitled to 5 per cent. commission on legal disbursements, which commissions will be \$1,978.90, whereas the estate is only credited with \$1,096.47. The difference should be added to the credits. The Booker estate will thus stand indebted to the Grove estate in the sum of \$2,179.34, for which amount, with interest thereon at the rate of 6 per cent. per annum from the fifteenth of July, 1879, judgment should be entered.

4. So far as interest on moneys in the hands of the late executor is concerned, it is sufficient to say that there was no more in his hands at any time than he might well have retained, especially in view of the fact that there was a contest over the will during the entire administration.

The judgment is reversed, and the cause remanded, with directions to the circuit court to enter up a judgment in conformity herewith.

(All concur.)

BLOCK, Receiver, etc., v. ESTES, Adm'r, etc.

(*Supreme Court of Missouri. June 20, 1887.*)

CONTRIBUTION—MISCONDUCT OF SURETY.

It is no defense to the liability to contribution of sureties on a sheriff's bond, in an action against them by their co-surety, who paid the damages in full, that the breach of the condition in the bond was caused by the misconduct of the co-surety himself, while he was deputy to the sheriff, when the alleged misconduct of the deputy was directed, or at least approved and ratified, by the sheriff.

Appeal from circuit court, Pike county.

W. H. Briggs, for Block, respondent. *Fagg & Reynolds*, for Estes, appellant.

RAY, J. This action is brought to enforce contribution as between co-securities on the official bond of one Lonergan, who was sheriff of Pike county, Missouri, the said securities being F. C. Wiseman, assignor of plaintiff, Nelson B. Griffith, the original defendant, (and since deceased,) E. F. Mathews, and W. A. Gunn. A judgment was obtained by W. G. & A. G. Brockway against said sheriff and his securities, which was paid off by said Wiseman; the amount of said judgment so paid being \$1,000. Said Lonergan, the principal in said bond, and also said Mathews, are insolvent, and the purpose of the suit is to compel said Griffith to contribute the sum of \$333.33 $\frac{1}{3}$, or one-third of the judgment for \$1,000 so paid by said Wiseman. The main defense, upon the merits, is that said Wiseman was not only a co-security with defendant upon said bond, but that he was also acting as a deputy-sheriff under said Lonergan, and that it was his wrongful and negligent acts, in his official capacity as such deputy-sheriff, that created the liability of said sheriff, which resulted in said judgment against the sheriff and his securities, and that, under such circumstances, the right of contribution does not exist.

It appears that W. G. & A. G. Brockway brought suit by attachment, which was levied on certain property of J. D. Harrison & Co., defendants therein, on August 5, 1870, and thereafter, and on the tenth day of the same month, certain other attachments in favor of several other plaintiffs were levied on the same property of said defendants. Judgment was first obtained, and the property subsequently sold under execution, in these latter cases, and purchased by Carstarphen, as agent for Dyer, who was attorney for plaintiffs therein, for the sum of \$801.85. Said Carstarphen paid said Wiseman the

costs, amounting to some \$70, by a check on said Dyer, and also gave said Wiseman the following memorandum in reference to said purchase: "\$731.50.

LOUISIANA, Mo., Dec. 13, 1870.

"This is to certify that I this day bought the safe and fixtures of the City Savings Bank for \$801.85, and gave the sheriff a check on D. P. Dyer's account for \$70.35, leaving due \$731.50 the sheriff from D. P. Dyer for the proceeds of sale, to be applied on two executions in which Dyer is attorney.

"J. E. CARSTARPHEN, for D. P. Dyer."

Subsequently said Dyer indorsed said executions, under which Wiseman, as such deputy-sheriff, had sold the property, as follows: "Received, December 13, 1870, of F. C. Wiseman, deputy-sheriff, \$731.50, on this, and an execution in favor of Blum & Bro., and against same defendants."

It appears from the answer of defendant, and the evidence as offered at the trial, and in behalf of the parties plaintiff and defendant, and the instructions given in the case, that the main issue and question in the cause was whether the said application of the said sums, arising from the sale of the property under said executions, was with the knowledge and consent of said Lonergan, or was the individual and personal act of said Wiseman as deputy-sheriff, and without the direction, assent, and knowledge of his principal, Lonergan, sheriff as aforesaid. On this branch of the case, the jury, in the instruction given in behalf of the plaintiff, were told, among other things, that if Wiseman, while acting in the capacity of such deputy-sheriff, created the liability which led to said judgment (in favor of Brockways) by his own negligent and illegal acts, without the direction, consent, or approval of the sheriff, Lonergan, then there was no right to contribution, and the finding must be for the defendant. The same rule was announced in the instruction given in defendant's behalf, and at his instance, as follows:

"If the jury believe, from the evidence in the case, that F. C. Wiseman, as deputy-sheriff, sold the property at sheriff's sale, which has been shown by the evidence to have been seized under attachment in favor of W. G. & A. G. Brockway, and against J. D. Harrison & Co., and, without the direction, assent, or knowledge of his principal, P. F. Lonergan, applied the proceeds of sale, or surrendered said property, for the payment of other claims against J. D. Harrison & Co., which were under the control of D. P. Dyer, to one James E. Carstarphen, then, if the jury should so find the facts to be, then plaintiff cannot recover, and the verdict should be for the defendant."

These instructions very fully and fairly submit the substantial and meritorious defense made in the answer, and upon this issue the evidence is manifestly and plainly conflicting. As to this question of the wrongful distribution of the money, upon the returns of said executions, and whether the same was without the knowledge, consent, or direction of Lonergan, the following extracts in substance from the testimony will be sufficient to show that the verdict is supported by the evidence. Wiseman, for example, testifies that a few days after the sale he told Lonergan what he had done, and showed the statement made out by Carstarphen at the time of the sale; that Lonergan folded the same up, and put it in his pocket; that afterwards, when he came to make his returns on said executions, he asked Lonergan what return he should make, as he did not collect the money, and that Lonergan told him to go to Dyer, who would make up his return for him. Dyer testifies that after the sale he met Lonergan, and talked with him about the sale, proceeds, etc., and what he proposed to do, and that Lonergan told him to see Wiseman, and have the indorsements made on the executions, and that he went to Wiseman, and made and entered the receipt and indorsement previously referred to in the said orders of sale. Lonergan testified, among other things, in substance, that Wiseman told him a few days after the sale what he had done in regard to the sale and the proceeds; that he had taken Carstarphen's receipt, which Wiseman, he thinks, showed him at the time; and in his cross-examination

he says, with some qualification, but in effect and substance, that he thinks Wiseman showed him the said statement taken from Carstarphen, which he thinks he read, and that he may have said it was all right.

The testimony of both Wiseman and Carstarphen also tends to show that said Wiseman insisted on having the money, but finally waived, at least for the time being, payment of the same, upon the representation that the arrangement would be satisfactory to said Lonergan, and that it ought, therefore, to satisfy him. So far as this distribution of said proceeds is concerned, said sheriff, as the evidence indicates, relied upon Dyer, rather than on his deputy, Wiseman. Said Lonergan was aware, as he testifies, of the pendency in said court of said suit on the part of said Brockways against said Harrison & Co., and that the other creditors in the attachment suits were contesting the same. The evidence was, we think, for the jury, under proper instructions. As to the objection to the use of the words, "direction, consent, or approval," in said first instruction for plaintiff, it is sufficient to say that the same, or equivalent, expressions are used in said instruction given for the defendant, and at his instance.

A further exception was taken to the reception in evidence of the proceedings of the Louisiana court of common pleas appointing plaintiff receiver for said bank; but as the objection and exception was general, and not specifically stated, it was properly disregarded by the court. *Primm v. Raboteau*, 56 Mo. 412; *Margrave v. Ausmuss*, 51 Mo. 561. Generally, the regularity of the appointment of the receiver cannot be questioned in collateral proceedings; but the remedy, in that behalf, is by motion to vacate the order. High, Rec. §§ 203-238.

Finding no error in the record calling for our interference, we affirm the judgment; and it is so ordered.

(All concur.)

STATE v. ROSE.

(Supreme Court of Missouri. June 6, 1887.)

1. JURY—DISQUALIFICATION—NEWSPAPERS.

After a panel of jurors had been qualified, defendant, after the jury had been duly cautioned, was, on motion, allowed 48 hours to make his peremptory challenges. On the day of the trial, which occurred four days thereafter, defendant's counsel requested a re-examination of the panel to ascertain whether any of them had become disqualified by having in the mean time read certain newspapers prejudicial to defendant. Held, that in the absence of evidence that the jury had disregarded the court's admonition, and read the newspapers, the motion was properly denied, especially as it did not appear that said newspapers contained anything prejudicial to defendant.

2. WITNESS—COMPETENCY—INFANT.

To sustain an objection that a witness for the state named Renben Ward had been hitherto convicted of grand larceny, defendant offered the record of the conviction of one Reuben Bradshaw. Said Ward testified that he had never been known by the name of Bradshaw. Another witness testified that he was not certain that Ward ever went by the name of Bradshaw, but that witness had heard him called Bradshaw several times. Held that, on this evidence, the objection to his competency was properly overruled.

3. EVIDENCE—TESTIMONY AT FORMER TRIAL.

On a trial for murder, defendant offered in evidence a transcript containing the testimony of a witness on a former trial. Held properly rejected, in the absence of a showing that said witness was dead, or beyond the jurisdiction of the court.

4. SAME.

The state may, in rebuttal, read in evidence the testimony of defendant given on a former trial for the same offense.

5. HOMICIDE—DEGREES—INSTRUCTION.

The evidence of the state characterized the crime committed as murder in the first degree, and that of the defendant as murder in the second degree or justifiable homicide. Held, that the trial court committed no error in not instructing as to any other grade of homicide than murder in the first and second degrees.

6. SAME—SELF-DEFENSE—INSTRUCTION.

The court instructed, on the law of self-defense, that "if defendant, at the time of the homicide, had reasonable cause to apprehend from the deceased, and did apprehend, immediate danger of receiving some serious injury to his person from deceased," and, to avoid such danger, cut and stabbed him, they should acquit. *Held* a proper instruction, and that the court did not err in using the words in quotation instead of "danger of receiving some great personal injury," the language of the statute; that at most it was only a verbal change, and in fact in favor of the accused.

7. SAME.

A qualification to said instruction by the court, in substance that the law of self-defense has no application if the jury believe that defendant voluntarily brought on the difficulty and the attack, *held* proper.

8. APPEAL—EVIDENCE—OBJECTION WAIVED.

A failure to object to incompetent evidence, when offered, cures the error of its admission.

SHERWOOD and BRACE, JJ., dissenting.

Appeal from criminal court, city of St. Louis.

Indictment for murder.

Atty. Gen. Boone, for respondent. *S. S. Bass*, for appellant.

NORTON, C. J. Defendant was indicted in the criminal court of the city of St. Louis at its May term, 1881, for murder in the first degree, in killing one George Ingram. Charles Williams and Calvin Emerson were also charged in the same indictment with aiding defendant in committing the crime. Defendant, after having been twice separately tried, and convicted at each trial of murder in the first degree, the judgment rendered in each of those trials being reversed, was again, at the March term, 1885, of said court, put upon his trial, and convicted of murder in the second degree, and his punishment assessed at 30 years' imprisonment in the penitentiary. From this judgment he has appealed, and the first error assigned is the action of the court in refusing to permit defendant to re-examine the panel of qualified jurors.

It appears from the record that, after a panel of 47 jurors had been qualified on the nineteenth of March, that, on defendant's motion, the court allowed him 48 hours wherein to make his challenges, first duly cautioning the jury; that on the 23d said panel again came into court, whereupon, and before the state had made its challenges, Mr. Bass, of counsel for defendant, stated that since the examination of the jury some remarks in relation to the homicide had appeared in some newspaper, and requested the court to allow him to interrogate the jury as to whether they had read the alleged newspaper report, and whether they had been influenced thereby; whereupon the court said to the counsel that if he knew, or had good reason to believe, that the jury had read such report, and would so state, he would be permitted to examine the jury in relation thereto, to which counsel replied that he had no knowledge of the subject, and thereupon the court refused the request. It cannot be presumed that the jury disregarded the instructions given them by the court when 48 hours was claimed and allowed defendant wherein to make his challenges; and in the absence of anything to show that they had, or to excite even a suspicion in the mind of the court that they had, disregarded it by reading the alleged newspaper report, the ruling of the court must be upheld, especially so as it did not appear that the alleged newspaper report contained anything prejudicial to the accused.

Appellant has cited the case of *State v. Collins*, 86 Mo. 245, in support of his contention, where it appears that four days had elapsed between the time of impaneling the jury and the time when the peremptory challenges were made. The point made in the case was that it was error for the court to impanel a jury on the sixth of the month when the cause could not be tried till the tenth, inasmuch as the jurors who might have been qualified on the sixth might have become disqualified between the sixth and the tenth. In disposing of this question, among other things, it is said: "We are of the opinion

that the point is not well taken, inasmuch as when said jurors appeared, on the 10th, defendant or his counsel, if they had so desired, could have examined them to ascertain the fact whether they, or any of them, had become disqualified by anything done or said between the two dates." It was not intended, by the above-quoted expression, to assert that a defendant could, as a matter of right, without making any showing to the court of some satisfactory reason on which to base its exercise, re-examine jurors who had been fully examined, and accepted as qualified, as to whether they had become disqualified between their acceptance and the time they appeared. To allow the parties to exercise the right of peremptory challenge, or the right to re-examine it must first be made to appear to the court that some good reason existed for its exercise.

An objection was made to the competency of Reuben Ward as a witness on the ground that he had been convicted of grand larceny in 1870. To sustain the objection, the defendant offered the record of the conviction of Reuben Bradshaw. Ward testified that he had never been known by the name of Bradshaw, and the evidence of another witness was to the effect that he was not certain that Ward ever went by the name of Bradshaw, but had heard him called Bradshaw several times. On this evidence the court was justified in overruling the objection.

Defendant offered in evidence a transcript containing the evidence of George Bell given on a former trial. This the court rejected, and properly; it neither having been shown that said witness was either dead or beyond the jurisdiction of the court. *State v. Houser*, 26 Mo. 431.

The court gave instructions as to murder in the first and second degrees in a form repeatedly approved by this court, and also a self-defense instruction. In this instruction the court told the jury that if the defendant, at the time he stabbed the deceased, had reasonable cause to apprehend from the deceased, and did apprehend, immediate danger of receiving some serious injury to his person from deceased, and to avert such danger cut and stabbed deceased, that they should acquit the defendant on the ground of self-defense. It is insisted that the instruction is erroneous, in that it used the words "immediate danger of receiving some serious injury to his person," instead of the words "danger of receiving some great personal injury," as used in the statute. The objection amounts to no more than a verbal charge; and, if an error in the respect complained of was committed, it is an error in favor of defendant, of which he cannot complain.

It is also objected that the court added to a qualification to the instruction the following: "But if the jury believe that the defendant voluntarily brought the difficulty on, and himself brought on the attack, then the jury should not acquit on the ground of self-defense; for, if that be true, the law of self-defense has no application." The action of the court in this respect is fully justified by the following cases: *State v. Underwood*, 57 Mo. 50; *State v. Starr*, 38 Mo. 270; *State v. Linney*, 52 Mo. 40; *State v. Shoults*, 25 Mo. 153; *State v. Christian*, 66 Mo. 138, 145; *State v. Hudson*, 59 Mo. 135, 138; *State v. Vansant*, 80 Mo. 69, 79; *State v. Jones*, 78 Mo. 278; *State v. Thomas*, Id. 627; *State v. Brown*, 64 Mo. 368; *State v. Peak*, 85 Mo. 190.

It is also insisted that the court erred in allowing the state to read in evidence in rebuttal the transcript of defendant's evidence given in a former trial. As no objection was made to the introduction of this evidence when it was read, that is sufficient to dispose of the objection when made here; but, if an objection had been made when it was offered, the court would have been justified in overruling it, and receiving the evidence, under the ruling made in the case of *State v. Eddings*, 71 Mo. 545, and subsequently followed in the case of *State v. Jefferson*, 77 Mo. 136.

Neither was error committed by the court in not instructing as to any other grade of homicide than murder in the first and second degrees. The evidence

of the state characterized the crime as murder in the first degree, and that of the defendant as murder in the second degree, or justifiable homicide committed in self-defense.

Upon the whole record we think the case was fairly tried, and the verdict of the jury sustained by the evidence; and it is hereby affirmed.

All concur, except SHERWOOD and BRACE, JJ.

ROAN v. WINN and others, Assignees, etc.

(*Supreme Court of Missouri. June 20, 1887.*)

1. BANKS—INSOLVENCY—FRAUDULENT CONVEYANCE.

A bank made an assignment for the benefit of its creditors, February 16, 1882. On March 2, 1880, it had conveyed a tract of land to W., one of its directors, and on February 11, 1882, another tract. The consideration of both of the deeds was the surrender to the bank by W. of certain shares of its capital stock held by him, the market value of which was more than the fair price of the land. At the time of these transfers the bank was insolvent, and W. had heard rumors as to its unsoundness. W. had held his office as director since 1874. *Held*, that the transfers were void, as in fraud of the creditors of the bank, the position occupied by W. being that of a trustee, and the rumors about the bank's condition which had come to him being sufficient to put him on inquiry.¹

2. ASSIGNMENT FOR BENEFIT OF CREDITORS — ESTABLISHMENT OF CLAIM — FRAUDULENT CONVEYANCE.

Under Rev. St. Mo. 1879, § 376, providing that "the decision of the assignee in relation to all claims presented to him for allowance shall be final," unless appealed from and reversed, a creditor whose claim has been so allowed, without appeal, has as good standing in a court of equity to impeach a conveyance by the assignor as fraudulent as if he had reduced his claim to judgment in a court of law.

3. SAME—FRAUDULENT CONVEYANCE—RIGHTS OF ASSIGNEE.

Under the Missouri assignment law, the assignee stands in the shoes of the assignor, and as between the assignee and a judgment creditor of the assignor seeking to set aside certain deeds by the assignor, valid as between him and his grantees, because in fraud of creditors, the property conveyed, upon the deed being canceled, should not go to the assignee, but should be sold and applied to the payment of the judgment.²

Cross-appeal from Moberly common pleas.

R. S. Mathews, for appellant. *Sears & Williams and Jones, Dysart & Mitchell*, for respondents.

NORTON, C. J. It is substantially alleged by the petition in this case that the Macon Savings Bank, on the sixteenth day of February, 1882, made an assignment for the benefit of its creditors to the defendant Web. M. Ruby; that at the time of the failure and assignment by the said bank the bank was indebted to the plaintiff in the sum of \$1,333.78; that previous to said assignment, on the eleventh day of February, and on the second day of March, 1880, said bank conveyed by deed to defendant Winn two parcels of land, the property of said bank, in consideration of said Winn (who was then, and had been

¹ Respecting the general subject of fraudulent conveyances, see *Davis S. M. Co. v. Dunbar*, (W. Va.) 2 S. E. Rep. 91; *Verner v. McGhee*, (S. C.) 2 S. E. Rep. 113; *Witz v. Osburn*, (Va.) 2 S. E. Rep. 33, and note, *Jackson v. Beach*, (N. J.) 9 Atl. Rep. 380, and note; *Foster v. Knowles*, (N. J.) 7 Atl. Rep. 295; *Dice v. Irvin*, (Ind.) 11 N. E. Rep. 488, and note; *Oppenheimer v. Half*, (Tex.) 4 S. W. Rep. 562; *Johnson v. Robinson*, Id. 625; *Carter v. Coleman*, (Ala.) 2 South. Rep. 354; *Gordon v. McIlwain*, Id. —; *Redhead v. Pratt*, (Iowa,) 33 N. W. Rep. 382.

² In the absence of statutory provisions conferring greater powers on the assignee, he stands in no better position than his assignor, in regard to conveyances or mortgages made by the latter. *Hawks v. Pritzlaff*, (Wis.) 7 N. W. Rep. 303; *Clapp v. Nordmeyer*, 25 Fed. Rep. 71; *Sandwich Manufg Co. v. Wright*, 22 Fed. Rep. 631. Respecting the general subject of the powers of an assignee, see *Sweetser v. Camp*, (Mich.) 29 N. W. Rep. 511, and note, part 1; *Grant v. Crowell*, (N. J.) 9 Atl. Rep. 201; *Merrill v. Rosler*, (Minn.) 33 N. W. Rep. 117.

since 1874, a stockholder and director in said bank) surrendering to said bank \$2,700 of his paid-up stock; that at the time these deeds were made the bank was insolvent and in failing circumstances, of which it is alleged defendant Winn had knowledge. The prayer of the petition is, in effect, that the property so conveyed be subjected to sale for the payment of plaintiff's debt as a creditor of said bank.

The answer of defendant Winn is a general denial. Defendant Ruby answers, and in effect admits the facts set up in the petition, and, by way of cross-action, sets up the assignment made to him by the bank, and, as the representative of the creditors, asks the court to deny the prayer of the plaintiff, and grant a decree in his favor, declaring the rents and profits of the land conveyed to his co-defendant Winn trust property for the benefit of the creditors, and that Winn be required to reconvey the land to him, as assignee of the bank.

The court found that the deeds to Winn were void, and decreed that the title to the premises be vested in defendant Ruby, to be administered by him under the deed of assignment, and that he pay plaintiff, out of the proceeds of the premises, \$200, assessed by the court in his favor for an attorney's fee in bringing the suit. The case is before us on cross-appeals from this judgment, taken by plaintiff, Roan, and defendant Winn; Roan complaining that the court erred in not decreeing the land to be sold for the satisfaction of the debt, and Winn complaining that it erred in holding the deeds to be void.

It is conceded that the relation of defendant to the bank, as stockholder and director, was such as is stated in the petition; that Winn paid for the property in dispute by surrendering to the bank \$2,700 of his paid-up stock, and that the stock so surrendered was selling at par, and that \$2,700 was the fair and full value of the land at the time of the sale, and it was agreed to be worth at the time of the trial \$2,200; and that the bank did not become indebted to plaintiff till 15 months after the sale. The defendant Winn, over the objection of plaintiff, testifies that he had no personal knowledge that the bank was insolvent or in failing circumstances at the time he purchased the property; that he bought it in good faith; had heard some rumors that the bank was not solvent.

The first question presented by the record is, are the deeds made to Winn fraudulent as to creditors of the bank, and the property conveyed subject to their claims? It is an admitted fact that when these deeds were executed the Macon Savings Bank was insolvent, and in such case the law is settled that the assets of the bank became a trust fund, to be managed by the directors, for the benefit of the creditors, and that after such confessed insolvency they cannot, in equity, secure any advantage to themselves. This has been so held in a well-considered case by Judge PHILIPS, (*Williams v. Patrons*, 23 Mo. App. 132,) and the authorities there cited sustain the proposition, in one of which, (*Marr v. Bank*, 4 Cold. 471,) it is said: "By the insolvency of the bank it is rendered incapable of pursuing the objects for which it is created, without defrauding the public and existing creditors. Its officers or agents properly ceased to use its franchises after the insolvency was ascertained, but their responsibility as to assets did not cease. They continued to hold them as before; not for themselves, or for the use and benefit of the stockholders, but for the creditors of the corporation. After the insolvency of the corporation, although the legal ownership of the assets may continue as before, the beneficial interest of the stockholders clearly no longer exists, as a state of insolvency presupposes that the capital and assets are insufficient to meet the liabilities. The stockholders, having incurred no personal liability for the debts of the corporation, have, in point of fact, no interest in the disposition of the assets of the bank after its insolvency. In equity, as well as at law, the beneficial interest therein belongs to the creditors. The capital is the fund they trusted, and to which, with the after-acquired property

or assets of the corporation, they can alone look for indemnity. Both stand pledged for the payment of the corporation debts, and a court of equity will follow them into the hands of stockholders, or other persons receiving them without notice, for the benefit of creditors." Now, under the principle stated above, if the bank was actually insolvent at the time the deeds were made to Winn, and he had knowledge of such insolvency, the deeds must give way to the claims of a creditor when a court of equity is asked by him to avoid them. Did Winn have such knowledge? He testified that he had no *personal* knowledge of the insolvency of the bank, and admitted that he had heard rumors that it was not solvent. In view of this statement, and the fact that he had been a director of the bank since 1873 or 1874, and also a stockholder, under the rulings of this court in the case of *Kitchen v. Railroad Co.*, 69 Mo. at page 265, and *Leavitt v. La Force*, 71 Mo. at page 356, he is chargeable, in the eye of the law, with knowledge.

In the first case cited it is said: "The law imputes to a purchaser the knowledge of a fact of which the exercise of common prudence and ordinary diligence must have apprised him." Whatever is sufficient to put a person on inquiry is notice; that is, when a man has sufficient information to lead him to a fact, he shall be deemed to be cognizant of it. In the case last cited it is said that, when a person has not actual notice, he ought not to be treated as if he had notice, *unless* the circumstances are such as to enable the court to say, not only that he might have acquired, but also that he ought to have acquired, the notice with which it is sought to charge him; that he would have acquired it but for his gross negligence of the conduct of the business in question. "In short, gross negligence, under certain circumstances, is held in equity to be equivalent to notice." Winn, having this knowledge, could only, thereafter, deal with the assets of the bank as a trustee for the creditors; and, having no beneficial interest as a stockholder, he is chargeable with knowledge of the fact that the \$2,700 of stock which he paid for the land, and withdrew from the trust fund, though having a marketable value, was of no value, and worthless.

In view of what has been said, the conclusion follows that the deeds to Winn must be held to be fraudulent in law, and the property conveyed subject to the claim of creditors. While the court, in its decree, properly set aside the deeds to Winn, it committed error in decreeing that the land should pass to defendant Ruby, to be administered. It is well settled by numerous decisions of this court that neither the grantor in a fraudulent deed, nor his heirs, executors, or assigns, can sue to set aside such deed. *Zoll v. Soper*, 75 Mo. 460; *Jackman v. Robinson*, 64 Mo. 289; *Merry v. Fremon*, 44 Mo. 518. Under our assignment law the assignee stands in the shoes of the assignor, and, if the assignor or grantor could not assail the deeds as fraudulent, neither can the assignee. While this precise question may not have been passed upon by this court, it follows as a corollary from what has been held; and it has been passed upon, as above stated, and we think correctly, by the St. Louis court of appeals. *Shultz v. Christman*, 6 Mo. App. 338; *Hettrichs v. Woods*, 7 Mo. App. 236. It is a rule so well established as not to require the citation of authorities in support of it, that before a creditor can proceed in equity to have a deed made in fraud of the creditors of the grantor set aside, and the property subjected to the payment of his debt, he must first have his claim established at law; the spirit and reason of the rule being that a court of equity is not the proper tribunal to ascertain what is due from one to another on a demand purely legal.

It is insisted by counsel that plaintiff has not complied with this rule. We think the point is not well taken. While the plaintiff did not sue in a court of law, and obtain judgment against the bank, it sufficiently appears in the record that the assignee of the bank adjusted his claim, ascertained and allowed the amount due, and gave him a certificate therefor, which adjudica-

tion was, under section 376, Rev. St., in so far as its finality was concerned, as much as if rendered by a court; and it has been so held in the case of *Epp-right v. Kauffman*, 1 S. W. Rep. 736, where it is said: "When the assignee passes on a claim, and allows it, the question involved therein becomes *res adjudicata*, and the decision of the assignee becomes final; in a word, a judgment having all the force and effect of any other judgment."

Under the facts in the case, and the law applicable to them, the prayer of the plaintiff should have been granted, and the court in refusing it committed error. The judgment will be reversed, and cause remanded, with directions to the circuit court to enter up a decree in favor of plaintiff in conformity with this opinion.

(All concur; BLACK, J., concurring in the result.)

MCGEE v. MISSOURI PAC. RY. CO.

(*Supreme Court of Missouri.* June 8, 1887.)

1. CARRIERS—PASSENGER ON FREIGHT TRAIN—NEGLIGENCE.

The fact that the train in fault was a freight train, on which, under the rules of the company, passengers were not permitted to ride, does not render the person injured any the less a passenger, when, at the time he bought his ticket, he had no knowledge of such rules, and took the train under the instructions of an agent of the company, whose duty it was to direct passengers as to what trains they should enter.

2. NEGLIGENCE—CONTRIBUTORY—PROVINCE OF JURY.

The plaintiff was injured by falling over an embankment, while alighting from a train at a station where he lived, and with the railroad approaches to which he was familiar. The train on which he was riding had not, however, stopped at the usual point, and the night was so dark that he could not see just where he was. Before he got off the station had been called, the train stopped, and the conductor had gone off with his lantern. *Held*, that these were facts tending to show negligence on the part of the company, and that the case should go to the jury.

Appeal from circuit court, Monroe county.

Rhodes & Waller, for respondent. *T. J. Portis*, for appellant.

NORTON, C. J. This is an action to recover damages for injuries sustained by plaintiff, a passenger on one of defendant's freight trains, in consequence of defendant's negligence, and the case is before us on defendant's appeal from a judgment obtained by plaintiff on the trial, and we are asked to reverse the judgment because of alleged error in the circuit court in refusing to give an instruction for defendant in the nature of a demurrer to the evidence, and in giving improper instructions for plaintiff. The evidence on the part of plaintiff tends to establish the following facts, viz., that plaintiff purchased from defendant's ticket agent, at Paris, Missouri, a round-trip ticket for himself and wife from Paris to Moberly and return; that having gone to Moberly, and wishing to return to Paris, he was directed by defendant's ticket agent at Moberly, with the acquiescence of the conductor, to take passage on a freight train standing on defendant's track some distance from the depot; that, the caboose having been pointed out, plaintiff and his wife, a Miss Carrer, and one Mason, entered the caboose attached to said train; that the conductor of said train took up the tickets from plaintiff for himself and wife, and collected from him one fare in cash for Miss Carrer; that it was dark when the train left Moberly, and very dark when the train arrived at Paris, about 9:30 o'clock at night,—so much so, according to the evidence of one of the witnesses, that you could not see your hand before you; that the train, on approaching Paris, was slowed up, and the whistle sounded; that the conductor and hind brakeman came down from the lookout on the caboose, and the brakeman, in the hearing of all the passengers, announced Paris, and, with the conductor, went out of the caboose, taking the light with them, the train in the mean time coming to a stop, and the conductor and brakeman

proceeding down the track to the depot, when the conductor registered his train, during which time, and after the stop, the engine was detached from the train for the purpose of taking water at the tank. The evidence tended further to show that the train, instead of being stopped at what was known as Fox crossing, the usual stopping place for north-bound freight trains, and which was known to plaintiff to be a safe place for alighting from trains, was stopped some distance before reaching said crossing, with the caboose standing on the east end of a high tressel put in a deep ravine, where heavy timbers had been dropped in against piling, making a square wall 80 or 40 feet long, and 9 feet high, the bank being steep. From the rail to the edge of the embankment was about five feet, and the steps of the caboose extended about two feet from the rail, so that a person in stepping down from the caboose would step within a foot of the edge of the embankment. The evidence tends further to show that after the train stopped, and after the action of the conductor and brakemen in leaving the caboose, and going down to the depot, and the detachment of the engine from the train, that plaintiff and the other passengers alighted from the caboose, and that plaintiff, having alighted, in assisting one of the lady passengers to alight, fell over the embankment, receiving the injury for which he sues, consisting of a broken leg. The evidence, while it also tended to show that plaintiff had long been a resident of Paris, was acquainted and knew of the embankment, by having passed over and seen it previous to the accident, did not tend to show that he knew the caboose had stopped there when he got off. The evidence also tended to show that the freight train on which plaintiff took passage was an extra, which, under the rules of the company, was not permitted to carry passengers, but did not tend to show that plaintiff had knowledge thereof.

The above facts, which the evidence tended to establish, make out a case which it was proper to submit to the jury. Notwithstanding, under the rules of the company, (which were unknown to plaintiff,) passengers were not permitted to ride on the train in question, yet plaintiff, when directed by the agents of defendant, whose duty it was to direct passengers what trains they should enter, to take passage on this train, became a passenger. *Marshall v. Railroad Co.*, 78 Mo. 616; *Logan v. Railway Co.*, 77 Mo. 668; *Hicks v. Railway Co.*, 68 Mo. 338; 2 Wood, Ry. Law, § 355, p. 1418. At pages 1044 and 1045 of the author last cited it is said: "A person who, without knowing that it is against the rules of the company for passengers to ride on a freight train, if he pays his fare, and is received as a passenger by the conductor, he may be entitled to the rights of a passenger; and such also may be the case where, notwithstanding the rules, it is shown that passengers have been habitually carried upon such trains; but where a person, knowing the rules, gets upon a freight train, even with the assent of the conductor, and pays no fare, he cannot be regarded as a passenger." In the case before us there was abundant evidence showing that passengers were habitually carried upon defendant's freight trains. Plaintiff having been received by defendant as a passenger on its freight train, the same degree of care was due to him that defendant owed to passengers on its regular trains, except that plaintiff, in taking the freight train, accepted and traveled on it, acquiescing in the usual incidents and conduct of a freight train managed by prudent and competent men. *Indianapolis, etc., R. Co. v. Horst*, 98 U. S. 293.

In section 20, p. 234, Thomp. Carr., it is said: "The company is held to as strict an accountability for the negligence of its employes in the management of a train with a caboose attached, in which passengers are seated, as the law imposes in the transportation of passengers on trains especially provided for that purpose. It cannot, however, be expected that a company will provide its freight trains with all the conveniences and safeguards against danger which may properly be demanded in the construction and operation of cars designed solely for the transportation of passengers; and the ordinary rule that

the company must provide safe and convenient means of getting on and off trains obviously has but slight application to the case of a passenger on a freight train."

The defendant did not stop its train at the usual stopping place, where it was safe for passengers to alight, but, on the contrary, at an unusual place, where it was unsafe and dangerous, before reaching which the station "Paris" was announced; thereby inviting plaintiff, nothing to the contrary appearing, to get off when and where it stopped.

These facts, in connection with the further facts that the night was very dark, and that passengers in the caboose could not for that reason see the danger, and that the conductor, on leaving the caboose with the light, could or might have seen it, made his failure to warn and inform the passengers of the dangerous character of the surroundings gross negligence. But it is argued that plaintiff was also negligent in leaving the caboose under the circumstances, and that the demurrer to the evidence ought to have been sustained for that reason. We are of a different opinion. The slowing up of the train as it approached Paris, the sounding of the whistle, the announcement by the brakeman of the station, stopping the train, the act of the conductor and brakeman leaving the caboose with the light, the detachment of the engine to take water, can be construed in no other light than as a direction to the passengers to alight then and there, and plaintiff, in the absence of anything appearing to the contrary, had a right to conclude that it would be safe for him to alight at that place. *Leslie v. Railway Co.*, 88 Mo. 51; *Terre Haute & I. R. Co. v. Buck*, 96 Ind. 347; *Beach*, Cont. Neg. 173, and section 23, p. 71, where it is said: "When the defendant, by his own negligent or wrongful acts or omissions, throws plaintiff off his guard, or when plaintiff acts in a given instance upon a reasonable supposition of safety, induced by the defendant, when there is in reality, danger to which plaintiff is exposing himself in a way and to an extent which, but for the defendant's inducement, might be imputed to the plaintiff as negligence sufficient to prevent a recovery, such conduct on the part of plaintiff, so induced, will not constitute contributory negligence in law, and the defendant will not be heard to say that the plaintiff's conduct, under such circumstances, is negligent for the purpose of a defense to the action. * * * If plaintiff exercises ordinary care and prudence, under the circumstances, in relying upon defendant's inducement, or in obeying defendant's orders and directions, he may have his action."

It is next insisted that the second instruction given for plaintiff is erroneous, because it is too general in telling the jury that if plaintiff exercised "due care," etc., and did not specifically set out all the circumstances tending to show contributory negligence. The instruction is as follows: "(2) If the jury find from the evidence that plaintiff was a passenger on defendant's said train, and that it was dark when said train arrived at Paris, and that defendant's agents and servants stopped said train so that the caboose stood upon a high embankment, the side of which was perpendicular, and that said place was a dangerous place for passengers to alight from said train, and that said place was not the usual and ordinary stopping place for freight trains at said station, and that the brakeman of said train announced the station, and that plaintiff, believing that said train was at its usual stopping place, and that no other opportunity would be offered him to alight from said train at said station, and further find that defendant's said agents and servants neglected to warn plaintiff of the dangerous character of the place, or that he must not attempt to alight at said place, and that they carried away their lanterns, and failed to furnish plaintiff any light by which to alight from said train, they will find defendant guilty of negligence towards plaintiff; and if the jury so find the defendant guilty of negligence towards plaintiff, and that, as the direct and immediate consequence of such negligence on defendant's part, plain-

tiff, while exercising due care on his part, alighted from said train, and fell down the embankment at said dangerous place, and sustained the injuries complained of in plaintiff's petition, they will find a verdict for plaintiff."

We have already shown that it was not negligence in plaintiff in alighting from the train at the time he did, and, inasmuch as there is nothing in the case before us to show that plaintiff in leaving the caboose was not exercising due care, the error complained of, if it may be so called, was immaterial; especially so in view of the evidence, which would have justified the court in adding, after the words "due care," "and there was no evidence tending to show that plaintiff was not exercising due care."

It is also insisted that the court erred in admitting evidence to show that it was the custom and usage for defendant's freight trains to carry passengers. The fact of such custom was testified to by a number of witnesses, and that it was notorious, and the reception of the evidence was warranted by the following authorities: Wood, Mast. & Serv. § 401, p. 791; Lawson, Usages, 41, 42. Nor was error committed in the reception of evidence to prove the usual stopping place of freight trains at the station in Paris. *Tibby v. Railway Co.*, 82 Mo. 299; *Brassell v. New York Cent. & H. R. Co.*, 84 N. Y. 241; *Wood v. Lake Shore R. Co.*, 49 Mich. 872, 18 N. W. Rep. 779.

The cause having been fairly tried, the judgment is affirmed, with the concurrence of the other judges.

STATE v. HICKS.

(*Supreme Court of Missouri. June 8, 1887.*)

1. HOMICIDE—SELF-DEFENSE—INSTRUCTIONS.

Where, upon an indictment for murder in the first degree, the plea of self-defense was interposed, and the court instructed the jury in a manner presenting the law applicable to the case, the verdict will not be disturbed because the court refused to give certain instructions asked for defendant, when the latter were substantially embraced in other instructions that were submitted to the jury. *SHERWOOD and BRACE, JJ.*, dissenting.

2. APPEAL—INSTRUCTIONS—REVIEW.

Instructions which substantially state the law in the usual manner as to declarations made by the defendant, against and for himself, after the fatal act, and as to the credibility of witnesses and the weight of testimony, will not be reviewed when the brief of counsel does not attempt to point out error in the same. *SHERWOOD and BRACE, JJ.*, dissenting.

3. SAME—OBJECTIONS NOT RAISED BELOW.

The appellate court will not consider objectionable remarks charged to have been made by the prosecuting attorney in his closing speech to the jury, when no exception thereto had been saved at the trial.

Appeal from circuit court, Texas county.

Atty. Gen. Boone, for respondent. *O. H. Travers* and *Seay & Herrick*, for appellant.

NORTON, C. J. Defendant was indicted at the May term, 1885, of the Texas county circuit court, for murder in the first degree for killing one R. E. Barnes. After various continuances, he was put upon his trial at the July term, 1886, of said court, and convicted of murder in the second degree, and sentenced to the penitentiary for 10 years. From this judgment he has appealed. No exceptions were saved either as to the reception or rejection of evidence, but a reversal is sought because of alleged errors of the court in giving, and in refusing to give, instructions. Of those given on behalf of the state the following are pointed out by counsel as being objectionable, viz.:

"(5) The court instructs the jury that what the defendant said against himself, after the fatal act, the law presumes to be true, because said against himself; but what he said for himself, after the fatal act, in any different conversation, not proved by the state, the jury will disregard."

"(7) The court instructs the jury that they are the sole judges of the weight

of evidence, and the credibility of witnesses; and, if you believe any witness has willfully sworn falsely to any material matter in controversy, you should reject such false testimony, and are at liberty to disregard or reject the whole of such witness's testimony. In passing upon the testimony of any witness, and the weight to be attached to his testimony, you should, in connection with all the other acts and circumstances proved, take into account the conduct and appearance of such witness upon the stand, his interest in the result of the trial, if any, the motives actuating him in testifying, the probabilities of the statements of such witness, and his inclination to speak truthfully or otherwise as to matters within his knowledge."

"(10) The court instructs the jury that the right of self-defense is a right which the law not only concedes, but guarantees to all men. If the jury, therefore, believe that at the time defendant shot deceased he had reasonable cause to apprehend, on the part of the deceased, a design to do him some great personal injury, and there was reasonable cause for him to apprehend imminent danger of such design being accomplished, and to arrest such apprehended danger he shot, and at the time he did so he had reasonable cause to believe, and did believe, it necessary for him to use his pistol in the way he did to protect himself from such apprehended danger, then and in that case the shooting was not felonious, but was justifiable, and you should acquit defendant on the ground of necessary self-defense. It is not necessary to this defense that the danger should have been actual or real, or that it should have been impending, and immediately about to fall. All that is necessary is that defendant had reasonable cause to believe, and did believe, these facts. However, before you acquit on the grounds of self-defense, you ought to believe that defendant's cause for apprehension was reasonable. Whether the facts constituting such reasonable cause have been established by the evidence you are to determine; and unless such facts have been established by the evidence in the cause, you cannot acquit, in such case, on the ground of self-defense, even though you may believe that the defendant really thought he was in danger. On the other hand, the law does not permit a person to voluntarily seek or invite a combat, or put himself in the way of being assaulted, in order that, when hard pressed, he may have a pretext to take the life of his assailant. The right of self-defense does not imply the right of attack, and it will not avail in any case where the difficulty is sought for and induced by the party by any willful act of his, or where he voluntarily and of his own free will enters into it, no matter how imminent his peril may become during the progress of the affray. The necessity, being of his own creation, shall not operate to excuse him. Nor is any one justified in using more force than is necessary to get rid of his assailant. But if he does not bring on the difficulty, nor provoke it, nor voluntarily engage in it, he is not bound to flee to avoid it, but may resist, with adequate and necessary force, until he is safe.

"If you believe, from the evidence in this cause, that defendant voluntarily sought or invited the difficulty in which Barnes lost his life, or that he provoked or commenced or brought it on by any willful act of his own, or that he voluntarily entered into the difficulty of his own free will, then you are not authorized to acquit him on the grounds of self-defense. This is true, no matter how violent his passion became, or how hard soever he was pressed, or how imminent his peril became during the affray. In determining who provoked or commenced the difficulty, or made the first assault, you should take into consideration all the facts and circumstances in evidence before you."

No attempt has been made by counsel in their brief to show wherein either of the above instructions is erroneous, and we perceive no error in them. The fifth instruction has in effect received the sanction of this court in the following cases: *State v. Gee*, 85 Mo. 647; *State v. Wisdom*, 84 Mo. 190; *State v. McGinnis*, 76 Mo. 328; *State v. Jones*, 86 Mo. 628. As to the sev-

enth instruction, the direction to disregard what defendant said for himself, in any conversation after the fatal act, not proved by the state, was warranted by the cases of *State v. Bryant*, 55 Mo. 77; *State v. Evans*, 65 Mo. 579; *State v. Christian*, 66 Mo. 138. The tenth instruction is a copy of one fully approved in the case of *State v. Thomas*, 78 Mo. 341.

The defendant asked of the court fourteen declarations of law, eight of which were refused, and six given. Those given are as follows:

"(9) The jury are instructed that any and all threats made by Barnes against Hicks, if any were made, which were not communicated to Hicks, should be considered by the jury in determining what were Barnes' intentions at the time he entered into the difficulty with Hicks, if he did enter into a difficulty with him.

"(10) If the jury believe that the defendant acted in a moment of apparently impending peril of his life or great personal injury, and did not himself voluntarily enter into the difficulty, the law does not require him to gauge or measure the proper quantum of force necessary to repel the assault of the deceased, but he may use whatever force is reasonably necessary to free himself of the impending peril he is placed in.

"(11) If the jury believe from the evidence that the deceased began the difficulty with the defendant by calling him a liar, and striking him, and followed up the difficulty thus begun by knocking the defendant down, then the defendant had the right to use such means as were within his reach, and all the energies under his control, which were apparently necessary to protect himself from great personal injury at the hands of the deceased.

"(12) The jury are instructed that the burden of proof to establish the guilt of the defendant devolves upon the state throughout, and that the law clothes the defendant with the presumption of innocence, which attends and protects him until it is overcome by evidence which shows his guilt beyond a reasonable doubt. It is not sufficient in this case, to justify a verdict of guilty, that there may be strong suspicions of his guilt, but the testimony must be of such a nature that, when you have considered it all, you find a clear conviction of defendant's guilt. This much is required by the law. If this much has not been proven, you will acquit the defendant.

"(13) The court instructs the jury that if they believe from the evidence that Barnes, the deceased, brought on the difficulty and struck the first blow, then the defendant had the right to resist such assault, and to use such force as was apparently necessary for that purpose. And if the jury believe from the evidence that Barnes was physically larger and stronger than the defendant, and that, by reason of such superior strength, he in the difficulty knocked the defendant down two or three times, and then jumped upon him, and the defendant had reasonable grounds to apprehend that the deceased, Barnes, was about to inflict upon him death or great bodily harm, and that such danger was then impending, or about to fall upon him, and he had no means to effectually protect himself from such impending danger at the hands of Barnes without the use of a deadly weapon, then the defendant was justified in shooting the deceased, if such shooting was reasonably necessary to protect himself from such impending harm.

"(14) If Barnes had threatened to kill Hicks, or inflict great personal injury upon him, and such threats had been communicated to Hicks, then Hicks had a right to arm himself with a pistol, or otherwise to defend himself against such threatened personal injury; and if Barnes assailed Hicks after making such threats, and after such threats had been communicated to Hicks, if such threats were made and communicated to Hicks, then Hicks had the right to use any force at his command that was reasonably necessary to repel the assault of Barnes, if Barnes assaulted him, and even to kill Barnes if reasonably necessary, or apparently so, to preserve his life, or prevent great personal injury being inflicted upon him."

The above instructions put the case of defendant fairly before the jury, and it is only necessary to say of the eight instructions asked and not given that they were properly refused on the ground that, in so far as they contained correct declarations of law, they were embraced in the above six instructions that were given.

There was the usual conflict of evidence as to who brought on the last encounter which ended in the tragedy, but there was sufficient evidence to justify the court in submitting that question to the jury, as was done in the tenth instruction given on behalf of the state, and in those given for defendant. It was for the jury, and is not for us, to deal with this conflict.

It is further objected that the prosecuting attorney made certain objectionable remarks in his closing speech to the jury. No objection was interposed at the time they were alleged to have been made, and for that reason will not be considered here, the rule as to matters of exception being the same in criminal as in civil cases. *State v. McDonald*, 85 Mo. 539.

The court gave instructions as to murder in the first and second degrees, and manslaughter in the fourth degree, and no complaint was made in the court below, nor is any made before this court, that the evidence applied to any other grades of homicide than those upon which instructions are given.

We find no error in the record justifying an interference with the judgment, and it is hereby affirmed, with the concurrence of Judge RAY and Judge BLACK, who file a concurring opinion.

BRACE and SHERWOOD, JJ., dissent.

BLACK, J. In the case of *State v. Partlow*, ante, 14, (recently decided,) no instructions were given of an offense below the grade of murder in the second degree, and the instructions upon self-defense were in no way qualified by any instructions as to manslaughter. Here the court gave the following instruction:

"If you believe and find, from the evidence in this cause, that said R. E. Barnes first assaulted the defendant, or that defendant entered into a difficulty, with no design to use his pistol, and, while under the influence of violent passion, aroused by the acts and conduct of said R. E. Barnes, he drew his pistol during the altercation, and fatally shot and killed deceased, but not in a cruel or unusual manner, without malice, as defined in these instructions, whether with or without intent to kill, and that he did this under such circumstances as did not justify him upon the ground of self-defense, then you should convict defendant of manslaughter in the fourth degree, and assess his punishment at imprisonment in the penitentiary for two years, or by imprisonment in the county jail not less than six months, or by fine of not less than five hundred dollars, or by both a fine not less than one hundred dollars and imprisonment in the county jail not less than three months."

In this case the evidence shows that defendant and deceased had a quarrel, and came to blows on the sidewalk, and were separated by other persons. The bulk of the evidence tends to show that after being separated the defendant renewed the contest, and there is no question in the case of an effort on the part of the defendant to withdraw from the contest after it had commenced. In view of this instruction and the evidence in the case I cannot see that there is any conflict in the rules of law upon which this case was tried, and those applied in the *Partlow Case*, and therefore concur in affirming the judgment.

GREER v. REDMAN.

(Supreme Court of Missouri. June 20, 1887.)

1. COVENANT—INCUMBRANCES—TAXES.

Plaintiff sued on the covenant against incumbrances to recover a sum paid by him for taxes of 1882 upon certain lands. The defendant had conveyed these lands

in Missouri to plaintiff by warranty deed, with a general covenant against incumbrances. In consideration of this conveyance, the plaintiff conveyed to defendant certain lands in Michigan, and also executed a deed of trust of the Missouri lands to secure the payment of two promissory notes to defendant. In this deed of trust plaintiff, in express terms, covenanted to pay all taxes then existing against the land. *Held*, that plaintiff could not recover.

2. **APPEAL—EVIDENCE—OBJECTIONS.**

Where a general objection is made to the introduction of evidence at the trial, but no specific grounds of objection are pointed out, the appellate court will not consider the objection.

Error to circuit court, Ralls county.

Bristow & Lighter, for plaintiff in error. *R. F. Loy*, for defendant in error.

PER CURIAM. This was a suit on the covenant against incumbrances in a deed to recover an amount paid for taxes for the year 1882. The answer was a general denial. The facts are as follows: On the twenty-ninth January, 1882, the defendant, Redman, by a warranty deed with a general covenant against incumbrances, conveyed to plaintiff, Greer, two parcels of land in Ralls county, upon which the taxes for that year had not been paid, and which the plaintiff paid. As a part of the consideration, Greer conveyed to Redman certain lands in the state of Michigan. He also, as another part of the consideration, made a deed of trust upon the Missouri land to secure the payment of two promissory notes; and in this deed of trust he, in express terms, covenanted to pay all taxes then existing against the land. It also appears, by parol evidence, that, at the time the deeds were made, plaintiff agreed to pay the taxes on land in Missouri, and the defendant agreed to and had paid the taxes on the Michigan land for the same year, (1882.) The deed sued upon and the deed of trust were made upon the same day, delivered at the same time, conveyed the same land, and were different parts of one and the same transaction, and may be taken and read together. The general covenant in the deed was qualified by the special covenant in the deed of trust, and the two instruments show that plaintiff was to pay the taxes for which he sues. Objections were made by the plaintiff to the introduction of the deed of trust in evidence, and to the evidence of the payment of taxes; by defendant to the parol proof of the agreement with respect to the payment of taxes; but the objections were general, without any grounds being assigned, and the case stands as if no objections had been made.

(All concur.)

HALEY and another v. STATE.

(*Supreme Court of Arkansas. May 21, 1887.*)

1. **ROBBERY—INDICTMENT—LARCENY.**

At common law one indicted for robbery could not be convicted of larceny. The statutory system of Arkansas has changed this rule.

2. **SAME.**

A statute (Mansf. Dig. § 2288) declared that "upon an indictment for an offense consisting of different degrees, the defendant may be found guilty of any degree not higher than that charged in the indictment, and may be found guilty of any offense included in that charged in the indictment." Section 2289 provided that all offenses of larceny should be deemed degrees of the same offense in the meaning of that section. *Held* that, the crime of robbery being an aggravated or compound larceny, a conviction of grand larceny upon an indictment for robbery is proper if the jury is in doubt which offense defendant committed.

3. **SAME—INSTRUCTIONS.**

Upon a trial for robbery, defendants requested an instruction to the effect that the long silence of the prosecuting witness in announcing the crime was a circumstance from which the jury might, in connection with the evidence, infer that no putting in fear or violence had been used. *Held* properly refused. It is not the judge's duty to point out what inferences may or should be drawn from particular facts in evidence.

4. SAME.

An instruction on the subject of fraud or stealth on a robbery trial, there being no evidence that the property taken had been obtained by these means, is error.

5. LARCENY—USE OF FRAUD—FALSE PRETENSES.

An instruction that if the property taken was so obtained by stealth or fraud, with intent to steal the same, the offense of larceny was made out, is erroneous. Where the owner parts with the property by consent, there is no trespass, and the offense is that of cheating at common law, or the statutory offense of false pretenses.

6. SAME—BLACKMAIL.

Upon a trial for robbery resulting in a conviction of grand larceny there was evidence showing that the property obtained was voluntarily given by the prosecuting witness to shield himself from a threatened exposure of crime by defendants. *Held*, that defendants were entitled to an unqualified instruction that, if the jury should find that the prosecuting witness had parted with the property to shield himself from prosecution, or to avoid a public charge of crime, the offense of larceny was not committed, and that it was error for the court to modify a requested instruction to that effect by adding the idea of fraud.

Appeal from circuit court, Saline county. Indictment for robbery.

John McLure, for appellants. *Dan W. Jones*, Atty. Gen., for appellee.

SMITH, J. The indictment charged that the defendants "sundry bills of United States currency of the aggregate value of five hundred dollars," etc., "of the money and personal property of one Perry Huff, feloniously, violently, by force, and intimidation, from the person and against the will of him, the said Perry Huff, then and there feloniously and violently did steal, take, and carry away, against the peace," etc. The jury found the defendants guilty of grand larceny. Motions for a new trial and in arrest of judgment were refused; and judgment of confinement in the penitentiary was pronounced against them.

The ground of the motion in arrest of judgment is, "because the facts stated in the indictment do not constitute the crime of grand larceny." At common law one indicted for robbery could not be convicted of larceny, as appears from *Rea v. Francis*, 2 Strange, 1014, which, after having been twice argued in the king's bench, was finally heard before all the judges of England. In that case the defendants were indicted for robbery. The jury returned a special verdict, and the question arose thereon whether the facts found constituted robbery. Counsel for the defendants moved for a discharge of the prisoners, and the court said: "We all think this is grand larceny, and therefore cannot discharge these persons, *but as we cannot give judgment for a larceny, there must be a new indictment.*" In the report of the same case in 2 Com. 478, it was held that the prisoners ought not to be discharged out of custody, but remanded; "for, though no robbery is found by the verdict, yet it appears they are guilty of grand larceny, for which no judgment can be given *on this indictment*, for this differs from burglary and other cases where the prisoner may be acquitted of the burglary, and found guilty of the felony; but here the offense is laid to be a robbery in taking a *persona*. The court cannot give judgment against them *on this indictment*, but must discharge them as to it, and remand them in order to be tried *upon a new indictment for the grand larceny.*"

Section 2288 of Mansfield's Digest declares that, "upon an indictment for an offense consisting of different degrees, the defendant may be found guilty of any degree not higher than that charged in the indictment, and may be found guilty of any offense included in that charged in the indictment."

"Sec. 2289. The offenses named in each of the subdivisions of this section shall be deemed degrees of the same offense in the meaning of the preceding section. *First*, all offenses of homicide; *second*, all injuries to the person by maiming, wounding, beating, and assaulting, whether maliciously or from

sudden passion, and whether attended or not with the intention to kill; *third*, all offenses of larceny; *fourth*, arson and house-burning; *fifth*, burglary and house-breaking; *sixth*, an offense, and an attempt to commit the offense," etc.

The question, then, resolves itself to this: Whether robbery is a degree or species of larceny, or includes it. In *Clary v. State*, 83 Ark. 566, this court said: "Perhaps, on a trial for robbery, if the state fails to prove that the goods were taken from the person of the party charged to have been injured, by putting him in fear, or by intimidation or violence, and *proves* that the goods were taken from his person *furtively*, the accused might be convicted of larceny." And in *Davis v. State*, 45 Ark. 464, it was declared that one accused of murder might be convicted of an assault with intent to kill, provided the indictment contained all the substantive allegations necessary to let in proof of the inferior crime. If the allegations of violence and intimidation be stricken out of the present indictment, a charge of larceny will still be left. Now, robbery is a compound or aggravated larceny. It is a stealing from a person, with the element of assault or putting in fear superadded. Hence it is that an acquittal or conviction of either offense bars a prosecution for the other. This could only be upon the theory that larceny is included in robbery. Hence, also, under an indictment for the higher crime, the jury may find the defendant guilty of the lower if they entertain a reasonable doubt as to which of the two offenses he is guilty. 1 Bish. Crim. Law, (6th Ed.) §§ 553, 566, 791, 792, 794, 795, 1054, 1055; 2 Bish. Crim. Law, (6th Ed.) §§ 892, 1158; *People v. McGowan*, 17 Wend. 386; *Hickey v. State*, 23 Ind. 21; *People v. Jones*, 53 Cal. 58; *State v. Jenkins*, 36 Mo. 372; *State v. Davidson*, 38 Mo. 374; *State v. Brannon*, 55 Mo. 63; *State v. Painter*, 67 Mo. 85; *State v. Keeland*, 2 S. W. Rep. 442.

The parties indicted for the robbery were T. J. Haley, his wife, and son. Perry Huff, the prosecuting witness, was a merchant of Hot Springs, and a believer in spiritualism. Mrs. Haley claimed to be a medium of communication with the world of spirits, cognizant of past events that had not fallen under her own observation, and able to predict the future. Huff had been in the habit of consulting her about his business transactions, and, having recently suffered some losses by fire, was anxious to know whether he was to get his insurance in full. Having invited her victim to a sitting at 10:30 A. M., the woman stationed her husband and step-son behind a curtain in the same apartment; and, pretending to go off into a trance, she accused Huff of burning his houses to defraud the insurance companies. About this time the two men walked from behind the curtain. Huff testifies that they locked the door of the room; that the old man Haley and his son both had pistols; that they exhibited them to him, and demanded his money, and told him he must give it up; that he was in fear of his life and great bodily injury, and, under this fear, he gave the defendants \$500, and made his note, payable to Mrs. Haley, for \$1,500 more. The three Haleys swear that Huff confessed to Mrs. Haley, acting as a spiritual medium, the burning of his houses on two different occasions; that old man Haley and his son heard the confession; that, after the confession was made, they confronted Huff; that Huff, being aware they had heard his confession, to keep them from telling the public, and especially Huff's wife, finally agreed, and without any suggestion or demand on their part, to pay Mrs. Haley \$500 in cash, and give his note for \$1,500, payable at a short time, as soon as he could sell some property. Huff also swore that they detained him in the room for several hours, the two men standing on each side of him; and that, after he had paid the money, they mesmerized or drugged or chloroformed him, so that he felt drowsy for three or four days; and that, before he had fully recovered, the defendants had left town. Huff made no complaint to any officer, but laid his case before a lawyer, who advised him to be quiet until the defendants should return. In three or four months they came back to collect the note, when Huff caused them to be arrested. Mrs.

Haley was acquitted, under the directions of the court, on account of the presence and presumed coercion of her husband.

The defendants requested the court to charge "that the long silence of Perry Huff, from August 27, 1885, to December 9 of the same year, in announcing the alleged robbery, is a circumstance from which the jury may infer, in connection with the evidence, that the said Huff was not deprived of his money through fear or violence." This was properly refused. To give it would have been, under our system of practice, an invasion of the province of the jury. It is not the duty of the presiding judge to point out what inferences may or should be drawn from particular facts in proof. *Randolph v. McCain*, 34 Ark. 696; *Flynn v. State*, 43 Ark. 289; *Maclin v. State*, 44 Ark. 115; *Polk v. State*, 45 Ark. 165; *Stephens v. Oppenheimer*, Id. 492.

The jury were also told that "if they believe, from the evidence beyond a reasonable doubt, that the defendants, or either of them, feloniously took the property from the possession of the said Perry Huff, by stealth or fraud, with intent to steal the same, then the jury may find the defendants, or either of them that so took the money, guilty of larceny." The court was further requested to charge that if the jury should find Huff had parted with his money to shield himself from a prosecution for arson, or to avoid a public charge of that character, this would not constitute larceny. This prayer the court modified by adding the words, "unless it was a contrivance resorted to by the defendants to induce him by fraud to give up his money, and in that way feloniously to steal the same."

In going out of its way to deal with the question of fraud and fraudulent devices, the court was treading upon dangerous ground; for some subtle distinctions have become firmly established in the law of larceny. Indeed, the whole law on this subject is extremely technical. Mr. Bishop, in his work on Criminal Law, (volume 2, § 808,) says: "If, by fraud, a person is induced to part with his goods, meaning to relinquish his property in them, as well as his possession, he who thus obtains them may be chargeable with a cheat at the common law, or under the statutes against false pretenses, but not with larceny, because, it is assumed, the owner having actually consented to part with his ownership, there was no trespass in the taking." In *Loomis v. People*, 67 N. Y. 329, this distinction is thus stated: "Where, by fraud, conspiracy, or artifice, the possession is obtained with a felonious design, and title still remains in the owner, larceny is established. Where title, as well as possession, is absolutely parted with, the crime is false pretenses." Compare Whart. Crim. Law, (9th Ed.) §§ 964, 965, and *Kellogg v. State*, 26 Ohio St. 15.

There was no evidence that the prisoners had obtained Huff's money by any trick. They obtained it either by exciting his fears or through his consent. And there being nothing in the circumstances from which the jury could infer that the possession of the money was intrusted to them as bailees, or for a temporary purpose, the question was, not whether the money had been procured from the owner by false and fraudulent representations, but whether it had been obtained by his free consent, or extorted from his fears. If the latter was the case, then the larceny was complete; the apparent consent being annulled by the fear which the thieves had inspired. 2 Bish. Crim. Law, § 807. Such, however, is not the law when goods or moneys are acquired by fraudulent practices. Consent, no matter how fraudulently obtained, if there be no mistake as to the taker or the thing taken, excludes the idea of trespass, and consequently the idea of larceny. And no threats of prosecution, or fear of loss of reputation, will nullify such consent. 2 Bish. Crim. Law, §§ 811, 1173; 1 Whart. Crim. Law, § 915; *Perkins v. State*, 65 Ind. 817. The defendants having given evidence tending to prove that the \$500 was voluntarily paid by Huff as hush-money for the preservation of his secret, and in order to prevent exposure, they had the right to have the jury instructed on

this hypothesis. And the qualification attached by the court, in relation to fraud, was erroneous, for two reasons: There was no testimony upon which to base it; and if there had been, it is not the law.

Reversed and remanded, with directions to put the defendants upon trial for larceny.

SCOTT v. STATE.

(Supreme Court of Arkansas. May 21, 1887.)

1. EVIDENCE—SECONDARY.

To prove that a witness for the defense had heretofore been convicted of larceny before a justice of the peace, parol testimony, and a document which purported to be not an exemplification of the docket entries of the justice, but a report of convictions in his court, required to be filed by law in the clerk's office, were introduced. *Held* error, as not being the best evidence available under the circumstances.

2. WITNESS—COMPETENCY—APPEAL.

Where evidence is ruled out on account of the subject-matter offered to be proved, it is necessary, in a bill of exceptions, to set out the proposed testimony, in order that the appellate court may be able to judge whether it is relevant and material. But when a witness is rejected on the ground of his legal disability to testify, the presumption is that he would have been rejected, no matter how important the evidence might have been, and the error will be considered, though such testimony is not so set out.

3. HOMICIDE—ASSAULT WITH INTENT TO KILL.

To support an indictment for assault with intent to murder alleged to have been committed on A., there must be evidence of the specific intent to injure such person. A charge that if the jury find from the evidence that defendant shot into the house of A. and into a crowd where A. was at the time situated without provocation and "when all the circumstances of the shooting show an abandoned and wicked disposition and a reckless disregard of human life on the part of the defendant" is error, as likely to mislead the jury into the belief that proof of the particular intent alleged could be dispensed with.

Appeal from circuit court, Drew county.

Indictment for assault with intent to murder.

W. H. Hyatt and David A. Gates, for appellant. Dan W. Jones, Atty. Gen., for appellee.

SMITH, J. On the trial of this indictment, the defendant offered one Burton as a witness. The state objected to his being sworn, alleging that he had previously been convicted of petit larceny before a justice of the peace. The trial was started, and a *subpoena duces tecum* issued for the justice, who came, but did not bring his docket. The state was then permitted, over the objection of the defendant, to prove the conviction by parol testimony, and to read to the jury a document, which purported to be, not an exemplification of the docket entries made in the course of the prosecution, but a report of the convictions in his court, which he had before that time filed in the clerk's office, as required by law. This was error. The judgments and orders of a justice of the peace are kept in a docket. They are *quasi* records, and provable only by the production of the docket itself, or by a certified copy. The record was in existence, and accessible. It therefore constituted the best evidence of the fact. Mansf. Dig. §§ 2824, 4032; *Gates v. Bennett*, 33 Ark. 475; 1 Greenl. Ev. §§ 375, 513; 1 Phil. Ev. (4th Amer. Ed., Cowan & Hill's Notes,) c. 3, note 14; *U. S. v. Biebusch*, 1 McCrary, 42.

The attorney general suggests that, inasmuch as the bill of exceptions does not show what the testimony of this witness would have been, it does not appear that the defendant was prejudiced by his exclusion. Where evidence is ruled out on account of the subject-matter offered to be proved, it is necessary to set out the proposed testimony in order that the court of errors may be able to judge whether it is relevant and material. But when a witness is rejected on the ground of his legal disability to testify in a court of justice, the pre-

sumption is he would have been rejected, no matter how important his evidence might have been. Pow. App. Proc. c. 5, § 12; *State v. Jim*, 3 Jones, (N. C.) 348.

The defendant was charged with an assault upon one Primus Bannister, with intent him, the said Primus, to kill and murder. It was proved that the defendant was on bad terms with Primus, and also with several members of his family or inmates of his house, and that he repeatedly made threats against all of them. About 10 o'clock of an August night, when the moon was shining brightly, and while Primus and his family were sitting in an open hall of his house, the defendant was recognized in the act of creeping along a picket fence, which ran a few yards from the house, with a double-barrel shot-gun in his hand, and when he came opposite the hall he discharged first one barrel, and then the other, among the group of persons sitting there. Luckily no serious damage was done. The gun was loaded with squirrel shot, and the charge lodged in the house, although a few scattering shot took effect in the persons of some of the family. Primus was not hit. Upon this state of proof the court gave the following charge: "Before the jury can convict the defendant of an assault with intent to kill Primus Bannister, they must believe, beyond a reasonable doubt, that the defendant shot at Primus Bannister with the felonious intent to kill him, the said Primus Bannister; and if the jury believe from the evidence that it was some one else other than Primus Bannister at whom the defendant shot, or if they have a reasonable doubt as to whom the defendant intended to shoot, they will find defendant not guilty, unless they further find from the evidence that the defendant shot into the house of Primus Bannister, and into a crowd where he, Primus Bannister, was at the time situated, without provocation, and when all the circumstances of the shooting show an abandoned and wicked disposition, and a reckless disregard of human life upon the part of the defendant."

Doubtless shooting into a crowd is an assault upon each member of the crowd. *State v. Nash*, 86 N. C. 650; *State v. Myers*, 19 Iowa, 517; *Smith v. Com.*, 100 Pa. St. 824. And probably, if the death of any individual results from such reckless conduct, it will be murder, the act being unlawful, and the law implying malice, in the absence of circumstances reducing the offense to a lower grade. But the essence of the crime for which the prisoner was indicted was the specific intention to take the life of Primus Bannister. That intent was distinctly alleged, and evidence was offered from which the jury might infer it to have existed in the defendant's mind. Having been alleged, it was necessary to prove it to the satisfaction of the jury.

And no general malevolence, malignity of disposition, or disregard of the sanctity of human life would supply the place of such proof. 3 Greenl. Ev. § 17; *Lacefield v. State*, 34 Ark. 275; *Com. v. Harley*, 7 Metc. 506; *Com. v. Kellogg*, 7 Cush. 477.

It follows that the concluding portion of the charge quoted above was liable to mislead the jury into the belief that proof of the particular intent alleged could be dispensed with. Reversed for a new trial.

VAUGHAN v. HARP.

(Supreme Court of Arkansas. May 21, 1887.)

1. APPEAL—DECISION—PRACTICE.

Mansf. Dig. Ark. §§ 1818, 1821, requiring every opinion of the supreme court to be reduced to writing, and to adjudicate and decide all points presented that legitimately arise in the case, whether their decision be necessary to the determination of the case or not, is repealed by Code Civil Pr. § 888, which provides for written opinions "in all cases involving a principle of law not previously settled by the court and reported."

2. CONSTITUTIONAL LAW—SUPREME COURT DECISIONS—LEGISLATIVE POWER.

The legislative and judicial departments of the state government being, in the line of their several duties, independent of each other, the former has not authority, under the constitution, to require the latter to give the reasons of its decisions in writing. *Houston v. Williams*, 13 Cal. 25, approved and followed.

Appeal from circuit court, Pulaski county.

T. J. Oliphint, for appellant. *Blackwood & Williams* and *Z. P. H. Farr*, for appellee.

BATTLE, J. During the present term of the court, the judgment in this action was affirmed without a written opinion setting forth the reasons of the court for so doing being filed. The appellant now says the court erred in so doing, and for that and other reasons moves the court for a reconsideration; and, in support of his motion, cites sections 1318 and 1321 of Mansfield's Digest, which provides that "every opinion of the supreme court shall be reduced to writing," and that "it shall be the duty of the supreme court to adjudicate and decide all points presented in error that legitimately arise in the case, notwithstanding that some one or more points, less than the whole, may be sufficient to determine the case." The sections cited by appellant are taken from the Revised Statutes of this state. Since their enactment the Code of Civil Practice has been enacted, which provides that this "court must deliver written opinions in all cases involving a principle of law not previously settled by the court and reported." This repeals so much of the Revised Statutes as requires every opinion of this court to be reduced to writing, and makes it unnecessary to reduce to writing any opinion not required by the Code to be in writing. Code Civil Pr. § 888.

But a more important question arises. The judiciary and legislative are co-ordinate departments of the state government. Each, in the line of its duties, is independent of the other. This being true, has the legislature authority to require this court to give the reasons of its decisions in writing? Mr. Justice FIELD, in delivering the opinion of the court in *Houston v. Williams*, 13 Cal. 25, so fully and satisfactorily expresses our view upon this question that we quote at length what he says upon the subject. In speaking for the court, he says: "If the power of the legislature to prescribe the mode and manner in which the judiciary shall discharge their official duties be once recognized, there will be no limit to the dependence of the latter. If the legislature can require the reasons of our decisions to be stated in writing, it can forbid their statement in writing, and enforce their oral announcement, or prescribe the paper upon which they shall be written, and the ink which shall be used. And yet no sane man will justify any such absurd pretension. But where is the limit to this power if its exercise in any particular be admitted? The truth is, no such power can exist in the legislative department, or be sanctioned by any court which has the least respect for its own dignity and independence. In its own sphere of duties, this court cannot be trammelled by any legislative restrictions. Its constitutional duty is discharged by the rendition of decisions. The legislature can no more require this court to state the reasons of its decisions than this court can require, for the validity of the statutes, that the legislature shall accompany them with the reasons for their enactment. The principles of law settled are to be extracted from the records of the cases in which the decisions are rendered. The reports are full of adjudged cases in which opinions were never delivered. The facts are stated by the reporter, with the points arising thereon, and are followed by the judgments rendered, and yet no one ever doubted that the courts, in the instances mentioned, were discharging their entire constitutional obligations. [See, by way of illustration, cases in 1 Day, in 1 Brock. Cas., and in 4 Har. & McH.] The practice of giving the reasons in writing for judgments has grown into use in modern times. Formerly, the reasons, if any were given, were generally stated orally by the judges, and taken down by the reporters

in short-hand. 1 Bl. 71. In the judicial records of the king's courts, 'the reasons or causes of the judgment,' says Lord Coke, 'are not expressed; for wise and learned men do, before they judge, labor to reach to the depths of all the reasons of the case in question, but in their judgments express not any; and in truth, if judges should set down the reasons and causes of their judgments within every record, that immense labor should withdraw them from the necessary services of the commonwealth, and their records should grow to be like *elephantini libri, of infinite length, and, in mine opinion, loss somewhat of their present authority and reverence*; and this is worthy for learned and grave men to imitate.' Coke, p. 3, pref. 5. The opinions of the judges, setting forth their reasons for their judgments, are, of course, of great importance in the information they impart as to the principles of law which govern the court, and should guide litigants; and right-minded judges, in important cases, when the pressure of other business will permit, will give such opinions. It is not every case, however, which 'will justify the expenditure of time necessary to write an opinion. Many cases involve no new principles, and are appealed only for delay. It can serve no purpose of public good to repeat elementary principles of law which have never been questioned for centuries. The court must therefore exercise its own discretion as to the necessity of giving an opinion upon pronouncing judgment; and, if one is given, whether it shall be orally or in writing. In the exercise of that discretion, the authority of the court is absolute. The legislative department is incompetent to touch it." *Hawkins v. Governor*, 1 Ark. 570; *Speight v. People*, 87 Ill. 595; *Willets v. Ridgway*, 9 Ind. 367.

In his motion for reconsideration, the appellant fails to call our attention to a single fact or principle of law which we have not carefully considered. We see no reason for changing our opinion, and the motion will be denied.

ST. LOUIS, I. M. & S. RY. CO. v. ALEXANDER.

(*Supreme Court of Arkansas.* June 4, 1887.)

1. TAXATION—ACTION BY TAX-TITLE HOLDER—LIEN FOR TAXES PAID—LIMITATION OF ACTIONS.

The cause of action of a purchaser at tax sale whose deed is declared invalid, to foreclose the lien for taxes, penalty, and costs, begins to run from the time of such adjudication, not from the date of the sale, or from the time of the expiration of the period for redemption. The statute (Mansf. Dig. Ark. § 5789) confers no right of action upon the tax purchaser for reimbursement until the sale at which he has purchased shall prove invalid, *i. e.*, until a court of competent jurisdiction shall pronounce the title bad.

2. SAME—PERSONAL JUDGMENT.

The fact that the proprietor of land sold for delinquent taxes is a railroad company, does not deprive the tax purchaser, on failure of his title, of the right to a "personal judgment," for the taxes, penalty, interest, and costs, against the railroad company as such defaulting proprietor.

3. SAME—VESTED RIGHT.

The fact that a statute authorizing the recovery of taxes paid, penalty, interest, and costs, by a tax purchaser whose title fails, is repealed or modified by legislation subsequent to the tax sale, will not affect the purchaser's right to recover, which had vested before the repealing act was passed. All the provisions of the statute giving him the right of action entered into, and became part of his contract of purchase, and so passed beyond the legislative control.

4. SAME—APPEAL.

Where a decree recites that a tax sale was held to be invalid "for irregularity in the same," it will not be presumed, on appeal from a judgment in favor of the tax purchaser against the proprietor of the land sold, for penalty, costs, etc., that the irregularity was at such a time, or of such a nature, as to invalidate the penalty and costs.

Appeal from circuit court, Garland county. In chancery.

Dodge & Johnson, for appellant. *Leland Leatherman*, for appellee.

COCKRILL, C. J. At the collector's sale for the non-payment of taxes in 1877, Alexander, the appellee, purchased and received his certificate of purchase for a section of land in Garland county. When the owner's time for redemption had expired, the clerk executed and delivered to him a deed to the land. In 1884 he brought an action of ejectment for the possession of the premises. Exceptions were filed to his deed, which were sustained by the court, and his action was dismissed. He then filed his complaint to foreclose the lien for the taxes, penalty, and costs, and for the taxes of 1878-79, which he had subsequently paid, and for a personal judgment against the railroad company as the defaulting land-owner at the time of sale. The land was condemned, and the personal judgment rendered as prayed. After the tax sale the company sold portions of the land, and its vendees were parties defendant. They interposed no special defense, but relied upon the railroad to make good its answer. All join in the appeal.

1. The company pleaded the three and the five year statutes of limitations as a bar to the action, and the argument is that the cause of action accrued, if not at the date of the tax purchase, then at the expiration of the time allowed for redemption; and that more than five years having elapsed from the expiration of the time to redeem before the suit was brought, the remedy was barred. The right of the purchaser at the tax sale to reimbursement for his outlay upon failure of his title is statutory. "If he has received a deed which for any reason is subject to fatal infirmity, he will lose what he has paid," unless the statute affords him relief. *Cooley, Tax'n*, (5th Ed.) 546. Our statute does not undertake to confer upon the tax purchaser any remedy for reimbursement until the sale at which he has purchased shall "prove invalid." *Mansf. Dig.* § 5789. The only method known to the law of proving the invalidity of a sale is by a judicial investigation, and it follows that his cause of action does not accrue until a court of competent jurisdiction has adjudged that the title is bad. The plaintiff's suit was instituted within a few months after the adjudication in the action of ejectment, and the defense of the statute of limitations was not sustained.

2. It is argued that the personal judgment against the railroad is erroneous. The complaint alleged, and the answer did not deny, that the railroad was the owner of the land, and failed in its duty to pay the taxes when the same became due, and when the sale was made. The statute in force at the time of the sale provides that, if the sale should prove invalid, "the purchaser shall receive from the proprietor of such land or lot the amount of taxes, interest, penalty, and costs of advertising, and the amount of taxes paid thereon subsequent to such sale," and charges the land also with the payment of these sums. As was ruled in *Hunt v. Curry*, 37 Ark. 100, 105, the railroad company was the "proprietor" of the land, whose default brought about the sale within the meaning of the statute, and the act confers a personal remedy for the taxes, penalty, interest, and costs against it as such defaulting proprietor.

3. But it is finally urged that this statute was repealed by the provision of the revenue act of 1883, which is digested as section 5789 of Mansfield's Digest; and that this section remits the tax purchaser to his remedy against the officer whose neglect of duty caused the failure of his title, to recover the penalty and cost of advertising, and that these items cannot be adjudged against the land or the proprietor. It is not material to ascertain whether the provision of the act of 1883 that is relied upon was intended to be retroactive in its operation or not. The plaintiff's right to recover all that was adjudged to him had vested before the repealing act was passed. The law in force when the sale was made, regulating its obligations, and defining the rights of the purchaser, all the provisions beneficial to him, and constituting a material inducement to the purchase, entered into and became a part of his contract, and so passed beyond the legislative control. *Cooley, Tax'n*, (2d Ed.)

545; Blackw. Tax Titles, (4th Ed.) *299, 490, 481; *Nelson v. Rountree*, 23 Wis. 371; *Louisiana v. Fisk*, 116 U. S. 131, 6 Sup. Ct. Rep. 329.

If the contract can be changed in one particular, it can in all, and, if the legislature can relieve the proprietor or the land of a part of the obligation to reimburse the tax purchaser, it can deprive him of the right of reimbursement *in toto*. "To admit such a fight," say the supreme court of Mississippi in *Moody v. Hoskins*, 1 South. Rep. 622, "is to concede the power to transfer valuable rights from one to another by the easy process of legislative declaration. * * * This is not legislation, but confiscation, and is beyond the power of the legislature."

There is nothing in the case of *Hickman v. Kempner*, 35 Ark. 505, that militates against the right to recover the penalty in this case. The right was denied in that case because the land-owner was not in fault in the non-payment of his taxes. See, too, Cooley, Tax'n, 456 *et seq.*, 547.

The record of the proceedings in the ejectment suit does not disclose for what informality the deed was ruled to be of no legal force. The decree in this case recites that the sale was held to be invalid "for irregularity in the same." We will not presume from this that the irregularity was at such a time, or of such a nature, as to invalidate the penalty and costs. The policy is to favor those who pay taxes upon lands for defaulting owners. *Hunt v. Curry*, *supra*. There can be no doubt of the right of the state to impose the penalty upon the defaulting owner, and it is for him to show that the circumstances were such as to exempt him from the liability.

Finding no error in the record, the decree is affirmed.

ST. LOUIS, I. M. & S. RY. CO. v. PERSON.

(Supreme Court of Arkansas. June 4, 1887.)

1. NEGLIGENCE—CONTRIBUTORY—ALIGHTING FROM TRAIN.

In an action against a railroad company by a passenger, to recover damages for personal injuries, instructions to the effect that if the plaintiff purchased a ticket to a regular station on defendant's road, and entered its train for the purpose of being carried there, and that, by reason of the failure of the conductor of said train to keep the cars at a stand-still a reasonable length of time to enable plaintiff to leave the cars in safety, the plaintiff was injured, without negligence on his part, the defendant is liable therefor; that if said train, after stopping at said station, started before the plaintiff could alight, and plaintiff, obeying the conductor's orders, attempted to get off while the train was going slowly, and the danger was not apparent, he was not guilty of such contributory negligence as would bar a recovery; that, if the plaintiff was directed by the conductor or agent of the defendant to get off while the train was moving, he had a right to rely upon said direction, provided he took no more risk than a prudent man would have taken under the same circumstances, and in so doing he would not be guilty of contributory negligence; and that where the danger of alighting from a moving train is not apparent to a passenger, and he is urged to take the risk by the company's employe, whose duty it is to know the danger, his conduct is not negligent,—correctly state the law as to carriers of passengers and contributory negligence.¹

2. SAME.

In an action for personal injuries caused by alighting from a train in motion, at the direction of the conductor, a refusal to instruct the jury to find for the defendant if they believed, from the evidence, that, after the train had stopped at the station for a reasonable length of time to enable plaintiff to alight, he, failing to so alight, leaped from the train while in motion, and in so doing was injured, is not error because it seeks to make circumstances, of which the negligence is to be determined by the jury, negligence *per se*.²

Appeal from circuit court, Pulaski county.

The complaint charged that on December 25, 1884, plaintiff was a passenger on defendant's train on his journey from Little Rock to his home at Mable-

¹ See *St. Louis, I. M. & S. R. Co. v. White*, (Ark.) 4 S. W. Rep. 52, and note; *Louisville, N. O. & T. R. Co. v. Mask*, (Miss.) 2 South. Rep. 380.

vale; that the conductor of the train failed to stop his train at Mablevale a sufficient length of time to enable plaintiff to get off safely, but at the same time pressed and urged the plaintiff to get off while the train was in motion; and by reason of the darkness of the night, and the train having passed the platform, plaintiff, in getting off, fell and broke his leg; whereby he suffered great pain, etc., to his damage \$5,000. The answer denied specifically all of the allegations of the complaint, and charged contributory negligence on the part of the plaintiff.

The court gave the three following declarations of law, over defendant's objections, properly saved, to-wit: "(2) The court instructs the jury that if they believe, from the evidence in the cause, that the plaintiff, at the time stated in his complaint, had purchased from the defendant company a ticket from Little Rock to Mablevale station, and entered its regular passenger train for the purpose of being carried there, and that said Mablevale was a regular station upon the line of railway, where passengers are accustomed to get on and off its trains, then it was the duty of the conductor of such train to stop the cars at said station, and keep them at a stand-still a reasonable length of time, sufficient to enable the plaintiff to leave the cars in safety. And if the jury further believe, from the evidence in this cause, that the conductor failed to comply with his duty in that behalf, and that, by reason of such failure, the plaintiff, while attempting to get off such train at said station, was injured, without any contributory negligence on his part, the defendant is liable therefor, and the jury should find for the plaintiff. And the court further instructs the jury that if they believe, from the evidence in this cause, that upon arriving at said station the train was stopped, but, before the plaintiff was able to alight therefrom, the train was started up again, and that the plaintiff was ordered by the conductor to get off, and under such directions attempted to do so while the train was going slow, and the danger of so doing was not apparent, the plaintiff had a right to rely upon the conductor's judgment, and his obeying such direction was not such contributory negligence as would bar his recovery. (3) If the jury find, from the evidence, that the plaintiff was ordered or directed by the conductor or agent of the defendant to get off the train, he had a right to rely upon such advice or direction, provided he took no more risk in getting off the train than a prudent man would have taken under the same circumstances. (4) If the jury find that the plaintiff took no more risk than a prudent man would under the circumstances, he was not guilty of contributory negligence."

The court gave several instructions as asked by defendant, only one of which we here copy, to-wit: "(1) If the jury believe, from the evidence, that the plaintiff jumped off the train after it had begun to move away from the station at Mablevale, and the night was so dark that he could not see whether there was a safe place for him to alight, and that he did this voluntarily, and for no other reason than because he did not wish to be carried past his station, and that a man of ordinary prudence would not so have jumped, they are authorized to find that the injury was caused by the contributory negligence of plaintiff, and he cannot recover."

But the court refused to give the fifth declaration as asked by defendant. It reads as follows: "(5) If the jury believe, from the evidence, that the train was stopped at the station a sufficient length of time to enable the plaintiff, by the exercise of reasonable diligence, to have alighted; that, failing to do so, he leaped from the train after it had started, and while it was in motion, and was thereby injured,—they will find for the defendant."

The court on its own motion, over defendant's objection, gave the jury this further instruction, to-wit: "(1) Where the risk or danger of alighting from a moving train is not apparent to the passenger, and he is urged to take the hazard by the company's employe, whose duty it is to know the danger, his conduct will not be regarded as negligent. Where the danger is obvious, but

slight, he has the right to rely upon the judgment of the conductor, whose duty and experience he may presume give a superior knowledge of such matters, and so justify an act which would otherwise be negligent. If the motion of the train was so slow that the danger of jumping off would not be apparent to a reasonable person, and the plaintiff acted under the instructions of the manager of the train, then the resulting injury was not caused by contributory negligence or a want of ordinary care." Ordinary care, in the case, was defined to be that degree of care which may have been reasonably expected from a sensible person in the passenger's situation. A passenger cannot throw the responsibility of his own wanton and unreasonable acts upon the company merely because the conductor has directed it.

The jury awarded the plaintiff \$865 damages. A motion for a new trial was filed, and overruled, and an appeal prayed.

Dodge & Johnson, for appellant. *W. L. Terry* and *T. E. Gibbon*, for appellee.

COCKRILL, C. J. Counsel for the appellant have not undertaken to point out any ground of objection to any part of the court's charge to the jury. The instructions given at the instance of the plaintiff in the action, and by the court of its own motion, either announce familiar principles of law as to the duty of a carrier of passengers to stop and allow reasonable opportunity to the passenger to alight upon the platform provided for the purpose, or else state the law of contributory negligence applicable to the facts of the case almost in the language used or approved by this court when discussing the principles that control similar cases. *St. Louis, I. M. & S. Ry. v. Cantrell*, 37 Ark. 522; *St. Louis, I. M. & S. Ry. v. Rosenberry*, 45 Ark. 261; *Little Rock & F. S. Ry. v. Atkins*, 46 Ark. 423.

The court granted all the appellant's requests for instructions as asked, except one, which it rejected. The refusal to instruct the jury as asked in this particular is the only objection made to any ruling of the court at the trial that has been specifically pointed to as error. The request was this: "If the jury believe, from the evidence, that the train was stopped at the station a sufficient length of time to enable the plaintiff, by the exercise of reasonable diligence, to have alighted; that, failing to do so, he leaped from the train after it had started, and while it was in motion, and was thereby injured,—they will find for the defendant." Without this, the charge of the court fairly covered every phase of the case. It had been explained to the jury that a passenger could not throw the responsibility of his own reckless or unreasonable conduct upon the company merely because the conductor had requested or directed him to hurry off; but they were told that if the motion of the train was so slow that the danger of alighting would not be apparent to a prudent man, and the plaintiff, in getting off, acted under the instructions of the conductor, who, they were informed, was presumed to know the hazard of the act better than the plaintiff, the latter would be exculpated from negligence, and the blame for the injury could not be visited upon him. The reasonableness of the train's stop, and the duty of the passenger to alight without necessary delay, were also impressed upon them. These features of the case are all that can be said to be covered by the request that was rejected. But it was proper to reject it independent of that consideration. Whether the plaintiff was negligent in getting off promptly, or in getting off at all, while the train was in motion, were questions of fact, to be determined from all the circumstances in proof; but the rejected prayer sought to make it negligence *per se*, and in itself inexcusable, for the plaintiff to undertake to alight from the train while it was in motion, and it was not an expression of the law upon the subject.

The evidence was conflicting, and we cannot say that the jury were not justified in the conclusion they reached. Let the judgment be affirmed.

MORAE v. STATE.

(Supreme Court of Arkansas. June 4, 1887.)

CRIMINAL PRACTICE—VERDICT—REFUSAL TO RECONSIDER.

M. being on trial for grand larceny, and the jury offering to return a verdict of petit larceny, the judge, conceiving that the jury did not understand that their verdict was equal to an acquittal, refused to receive the same, charged them over again, and, on their failure to agree, discharged them. Thereafter, against defendant's motion for his discharge, he was tried and convicted of grand larceny for the same offense before another jury. *Held*, that the conviction was proper; that the court may refuse to receive a verdict which it is plain the jury do not intend to render; and while the more regular course would have been for the court to have explained to the jury the effect of the first verdict, and polled them, adhering to the verdict in case of acquiescence, and sending them back for further deliberation in case of disagreement, yet the course followed was substantially the same.

Appeal from circuit court, White county.

T. J. Oliphint, for appellant. Dan W. Jones, Atty. Gen., for appellee.

SMITH, J. McRae was tried upon an indictment for grand larceny, and the jury offered to return a verdict of guilty of petit larceny. The testimony showed that the offense had been committed more than 12 months before the finding of the indictment, and the court, conceiving that the jury did not understand that their verdict was equivalent to an acquittal, refused to accept the verdict, charged the jury over again, and directed them to reconsider. They afterwards reported that they were unable to agree upon any verdict, whereupon they were discharged from the further consideration of the case, and a mistrial was entered. McRae then moved for his discharge, alleging that he had been acquitted of the felony, and the prosecution of the misdemeanor was barred by lapse of time. But his motion was denied, another jury was impaneled, and he was convicted of grand larceny, and sentenced to the penitentiary. The question for determination is whether or not the judgment pronounced under these circumstances can be sustained.

The English courts have always exercised a very large authority in matters of this sort. A single case will illustrate their practice. *Reg. v. Meany*, Leigh & C. 213, (decided in 1862,) was a prosecution for obtaining money and goods by false pretenses. The facts having been left to the jury, the foreman said: "We find the prisoner guilty of obtaining the property by false representations in the two forged letters, and that the parties would not have parted with it without those letters had been used, but we think that he meant to pay for them." The judge refused to receive this as a verdict, telling the jury that they must find the prisoner guilty or not guilty; and that if, in their opinion, he had not a fraudulent intention, they must say it by a verdict of not guilty. After consultation, they found a verdict of "guilty." Before passing sentence, the matter was referred to the judgment of the court of criminal appeals. Counsel for the prisoner contended that the first verdict should have been recorded. POLLOCK, C. B., said: "That point is utterly unarguable. A judge has a right, and in some cases it is his bounden duty, whether in a civil or in a criminal cause, to tell the jury to reconsider their verdict. He is not bound to receive their verdict unless they insist upon his doing so; and where they reconsider their verdict, and alter, the second, and not the first, is really the verdict of the jury."

In *Blackley v. Sheldon*, 7 Johns. 82, it is said: "The law is well settled that, before a verdict is recorded, the jury may vary from the first offer of their verdict, and the verdict which is recorded shall stand; and there are many cases in the books of a jury changing their verdict immediately after they have pronounced it in open court, and before it was received and entered. *Dyer*, 204b; *Saunders v. Freeman*, Plowd. 209a; Co. Litt. 227b. The verdict is not recognized as valid and final until it be pronounced and recorded in open court; and it is

reasonable that the jury should be enabled to avail themselves of the *locus penitentiae*, and correct a verdict which they have mistaken, or about which, upon further reflection, they have doubt. * * * The court may also, of its own accord, send the jury back to reconsider their verdict, if it appears to be a mistaken one, before it is received and recorded. We have an instance of this in 11 Hen. IV. 2, pl. 8. It was in a case of a writ of conspiracy against two, and the jury found one guilty, and the other not guilty. And TIRWIT, J., told the jury that their verdict was contradictory, and that if one be not guilty the other was not guilty in a charge of conspiracy, and that they had better reconsider their verdict; and the jury were accordingly taken back, and afterwards returned and found both guilty."

This doctrine, however, has its limitations, where, as with us, judges are forbidden to charge juries with regard to matters of fact. The presiding judge has no power to control the jury in their findings, nor to refuse to permit a verdict to be recorded, merely because he is dissatisfied with it, and thinks the jury ought to have come to a different conclusion. *State v. Shule*, 10 Ired. 158; *Dougherty v. Shown*, 1 Heisk. 302; *Henslie v. State*, 3 Heisk. 202. But all the cases concur that the jury have full power over their verdict, and may amend it, or recede from it, at any time before it has been received and recorded, and they themselves have been discharged from the case. *Straughan v. State*, 16 Ark. 37; *State v. Mills*, 19 Ark. 476; *Levells v. State*, 32 Ark. 585; *Root v. Sherwood*, 6 Johns. 68, 5 Amer. Dec. 191; *Warner v. New York Cent. R. Co.*, 52 N. Y. 487, 11 Amer. Rep. 724; *Walters v. Jenkins*, 16 Serg. & R. 414; *State v. Underwood*, 2 Ala. 744; *Sargent v. State*, 11 Ohio, 472; *People v. Bonney*, 19 Cal. 426; *Gipson v. State*, 38 Miss. 295.

Ward v. Bailey, 23 Me. 316, was a writ of entry. The jury returned a verdict that the defendant did not disseize the demandant. Another action for trial between other parties and the writ was read to the same jury, when the counsel for demandant in the first case suggested to the court that he apprehended the jury had by some mistake returned a different verdict from what they had intended. The judge then informed the jury of the legal effect of their finding; and the foreman stated that they found the location of a monument in controversy as contended for by the demandant. The judge then directed the papers in the case to be delivered back to the jury, the counsel for the tenant objecting. The jury consulted together, and returned a verdict that the tenant did disseize the demandant; and this verdict was thereupon affirmed in the place of the other. On exceptions filed, the supreme court said: "It is true, their verdict had been received and entered on the docket. But it appeared, on questioning the foreman, that they had misconceived the meaning of the terms used in their verdict. They were thereupon permitted to correct the mistake." So the exceptions were overruled, and judgment entered on the last verdict.

It is plain that the jury did not intend to acquit McRae; for, when they were advised of the legal consequences of their verdict, some of them dissented from it. Perhaps the more orderly course would have been for the court to explain to the jury that the verdict which they proposed to render amounted to an acquittal; and then to cause the jury to be polled. If all adhered to it, the verdict should have been received; but, if one or more dissented, the jury should have been sent back for further deliberation. However, the course actually pursued was in substance the same as that herein indicated as the correct practice. Judgment affirmed.

JAMES v. CITY OF PINE BLUFF.

(Supreme Court of Arkansas. June 4, 1887.)

1. MUNICIPAL CORPORATIONS—CONTROL OF STREETS.

The Arkansas statute of March 21, 1885, § 3, conferring on cities of 5,000 inhabitants power to require owners of lots abutting on streets to build and maintain sidewalks, when necessary to the safety or convenience of travel, and to enforce obedience by fine, etc., is not unconstitutional, as an unwarranted delegation of the taxing power, but is a proper exercise of the police power of the state; and a city ordinance passed pursuant to, and in accord with, the statute, is valid.

2. SAME.

Such an ordinance, however, must be general, covering the whole street or locality where the necessity exists; and it must be reasonable, and not oppressive, in respect to the dimensions and materials of the proposed sidewalk.

3. APPEAL—PRESUMPTION.

Where a city ordinance requires a footway to be constructed of brick, 10 feet wide, with a curb, in the absence of proof to the contrary, it will be presumed, on appeal from a conviction of a lot-owner for disobeying the ordinance, that a pavement of that width was necessary at that point to accommodate pedestrians, and that brick was ordered to be used because the street was within the fire limits of the town.

Error to circuit court, Jefferson county.

M. L. Bell, for plaintiff in error. *W. E. Hemenway*, City Atty., for defendant in error.

SMITH, J. In September, 1885, the city council of Pine Bluff, a city of the first class, adopted an ordinance, requiring owners of lots in a designated part of the city to construct and maintain sidewalks of prescribed material and dimensions, along the streets upon which their lots abutted. It provides for a notice to be served on lot-owners, warning them to build the sidewalks within a given time; and, upon failure to do so, they are liable to be fined as for a misdemeanor. The plaintiff in error owned certain lots in the district, and failed to build sidewalks along them. Notice was given him, and he still refused to comply with the ordinance; whereupon a prosecution was instituted against him in the police court. The police judge declared the ordinance invalid; but, on appeal to the circuit court, the plaintiff in error was convicted, and fined \$10. The cause was tried upon an agreed statement of facts, from which it appears that the ordinance conforms to the Act of March 21, 1885, entitled "An act for the better government of cities of the first class, and to confer enlarged and additional powers on such cities," etc. It is conceded that, if this act be constitutional, the plaintiff in error is liable to the penalties denounced for a violation of the ordinance. The third section of the act confers upon cities of the first class, that is, cities which have been ascertained to have a population of 5,000 inhabitants, power to require the owner to build and maintain suitable pavement or sidewalk improvements along their premises, whenever the same may become necessary to the safety or convenience of travel, and to designate the kind of sidewalk to be made, and the kind of material to be used, and the time within which such improvement is required to be completed; also power to enforce obedience to the sidewalk ordinance by the imposition of fines.

If the power to compel owners of property to build sidewalks in front of their property is exclusively referable to the taxing power of the state, the act as a delegation of that power to a municipal corporation, cannot be sustained; for it violates the constitutional principle of taxation, according to the value of property, and, considered as an assessment for local improvement, it dispenses with the consent of a majority in value of the property holders whose property is to be affected. Const. 1874, art. 19, § 27; *Peay v. Little Rock*, 32 Ark. 31; *Monticello v. Banks*, 48 Ark. 251, 2 S. W. Rep. 852; Dill. Mun. Corp. (3d Ed.) § 800; *Howell v. Bristol*, 8 Bush. 493.

Says an eminent writer on constitutional law and on the law of taxation:

"The cases of assessments for the construction of walks by the sides of streets in cities and other populous places are more distinctly referable to the power of the police. These footwalks are not only required, as a rule, to be put and kept in proper condition for use by the adjacent proprietors, but it is quite customary to confer by the municipal charters full authority on the municipalities to order the walks of a kind and quality by them prescribed, to be constructed by the owners of the adjacent lots at their own expense, within a time limited by the order for the purpose, and that, in case of their failure so to construct them, it shall be done by the public authorities, and the costs collected from such owners, or made a lien upon their property. When this is done, the duty must be looked upon as being enjoined as a police regulation, made because of the peculiar interests such owners have in the walks, and because their situation gives them peculiar fitness and ability for performing, with promptness and convenience, the duty of putting them in proper state, and of afterwards keeping them in a state suitable for use. Upon these grounds the authority to establish such regulations has frequently been supported." Cooley, Tax'n, (2d Ed.) 588. Compare Burroughs, Tax'n, 494, and 2 Desty, Tax'n, § 190.

It is somewhat difficult to understand how the police power can be extended to matters which do not concern the preservation of the peace, good order, safety, health, and morals of the community, nor the protection of property. If taxation is the exaction of money or services from individuals as the share to be contributed by them to a public burden, (*People v. Mayor*, 4 N. Y. 423,) then an ordinance requiring the adjacent proprietors to make sidewalks would seem to be a species of tax; for it imposes a private burden for the public benefit. Yet an examination of the adjudged cases will show that the courts have not taken this view. The oldest case on the subject that we have found is *Paason v. Sweet*, 13 N. J. Law, 196, decided in 1832. The city of Trenton was authorized to make such by-laws as to the common council should seem "necessary for the good government of the city, and for the regulation and paving of the streets and highways." And it was held that an ordinance requiring the owner of every lot fronting on a designated section of a certain street to fix curbstones, and make a brick way or sidewalk in front of his lot, was neither unconstitutional, illegal, nor unreasonable. In 1835 the case of *In re Goddard*, 16 Pick. 504, was decided. The constitution of Massachusetts provided that assessments, rates, and taxes imposed and levied on the inhabitants of the commonwealth should be proportional and reasonable. A by-law of the city of Boston required the owners or occupants of houses bordering on streets to clear the snow from the sidewalks adjoining their respective houses and lands. This was declared not to be the levying of a tax, nor partial and unequal, within the sense of the constitutional provision, inasmuch as the burden created was imposed on a numerous class, and upon all persons equally who came within the description of such class; upon those, moreover, who commonly derived a peculiar benefit from the duty required, and who were peculiarly able to perform it with the promptness which the good of the community demanded. Perhaps this case might be justified on the ground that the ordinance directed the lot-owner to abate a nuisance on or near his premises. But in *Lowell v. Hadley*, 8 Metc. 180, an assessment on the owner of buildings in a city, for the expense of a sidewalk constructed on a street in front of the buildings, by order of the city council, was held to be constitutional and valid. See, also, *Mayor, etc., v. Maberry*, 6 Humph. 368; *Washington v. Nashville*, 1 Swan, 177; *Whyte v. Nashville*, 2 Swan, 364; *Deblois v. Barker*, 4 R. I. 445; *Cemetery v. Buffalo*, 46 N. Y. 503; *Borough of Greensburg v. Young*, 53 Pa. St. 280; *Sands v. Richmond*, 31 Grat. 571, 31 Amer. Rep. 742; *State v. City Council of Charleston*, 12 Rich. Law, 702; *Bonsall v. Lebanon*, 19 Ohio, 418; *Macon v. Patty*, 57 Miss. 378, 34 Amer. Rep. 451; *Hydes v. Joyes*, 4 Bush, 464; *Palmer v. Way*, 6 Colo. 106.

In fact the supreme court of Illinois is the only court known to us that has declared and maintained a different rule. In the face of such unanimity of decision, we must decline to hold that the legislature exceeded its powers in enacting the law in question.

There is a recognized distinction between a sidewalk and the rest of the street. *Hart v. Brooklyn*, 36 Barb. 226; *Woodbridge v. Detroit*, 8 Mich. 309; *Sands v. Richmond*, *supra*; *Palmer v. Way*, *supra*.

Thus Chief Justice GEORGE, speaking for the court, in *Macon v. Patty*, says: "If this were a local assessment, it would be void. The improvement, however, is the repair of a sidewalk, and not of a street; and it seems to be well settled that the paving and repairing of a sidewalk in front of the owner's property may be imposed upon him as a police regulation."

The supreme court of Pennsylvania says: "The charge for paving a sidewalk is not a tax. Such ordinances we believe to have been always usual. Although a sidewalk is in fact a part of a street, yet a distinction between it and the main body of the street has been usually made, especially in regard to the expense of paving and grading it." *Borough of Greensburg v. Young*, 53 Pa. St. 280-283.

And in *Re Goddard*, *supra*, the judgment of the court proceeds in part upon the ground that the owner of a lot abutting on a street has a peculiar interest in the sidewalk in front of his property, and a peculiar use in it, notwithstanding the public easement; for example, in accommodating his cellar door and steps, furnishing a passage for fuel, and a passage also from his house to the street.

It must not be supposed, however, that the city council possesses unrestricted power in the premises. For instance: The expense of making sidewalks in front of his property cannot be imposed upon one individual alone, but, according to the provisions of the act, the sidewalk improvement is to be ordered "by a general ordinance for all property owners or occupants on a certain street or streets, or within a certain quarter where the necessity therefor" exists. Another limitation upon the power, which the courts will enforce, is that the ordinance, prescribing the dimensions of the sidewalk and quality of materials to be used in its construction, must be reasonable, and not oppressive to the lot-owner. In the case at bar the footway was to be 10 feet wide, and to be made of brick, with a curb. In the absence of proof to the contrary, it will be presumed that a pavement of that width was necessary at that point to accommodate pedestrians, and that a brick pavement was prescribed because it was within the fire limits of the town. Regarding such imposition as made under the police power, Mr. Burroughs, in his work on Taxation, at page 494, says: "As a general rule, it is believed that in such cases the duty consists, either in keeping the walk in repair, or in constructing a footing of plank, or some similar material not very expensive, and not in constructing permanent and expensive pavements."

And in *Macon v. Patty*, *supra*, it is said: "The police power in such cases, having reference only to the health and convenient intercourse of the citizens and general public, it would seem, ought not to be exerted to impose a burden not necessary to the end proposed. The lot-owner, when ordered to make or repair his sidewalk, it would appear, has fully complied with his duty when he has used such material as makes the walk dry, as a requisite for health, and smooth and firm for the easy and convenient passage of the public. * * * This power ought not to be extended beyond the just limits for which it is granted, and should not be made subservient to the imposition of burdens for improvements, useful only for the adornment of the public streets." Judgment affirmed.

FARGASON v. EDRINGTON.

*(Supreme Court of Arkansas. June 4, 1887.)*1. **VENDOR AND VENDEE—BONA FIDE PURCHASERS.**

F. & Co., holders of a deed of trust executed by M., advanced to him \$5,000. He was also indebted to them at the time in the sum of \$7,000. On consideration that he would give them his note for \$18,000 at 10 per cent. interest from date, and his deed of trust to secure the same, they advanced to him about \$4,000 more to pay for the land to be included in the new deed of trust, and canceled and surrendered the original deed of trust. F. & Co. subsequently purchased the land at a sale under the second deed of trust. *Held* that, on these facts, F. & Co. were purchasers for a valuable consideration, without notice, and that the acceptance by them of a quitclaim deed did not charge them with notice of prior equities.

2. **EVIDENCE—DECLARATIONS.**

Declarations and admissions of a trustee in a trust deed, affecting the title to the trust property, made before he became trustee, are not admissible in evidence to charge the beneficiary of the trust with notice of a defect in the title.

Appeal from circuit court, Mississippi county. In chancery.

U. M. & G. B. Rose and H. M. McVeigh, for appellants. O. P. Liles, for Mrs. Edrington. B. F. Adams, for Edrington heirs and executors.

BATTLE, J. On the twelfth day of June, 1874, James H. Edrington and his wife, Nancy A., executed a deed of trust, and thereby mortgaged certain land to secure his indebtedness to Brooks, Neely & Co., of Memphis, Tennessee. He died in 1874, and on March 12, 1877, the trustee appointed to execute the trust, after advertising the same, sold 62 acres of the land at public sale, pursuant to the authority vested in him as such trustee. John Mathews, paying for the land the sum of \$3,951.02, became the purchaser thereof, and received a deed therefor on the same day. On March 16th, four days after, he conveyed this land and certain personal property to Dan Mathews, as trustee, to secure an indebtedness of \$16,000 he owed to J. T. Fargason & Co. John Mathews failed to pay this indebtedness when it became due; and on the twentieth of May, 1879, Dan Mathews sold the land, under the deed of trust executed to him, at public sale, and J. T. Fargason & Co. became the purchasers. On the fifth of May, 1881, J. T. Fargason & Co. sold the land to W. P. Hale. On the twelfth of the same month, Nancy A. Edrington filed a complaint in the Mississippi circuit court, asking a cancellation of the deed to Mathews, to J. T. Fargason & Co., and to Hale, and that the title to the same be vested in herself. She alleges in her complaint that John Mathews purchased the land for her; that on the eleventh of May, 1877, he executed a declaration of trust, acknowledging that he had purchased the land at her instance, and agreed to convey it to her upon the payment by her of \$6,400, with interest at 12½ per cent. per annum, saying that that was what he had to give for the land, and the rate of interest he had to give to raise the money; that J. T. Fargason & Co. had notice of her rights when the deed of trust to secure them was executed; that the deed of trust to secure them had been paid off by Mathews, and that the sale under it was a fraudulent device to cheat her out of her equities; that Hale purchased with knowledge of her rights; and that she was willing to pay Mathews whatever amount should be found due him on an account stated.

John Mathews answered, in effect, that he purchased the land on his own account, and not as agent for Mrs. Edrington; that he borrowed the money from J. T. Fargason & Co. to make the purchase,—they exacting, as a condition of the loan, that he should convey the land in controversy, if he became the purchaser thereof, and other property, to a trustee to secure them in the payment of the sum advanced to purchase the land, of \$5,191.05, before then advanced by them to him under a deed of trust executed by him on February 11, 1877, and of another debt of \$7,334.98 he owed them; that he accepted these terms, borrowed the money, and made the purchase; that, pursuant to

his agreement, he executed the deed of trust to secure the \$16,000; that from kindness and good feeling for Mrs. Edrington he agreed to let her have the benefit of his purchase, as evidenced by the declaration of trust of May 11, 1877; that she, at the time, knew of the existence and record of the trust deed for \$16,000; that, at the time of the sale under the deed of trust made to secure J. T. Fargason & Co., there was due to them, on the indebtedness secured thereby, the sum of \$13,659.03; that the purchase made by them was a fair and *bona fide* purchase; and that he was closed out because he could not pay up. J. T. Fargason & Co. answered to the same effect as John Mathews; and further stated that they knew nothing of the declaration of trust until long after the trust deed to secure them in the payment of the \$16,000 had been executed and recorded, and that they took this trust deed in good faith, with the understanding that John Mathews was the sole and absolute owner of the property, and without notice that plaintiff had any claim whatever upon it, and that they sold the land to W. P. Hale in good faith, on their own account, and for their own exclusive use and benefit.

The administrator and heirs of J. H. Edrington, Mrs. Edrington's deceased husband, were on their motion made parties defendant, and filed an answer and cross-bill. They admit the allegations of the complaint, but allege that the plaintiff was the executor, and Mathews her agent, and that neither of them could legally purchase at the sale of any part of the property of decedent's estate; that the purchase by them simply amounted to a redemption, and the land reverted back to the estate, subject to the widow's right of dower; that Mathews' advances in making the purchase have long since been repaid by way of rents and profits; that the estate of J. H. Edrington is hopelessly insolvent. The prayer was for an accounting, a cancellation of the conveyances between Fargason & Co. and Mathews and Hale, a sale of the property to pay the debts of the Edrington estate, and for general relief. Fargason & Co. answered the cross-complaint, making the same denials and allegations as in the answer to the original complaint. W. P. Hale answered, alleging that he had purchased all the property, except certain lots specifically described, in good faith, and without notice of any defect in the title, and that Fargason & Co. had conveyed the property to him by a warranty deed.

The court, after hearing the evidence, found "that the purchase of the land by John Mathews was a fraud upon the estate of James H. Edrington, and that the benefit of said purchase inured in equity to the said estate, and that John T. Fargason & Co. and the other holders were affected with notice, at and before their several purchases, of the equities of said estate, and of Nancy A. Edrington; that John Mathews and John T. Fargason & Co. had been fully paid for the purchase money;" and set aside the conveyance to Mathews, and the conveyance of Mathews to J. T. Fargason & Co., and the sale of J. T. Fargason & Co. to Hale, and vested the property in the estate of J. H. Edrington, deceased, and referred the cause to a master to state an account. Mrs. Edrington and J. T. Fargason & Co. appealed.

The record in this case is voluminous, and many questions are involved. But it is only necessary to decide one of these questions, and that is, were J. T. Fargason & Co. innocent purchasers? A *bona fide* purchaser has been defined to be one who, at the time of his purchase, advances a new consideration, surrenders some security, or does some other act which leaves him in a worse position if his purchase should be set aside, and purchases in the honest belief that his vendor had a right to sell, without notice, actual or constructive, of any adverse rights, claims, interests, or equities of others in and to the property sold. 1 Perry, Trusts, § 239; *Merritt v. Northern R. Co.*, 12 Barb. 605; *Sanders v. McAfee*, 42 Ga. 250.

It is well settled that a mortgagee is a purchaser, and, to the extent of his claim, is entitled to protection, as a *bona fide* purchaser, against all secret equities and trusts of which he had no notice. It was held by this court in

Gerson v. Pool, 81 Ark. 85, that a creditor who makes advancements under the security of a deed of trust in good faith, and without notice of a vendor's equitable lien for the purchase money, is entitled to the protection of an innocent purchaser. It necessarily follows that when a creditor makes advances, or extends the time of the payment of a pre-existing debt for a definite time, or surrenders a valuable security, on the condition that his debtor secures him in the payment of the advances and pre-existing debt by a deed of trust, and the debtor, in the performance of the condition, executes the deed of trust, the creditor is entitled to protection as a *bona fide* purchaser for a valuable consideration, against all claims, equities, and trusts of which he had no notice. 1 Jones, Mortg. §§ 458, 459, 710; 2 Lead. Cas. Eq. 85, 86; *Cook v. Parham*, 68 Ala. 456; *Thurman v. Stoddard*, Id. 336; *Thames v. Rembert*, Id. 561; *Gilechrist v. Gough*, 63 Ind. 576; *Port v. Embree*, 54 Iowa, 14, 6 N. W. Rep. 83; *Schumpert v. Dillard*, 55 Miss. 348.

On the sixteenth of March, 1877, J. T. Fargason & Co. held a deed of trust executed to them by John Mathews on the sixteenth of February, 1877, as a security for advances to be made to him by them. They had advanced, under this deed of trust, the sum of \$5,191.05. He was indebted to them in the further sum of \$7,384.98 then due. On condition that he would execute to them his note for \$16,000, and 10 per cent. per annum interest thereon from date, due and payable on the fifteenth of November, next following, and his deed of trust to secure the same, they advanced to him the sum of \$3,951.02 to pay for the land purchased on the twelfth of March, and canceled and surrendered the deed of trust executed on the sixteenth of February. In compliance with these terms, he executed his note and the \$16,000 deed of trust. From these facts it is obvious they were purchasers for a valuable consideration.

But it is insisted by appellees that they were not *bona fide* purchasers without notice, because they say Dan Mathews, the trustee in the \$16,000 deed of trust, knew that John Mathews bought the land in question, at the sale on the twelfth of March, for Mrs. Edrington. The only evidence of the truth of this allegation is in the deposition of a witness who testified that he heard Dan Mathews say, before and after the sale, that he knew that John Mathews had bought the land for Mrs. Edrington. Is this competent evidence? It is not competent, on the ground that Dan Mathews, in his capacity of trustee, was the agent of J. T. Fargason & Co.; for, at the time these declarations were made, he was not in the performance of any duty as trustee. The declarations and admissions of an agent, when made during the continuance of his agency, and while he is in the lawful prosecution of the business of his agency, are admissible against the principal. They are admissible in that case, because they are a part of the *res gesta*, and explain the act of agency they accompany. It is only because they are verbal acts, and part of the *res gesta*, that they are admissible at all. Whenever what the agent did is admissible in evidence, then it is competent to prove what he said about the act while he was doing it, in order to explain or show its quality; and it follows that all declarations or admissions of an agent made while he was not in the performance of an act of agency are not competent evidence, and are mere hearsay. *Byers v. Fowler*, 14 Ark. 105; 1 Greenl. Ev. § 118. Then, again, the admission of a naked trustee, having no beneficial interest in the property conveyed to him, cannot be given in evidence to defeat his *cestui que trust*. It is his duty to protect the interest of his *cestui que trust*, and he will not be allowed to betray that interest, or the confidence placed in him. Not having any beneficial interest, his admissions or declarations, made while he was not in the discharge of any duty as trustee, are mere hearsay. 1 Perry, Trusts, § 483; *Graham v. Lockhart*, 8 Ala. 26; *Thompson v. Drake*, 82 Ala. 99; *Thomas v. Bowman*, 29 Ill. 426, and 80 Ill. 89.

It is insisted that J. T. Fargason & Co. purchased at public sale, and re-

ceived only a quitclaim deed, and that this fact alone is sufficient to charge them with notice of all the equities of Mrs. Edrington. But the trust deed under which the land was sold to John Mathews, and the \$16,000 trust deed, were warranty deeds. We have seen that J. T. Fargason & Co. were innocent purchasers for a valuable consideration by reason of the transactions which resulted in the execution of the \$16,000 trust deed, and of the execution thereof. The sale to them by the trustee in that deed, in the exercise of the authority vested in him, entitled them to the protection of innocent purchasers, notwithstanding they purchased at the sale under the deed of trust with notice of the claims of other parties. They stand in the attitude of a grantee of a *bona fide* purchaser, which is that of a *bona fide* purchaser. The conscience of a *bona fide* purchaser is clear, and he can transfer to another, although affected with notice at the time of the transfer, that which he has and can honestly retain. If this was not true, the *jus disponendi* would be clogged by a restraint of indefinite duration, and the *bona fide* purchaser would fail to receive that protection to which he is entitled. *Webster v. Van Steenberg*, 46 Barb. 211; *Wood v. Chapin*, 18 N. Y. 509; 2 Lead. Cas. Eq. 83, 84; 1 Jones, Mortg. § 458.

It is contended that John Mathews was in possession of the land when he executed the \$16,000 trust deed, and that was notice to J. T. Fargason & Co. of whatever interest he had in the land in question, and that he held subject to the equities of Mrs. Edrington, if she had any. It is true that Mathews was in possession, but it is also true that he purchased in his own name, and took the deed to himself in his own right, and caused it to be recorded. The circumstance of his being in possession undoubtedly had a tendency to excite inquiry in the minds of those contemplating a purchase; but the fact that he had placed the evidence of his right to occupy upon record, where it is accessible to the whole world, arrested inquiry at that point, and plainly informed every one that they might rest securely upon the fact that he held in his own right, and for no one else. J. T. Fargason & Co. had a right to rest upon this fact, and were not required to make any further inquiry as to how he held; and it follows that the possession of Mathews was no notice of Mrs. Edrington's claim. *Woods v. Farmers*, 7 Watts, 385; Wade, Not. (2d Ed.) §§ 297, 298, and cases cited; 1 Jones, Mortg. § 600, and cases cited. There is no evidence that J. T. Fargason & Co. had notice of the claim and equities of Mrs. Edrington, or any one else, until long after the execution of the \$16,000 trust deed; but, on the contrary, John Mathews and Fargason testified that they had no such notice, and that they acted in good faith in taking the deed of trust made to secure them. Except as stated, the title acquired by them is unquestioned. This being true, they and those holding under them are entitled to the protection of innocent purchasers.

The decree of the court below is therefore reversed, and a decree will be entered here dismissing the original and cross-complaints.

A motion for rehearing in this case was filed June 23, 1887, and is now pending.

WILKES, Adm'r, v. BLACK and others, Ex'rs.

(Supreme Court of Arkansas. June 11, 1887.)

1. EXECUTORS—POWER TO COMPOUND DEBTS—LIABILITY.

Mansf. Dig. Ark. § 74, authorizing an administrator to compound debts due the estate in certain cases, on obtaining leave of the probate court, did not abrogate the administrator's common-law power to compound debts, but merely relieved him of the peril of being charged with the amount released if the estate was prejudiced through his negligence or bad faith, and of the burden of proving that he acted judiciously.

2. SAME.

An acceptance by an administrator, of a sum of money less than the debt due the estate from a third person, under an agreement to discharge the debtor, is a valid settlement by way of compromise of the debt.

Appeal from circuit court, Lee county.

E. D. Robertson, for appellant.

COCKRILL, C. J. The plaintiff, Wilkes, as administrator, held the joint note of H. P. Slaughter and H. W. Cotter as assets of his intestate's estate. He compromised with Slaughter, and agreed to release him from further liability upon the payment of his proportion of the debt. He, as administrator, received a part of the amount agreed upon from Slaughter himself, and a part from a stranger, under such circumstances as to justify the inference that it was received from him under the agreement to discharge Slaughter. The administrator denied that he had made any arrangement looking to the release of Slaughter; but the jury, upon conflicting evidence, found the issue against him, and the court rendered judgment in favor of Slaughter's executors, the appellees, in a proceeding to have the residue of the note probated against Slaughter's estate. Wilkes' administrator has appealed, and urges (1) that there was no consideration for the release; and (2) that, if there was, it was not binding upon him because he had not previously obtained authority from the probate court to compound the debt. The statute relied upon to sustain the second position provides that whenever it shall be made to appear, to the satisfaction of the probate court where the administration is pending, that a debt due the estate cannot be realized, the court may authorize the administrator to compromise upon such terms as it may direct. Mansf. Dig. § 74.

1. Administrators had authority to compromise a claim or compound a debt before the statute was enacted. The common law recognized the power, but attended it with the peril to the administrator of being charged with the amount released to the debtor, if, through his bad faith or negligence, he permitted the estate to be prejudiced, and the burden was upon him to show that he had acted judiciously. But, in the absence of collusion between the administrator and the debtor, or of fraud on the part of the latter, such as would vitiate the contract, the compromise or compounding was binding upon each of the parties to it if executed upon a sufficient consideration, just as it would be if neither party was administrator. *Chase v. Bradley*, 26 Me. 531; *Boyd's Sureties v. Oglesby*, 23 Grat. 674, 686, 687; *Bean v. Farnam*, 6 Pick. 268.

"The statute," says PARKER, C. J., in *Wyman's Appeal*, 13 N. H. 18, in speaking of a provision similar to ours, "has provided a mode in which the administrator, by obtaining a previous authority from the judge, [the court, under the Arkansas statute,] may compromise with the debtor with perfect safety, and without being subject to expense in sustaining his acts. But the right to compromise, which existed prior to the statute, is not taken away. It may still be exercised as before, subject to the same limitations and risk." And this is the effect given to such legislation in other jurisdictions. 3 Williams, Ex'rs, 1900, 1901, and notes; Schouler, Ex'rs, § 887, and note; *Chouteau v. Suydam*, 21 N. Y. 179; *Wood v. Tunnick*, 74 N. Y. 38; *Childs v. Updyke*, 9 Ohio St. 333; *Moore's Adm'r v. O'Brannin*, 14 Ohio St. 177; *Chadbourn v. Chadbourn*, 9 Allen, 173; *Chase v. Bradley*, *supra*; *Boyd's Sureties v. Oglesby*, *supra*; *Woolfork v. Sullivan*, 23 Ala. 548.

It has been ruled by this court that the provisions of the statute in reference to arbitrations and awards did not abrogate the common law upon the subject, (*Wilkes v. Cotter*, 28 Ark. 519; *Collins v. Karatopsky*, 36 Ark. 316; *Harris v. Hante*, 37 Ark. 348;) and we can see no better reason for supposing that any alteration of the rule of the common law was intended by the provision relied upon by the appellant. "A statute shall not be taken in derogation of the common law unless the act itself shows such to have been the intention

and object of the legislature." *Gray v. Nations*, 1 Ark. 557; *State v. Pierson*, 44 Ark. 265; *Chadbourne v. Chadbourne*, *supra*.

2. As money was accepted from a third person under the agreement to discharge the debtor, the payment of the smaller sum in satisfaction of the whole discharged the debt. *Gordon v. Moore*, 44 Ark. 349; *Pettigrew Machine Co. v. Harmon*, 45 Ark. 290.

Let the judgment be affirmed.

MCLAIN, Adm'r, and another v. BULINER and others.

(*Supreme Court of Arkansas. June 4, 1887.*)

1. TRUST—CONSTRUCTIVE.

A., who had made some improvements on land belonging to a railroad company, relinquished his right to purchase the same, together with his interest in the improvements, by verbal contract to B., promising B. not to purchase the land from the company. B. entered and built a house on the land. Subsequently, A. purchased the land from the company, took a deed therefor, and brought ejectment against B. for the land. The trial court held that A. and those claiming under him were estopped from setting up the title acquired from the railroad company, as against B., and that they held the same subject to a trust in B.'s favor. *Held* error; the evidence indicating that A. had no preferred right of purchase or claim to the lot at the time of the alleged relinquishment and promise, which could be transferred by him, or acquired by B., the title being at that time, with full power of disposal, in the railroad company.

2. ESTOPPEL—ADVICE—RELIANCE.

In the absence of any fraudulent intent or concealment, mere advice to buy land, accompanied with a promise on the part of the speaker not to purchase it himself, is not sufficient to induce a prudent person to rely upon it to the extent of erecting valuable buildings upon the property, to which it was known that the adviser had no title. There is no equitable estoppel in such a case.

Appeal from circuit court, Miller county. In chancery.

Scott & Jones and John B. Jones, for appellants. *L. A. Byrne*, for appellees.

BUTLER, Special Judge, (BATTLE, J., being disqualified.) The following statement is deemed sufficient to a correct understanding of this case: On the thirty-first day of January, 1878, James Ritchie, since deceased, obtained from the St. Louis, Iron Mountain & Southern Railway Company a deed to lot No. 5, in block No. 73, in the town of Texarkana, Arkansas. Sarah L. Buliner, appellee, prior to the date of Ritchie's deed, had erected upon the lot a two-story frame building, under the claim that, in the year 1876, James Ritchie had relinquished to her his right to purchase the lot, as also his claim for improvements made thereon, and had promised that he would not purchase it himself from the owners, the St. Louis, Iron Mountain & Southern Railway Company. She further claimed that, after securing Ritchie's interest in the lot, she contracted with the local agent of the railway company at Texarkana to purchase it, and immediately thereafter began to build upon it. About January, 1877, the building was completed, and she took possession of the lot and the improvements, without protest or objection on the part of James Ritchie.

On the twenty-fourth of October, 1878, Ritchie brought an action of ejectment, in the Miller circuit court against Bero Buliner and Sarah L. Buliner, his wife, and others in possession of the property. Bero and Sarah L. filed an answer and cross-complaint and a counter-claim, making the St. Louis, Iron Mountain & Southern Railway Company a party defendant to the counter-claim. The cause was transferred to the equity docket. Ritchie demurred to the counter-claim. Pending the suit, Ritchie died, and the cause was revived and proceeded in the names of Lucy Ritchie, the widow, and H. N. McLain, the administrator of the deceased. The cross-bill was dismissed as to the St. Louis, Iron Mountain & Southern Railway Company. At the July

term, 1885, the court overruled the demurrer to the counter-claim, and decreed that Ritchie, in his life-time, had a preference right to purchase the lot in controversy from the St. Louis, Iron Mountain & Southern Railway Company, the owner of the lot, and that he held a claim for improvements placed thereon; that Ritchie sold to Sarah L. Buliner, for a valuable consideration, his claim on the lot, and relinquished to her his right to purchase it from the railway company; that the heirs and assignees of James Ritchie are estopped from setting up the title which he acquired to the lot from the railway company, as against Sarah L. Buliner; that Lucy Ritchie holds the title to the lot, acquired by purchase from her husband, in trust for the said Sarah L.; and that the said Lucy Ritchie make and execute a deed conveying to Sarah L. Buliner the title to the lot. It was further decreed that Sarah L. Buliner recover from the said Lucy Ritchie the sum of \$1,000 for the rental value of the property during the time she held possession.

Counsel concede that the issues involved in this case are narrowed down to a single question,—that of an equitable estoppel. It is insisted for the appellees that the title of Lucy Ritchie to the lot in controversy cannot be set up against Sarah L. Buliner, because of certain promises made by Ritchie, and because he had transferred to her all claim and right to the lot for improvements, and had relinquished his right to purchase from the railway company. It therefore becomes necessary to ascertain whether or not the doctrine of equitable estoppel, wide and varied in application as it is, applies in this case. There was no written contract or agreement between Ritchie and appellees. The case must be determined upon the promises and representations and the alleged parol relinquishment of Ritchie.

Waiving the question of the validity of certain depositions, to which one or the other parties, respectively, took exceptions, we think the evidence establishes that the title to the lot in controversy, at the time Ritchie relinquished his claim to Sarah L. Buliner, was in the St. Louis, Iron Mountain & Southern Railway Company; that Ritchie represented he had a claim for improvements made on the lot, which claim he transferred to Sarah L. Buliner for the consideration of \$12; that Ritchie advised Sarah L. Buliner to purchase the lot and to build upon it,—representing that it would be a good investment; that he could not buy it himself, as he had not paid for the lot adjoining, which he occupied. He assured her that he would not purchase the lot himself, and this promise he frequently reiterated to Bero Buliner, the husband of said Sarah L., as also to other persons. After Ritchie had relinquished his claim to the lot, Sarah L. Buliner, in September, 1876, applied to the local agent of the railway company at Texarkana to purchase the lot. The agent informed her that the lot could be bought for \$200; payable one-third in cash, one-third in 12 months, and the remainder in 18 months. She paid to the local agent of the company \$10, receiving a receipt as follows:

“TEXARKANA, ARKANSAS, September 11, 1876.

“Received from Sarah L. Buliner the sum of ten dollars, to be applied to first payment on lot 5, block 73. Said lot sold Mrs. Sarah L. Buliner for the sum of two hundred dollars, with the understanding that one-third of the amount is to be paid in thirty days. If said payment is not made, money received is to be refunded, and sale ‘null and void.’

[Signed]

“CHARLES E. BRAMBLE,

“Local Land Agent St. Louis, I. M. & S. R. Co.”

The evidence discloses that Bramble, the local agent, had authority to receive applications for the purchase of railway lands, but not to effect sales. Soon after the payment of the \$10 to the local agent of the railway company, Sarah L. Buliner took possession, and commenced building upon the lot. James Ritchie was aware of the progress made in the construction of the house, and assisted the appellees to move into it when it was completed. Sarah L. Buliner made no further payment on the lot until November, 1877, when she paid

the balance of the cash payment to the local agent, for which he gave a receipt as follows:

"TEXARKANA, twentieth November, 1877.

"Received of Sarah L. Buliner the sum of sixty-six 66-100 dollars, same to be applied as first payment on lot 5, in block 73, in the town of Texarkana, Arkansas. Said sale made subject to the approval of the St. Louis, Iron Mountain & Southern Railway Company.

[Signed]

"CHARLES E. BRAMBLE,

"Local Agent St. Louis, Iron Mountain & Southern Railway Co."

It is shown that both Bramble and Sarah L. Buliner, at the date of this last payment, had information that Ritchie, a short time before, had contracted to purchase the lot from the land commissioner of the railway company at Little Rock, who, it appears, had not been notified of the effort made by Sarah L. Buliner in September, 1876, to purchase the lot from the local agent at Texarkana. A witness for appellees testifies to a conversation had with Ritchie after he had obtained the deed for the lot. In this conversation Ritchie stated that he had rendered to the railway company certain services, for which the company promised to compensate him. Ritchie demanded that the company should give him the lot now in controversy, and the then land commissioner of the company promised that Ritchie should have the privilege to purchase the lot for a nominal consideration, which Ritchie interpreted to be the sum of \$50. In the same conversation Ritchie made complaint stating that the railway company did not comply with the promise made to him. When he purchased the lot he had to pay more than \$50 for it.

This is in effect the evidence in the case, so far as it is relevant to the question of an equitable estoppel. We do not think it is established that Ritchie, at the time of the alleged relinquishment and representations, had any preferred right or legal claim to the lot in controversy which could be transferred by Ritchie, or acquired by Sarah L. Buliner. At any time prior to executing the deed to Ritchie the railway company could have sold the property to any one desiring to purchase, or could have instituted proceedings for the possession of the lot. The evidence does disclose that Ritchie urged Sarah L. Buliner to buy the lot, and to put improvements upon it; that he relinquished to her his claim for grading, and promised not to buy the lot; yet, in our opinion, such expressions of intention and advice were not sufficient to induce a prudent person to rely upon them to the extent of erecting valuable buildings upon the property, to which it was known that the adviser had no title. There is no evidence that, at the time Ritchie made the representations and promises, he intended to commit a fraud upon the appellees, and it cannot be assumed that he then foreknew that Sarah L. Buliner would erect a building upon the lot, that she would fail to secure the title, and, finally, he would be enabled to purchase the lot for himself.

Mr. Bigelow, in his work on Estoppel, (4th Ed. p. 597,) says: "Under either doctrine, whether there be knowledge or not of the true state of the title to the land in question, the estoppel applies only to rights existing in the party at the time of the representation or admission, and he will not be precluded from setting up a paramount title, afterwards acquired from a third person." Our attention has been called to the distinction in the rule of estoppel when the conduct of the party against whom the estoppel is alleged should be treated as a waiver, and not as constituting a representation. Bigelow on Estoppel, (639,) states that "it should be clearly apprehended, of the entire class of cases now under consideration, that the conduct of the party against whom the estoppel is alleged, whether that conduct be misleading silence or outward action, should be treated as waiver, and not as constituting a representation. Treated as a waiver, it is immaterial that the party claiming the estoppel knew the facts. Waiver is not only consistent with, it is generally created upon, knowledge of all the facts by both parties. Treated as a representation, the case would fall under the other head of estoppel by

conduct, and knowledge by the party alleging the estoppel would be fatal. This difference between the two estoppels is founded upon the difference in subject-matter, to be seen in the fact that in the present case parties are openly and expressly dealing with known rights; in the other case a secret concealed right is brought forward against one who has been led by the party originally owning it to believe that one has acquired it. He has not acted in good faith, if he knew the facts."

Were it shown that Ritchie, at the time he urged Sarah L. Buliner to buy the property, had any legal right to the property, which he concealed from her knowledge, or if he had a secret claim, which the railway company recognized, in respect to the sale of the property, the rule of estoppel, insisted upon by appellees' counsel, would be applicable; but we find no such state of facts present in this case.

The decree of the Miller circuit court is reversed, the cross-action of the Buliners is dismissed, and a judgment will be entered here in favor of Lucy Ritchie, for the recovery of the premises in controversy.

A motion for reconsideration was filed in this case June 22, 1887, and is now pending.

NEAL and others v. SHINN and others.

(*Supreme Court of Arkansas. June 4, 1887.*)

1. JUDGE—ABSENCE AT TERM—DAY—ADJOURNMENT FROM DAY TO DAY.

The Arkansas constitution (article 7, § 21) provides that, where the regular judge of the circuit court fails to appear on the first day of the term, the practicing lawyers may meet at 10 A. M. on the second day, and elect a special judge, and thus preserve the term until the regular judge shall appear. The judge failed to appear on the first day of the November term, 1886, but did appear on the third day, and opened court, the practicing lawyers not having elected a special judge on the second day. A statute passed February 21, 1887, in order to validate these proceedings, provided that, (section 17,) "if any court shall not be held on the first day of the term, such court shall stand adjourned, from day to day, until the evening of the third day." Section 18: "If at that time the court shall not be opened, such court shall stand adjourned until the next regular term," etc. *Held*, that the act is constitutional, and the action of the judge in opening court on the third day was regular and proper.

2. ELECTIONS—BRIBERY—BONUS FOR COUNTY-SEAT LOCATION.

An offer by persons interested to build a court-house and jail in a certain town, and donate them to the county in case the county-seat be changed to said town, is not the offer of a bribe to the electors, and will not invalidate an election at which such change is made. Such a case is distinguishable from the offer of a candidate for public office to take less than the regular salary, if elected.

Appeal from circuit court, Pope county.

McKennon & McGill, for appellants. *Wilson & Granger* and *G. W. Shelm*, for appellees.

COCKRILL, C. J. The county court of Pope county, at a special term, on twentieth July, 1886, upon proper petition, ordered an election to be held at general election, September 5, 1886, submitting the question (1) of removal of county-seat from Dover; (2) removal to Russellville; (3) removal to Atkins. At such election a majority of the qualified voters of said county voted in favor of a change from Dover, but there was not a majority for Russellville or Atkins. At the October term, 1886, of said court, T. M. Neal and others, after due notice, filed their petition contesting said election, and the court, upon hearing, sustained the contest, and set aside the election, and J. L. Shinn *et al.* and E. A. Darr *et al.*, as contestees, appealed to the Pope circuit court. The time for holding the Pope circuit court, as fixed by law, was the first Monday—the first day—of November, 1886; but the court was not opened until the third day, (Wednesday,) when the circuit judge appeared, and pro-

ceeded to open and hold the court. On the fifth day of said month, Hon. M. L. Davis was elected special judge, and on the twelfth he proceeded to try the contest, upon the amended petition of contestants and demurrer of contestees thereto, and sustained the demurrer, and so rendered judgment; and thereupon ordered an election to be held on the nineteenth day of March, 1887. Such an election was then held, and a majority of the voters of said county voted to locate the county-seat at Russellville. The petition is for *certiorari*, and to quash the judgment of the circuit court, and its order for holding the election.

The question presented upon the threshold, in the consideration of this case, goes to the validity of the term of the circuit court at which the proceedings were had. The term as fixed by statute began on the first Monday in November, but the court was not opened until the Wednesday following, when the judge of the circuit appeared, opened, and held the term of court at which the proceedings complained of were had. If the court was held at a time not authorized by law, its proceedings are void. *Brumley v. State*, 20 Ark. 77; *State v. Williams*, 48 Ark. 227, 2 S. W. Rep. 843. The decision of this case may therefore reach beyond the single question of the election to change the location of the county-seat. It involves the legality of all the judgments rendered and proceedings had at the November term, 1886, of the Pope circuit court. The legislature undertook by act of February 21st of the present year to validate the proceedings of this term, but whether the act can have the desired effect, aside from other considerations, depends upon the solution of the question whether the legislature can authorize the judge to appear and open the court on the third day of the term, after a failure of the practicing attorneys to preserve the term for him by the election of a special judge to preside in his absence, as provided by section 21, art. 7, of the constitution. If the legislature is without power to authorize the judge to appear on the third day, and then for the first time cause the court to be opened, it is apparent they could not breathe judicial life into his acts done at such a time by a retroactive act, because that would be doing by indirection that which could not be done directly. If they are not prohibited from empowering the judge to appear on the third day, and open court, notwithstanding no special judge had been previously chosen, the curative act was unnecessary, because the provision of the Revised Statutes which authorized the judge to appear and open court as late as the third day would then stand intact, unaffected by the constitutional provision, and would afford legislative authority for the action of the judge in opening court at the time disclosed by this record. The construction of the constitutional provision referred to must therefore furnish the solution of the question. If it contains no limitation upon its exercise, the power resides in the legislature to authorize the judge to open court at any time within the period fixed for the term, and in that event the statute referred to is not inconsistent with any provision of the constitution of 1868 or 1874, and has not been abrogated by either. Both instruments continue in force all previous laws not inconsistent with their provisions. Section 1. Sched. Const. 1874; article 15, § 16, Const. 1868.

The provision is as follows: "Whenever the office of judge of the circuit court is vacant at the commencement of a term of such court, or the judge of said court shall fail to attend, the regular practicing attorneys in attendance on said court may meet at 10 o'clock A. M. on the second day of the term, and elect a judge to preside at such court, or until the regular judge shall appear."

It is not here affirmed, in terms, that the general assembly shall not authorize the court to be opened by the regular judge, after 10 o'clock of the second day, in the event no special judge is chosen. Negative words are not necessary, however, to create a prohibition. Every positive direction contains an implication of anything contrary to it, and affirmative words may imply a negative of what is not affirmed; but such an implication is not as readily

drawn in the construction of a state constitution as it is in dealing with a statute. *Vance v. Austell*, 45 Ark. 400. The reason is "the constitution of a state is not a grant of enumerated powers. * * * We look to it not so much to see whether a contested enactment is authorized, but whether it is prohibited," (*Vance v. Austell, supra.*) for the general assembly may exercise unlimited legislative power unless a restraint, express or necessarily implied, in the prohibited powers, is found in the fundamental law; and this power is not to be cut off by inference, save where the inference is too strong to be resisted. *Scoles v. State*, 47 Ark. 476, 1 S. W. Rep. 769. But if the prohibition is plain, whether express or implied, no argument of hardship, or inconvenience or public exigency, has any weight to deter the courts from checking assumed legislative power. The main purpose of the provision in question was to provide a ready remedy for the continuation of a term of the circuit court in the absence of the regular judge. But for this provision, any term of a circuit court might fail for want of power to create a special judge, and great inconvenience would follow. No provision for special judges to hold terms of courts, in the absence of the regular judge, existed in this state prior to the adoption of the constitution of 1868, (*Cruson v. Whitley*, 19 Ark. 99,) which contained a provision substantially the same as that now under consideration. It asserts the right of the practicing attorneys in attendance to prevent the possibility of a lapse of the term by the selection of one of their number to take the place of the absent judge, and by implication prohibits the legislature from taking the power away. But it is not mandatory upon the attorneys to put their power of creation into exercise. The language is permissive only,—they *may* elect, (*Edwards v. Hall*, 30 Ark. 31.)—and the penalty of an absolute lapse of the term is not imposed for a failure to do so. The provision recognizes the right of the regular judge to appear at any time during the term, and assume his judicial duties if a special judge has set and kept the machinery of the court in motion; and their right, having been crystallized by the constitution, cannot be impaired by the legislature. But we are aware of no canon of construction which would justify the conclusion that a denial of the legislative power to authorize the judge to open court after the second day when no special judge has been chosen is necessarily implied because the right to do so is preserved to him if a special judge has been chosen. An implied prohibition against depriving him of the right to appear in the one case cannot logically be construed as an implied restraint upon the power to grant him the right in the other. Sedg. Const. & St. Law, 418, note a; *Purcell v. Smidt*, 21 Iowa, 540; *State v. Tatt*, 22 Iowa, 140.

This power of the legislature had never been recognized as an evil that needed correction. We find nothing in the provision to indicate the intention of imposing a restraint upon the law-making power in this respect. The statutory provisions referred to are as follows:

"Sec. 17. If any court shall not be held on the first day of the term, such court shall stand adjourned, from day to day, until the evening of the third day.

"Sec. 18. If at that time the court shall not be opened, such court shall stand adjourned until the next regular term, and all cases, civil, penal, and criminal, shall stand adjourned over until the next term of such court." Gould, Dig. c. 50.

Construing these provisions as *in pari materia* with the constitution, (*Bilingsley v. State*, 14 Md. 369,) the conclusion is that, if the attorneys fail to exercise their privilege of choosing a special judge at 10 o'clock of the second day of the term, and the regular judge does not appear, the court will stand adjourned until the next day, when he may lawfully assume the duties of the bench. There is, then, no irregularity disclosed by the record in the time of opening the court in this case, and the cause must be determined upon its merits.

The complaint filed by the contestants, who are the appellants here, charges that the offer of the appellees to build a court and jail, and donate them to the county in case the county-seat should be changed, and the execution of a bond payable to the county commissioners for the faithful performance of their promise, was the offer of a bribe to the electors; that a sufficient number of votes to change the result was influenced thereby; and that the election voting a change of the county-seat was, for that reason, void. That donating facilities for the public convenience as an inducement to the electors of a county to vote for the removal of a county-seat will not invalidate the election has been ruled in every case where the question has arisen to which our attention has been called, and, as we think, upon sound reasoning. *State v. Elting*, 29 Kan. 397; *Dishon v. Smith*, 10 Iowa, 212; *State v. Purdy*, 86 Wis. 225; *Wells v. Taylor*, 5 Mont. 202, 3 Pac. Rep. 255.

The considerations of public policy which avoid the election of a candidate for an office who offers to serve the public at less than the salary fixed by law do not apply to cases like the one at bar. The distinction between the two classes of cases, briefly stated, is the difference between determining upon the moral character and personal fitness of an individual upon whom the integrity of the government and the preservation of its principles may for the time be devolved, and settling a question of public convenience and pecuniary interest, involving no principle of self-government. The latter being a question primarily of material advantages of many kinds, an offer by a municipality or of a part of its citizens to increase those advantages, introduces no foreign or improper matter to the consideration of the voter.

The demurrer was properly sustained, and it was not error for the circuit court, after obtaining jurisdiction by the appeal, to enter the order directing an election to be held to determine to which of the two contesting points the removal should be made.

DIXON v. ORR.

(*Supreme Court of Arkansas. June 11, 1887.*)

1. ELECTIONS—EVIDENCE—POLL-BOOKS AND TALLY-SHEETS.

Where an election, *e. g.*, for sheriff, is contested on the ground of the suppression of the vote of one of the townships of the county, and the non-return of such township's vote to the county clerk, while it is true that the poll-books and tally-sheets made out and properly certified by the election officers, and the ballots themselves, are the primary evidence of the result of the election, still, if these are lost, destroyed, or stolen, secondary evidence is admissible.

2. SAME—EVIDENCE.

In such a case the voters themselves may, if they choose, testify as to how they voted, but they cannot be compelled to do so, and thus violate the secrecy of the ballot.

3. SAME.

So, also, the judges and clerks who canvass the vote may, in the absence of the returns and papers, testify as to the number of votes given to each person voted for; and even spectators who were present at the count, heard the result announced, and inspected the papers prepared and signed by the officers recording the result, are competent witnesses in such a case.

Appeal from circuit court, Miller county.

Jones & Martin and *T. E. Webber*, for appellant. *Scott & Jones*, for appellee.

SMITH, J. At the general election which took place in September, 1886, Dixon and Orr were opposing candidates for the office of sheriff of Miller county. According to the returns certified to the county clerk, Dixon received 1,015 votes, and Orr 987 votes. No return was, however, made from Red River township, the voting precinct of which was at Garland city. Dixon received the commission, and Orr instituted his contest for the office. The sole ground relied upon in his notice of contest was the suppression of the

vote of Red River township. The judgment, both of the county court and of the circuit court, was favorable to Orr.

From the testimony of the three judges of election and the two clerks, all of whom were supporters of Dixon, it appeared that an election was regularly held at Garland city on the sixth day of September, 1886; that, after the close of the polls at sunset, the ballots were duly counted; that the number of votes received by each candidate was certified under the hand of the judges, and attested by the clerks; and that the ballots, together with one of the poll-books, were sealed up, directed to the county clerk, and delivered to one of the judges, by whom they were to be taken to the county clerk. This judge deposed that he deposited the election papers in his trunk at his room, and that next morning he discovered they had been abstracted.

The election officers displayed a remarkable deficiency of memory as to the state of the vote. None of them seemed to retain the least recollection of the result. One judge could not even remember whether so many as five votes had been polled at that precinct; but the others stated that the total vote was about 100, or perhaps a little more. The only direct testimony as to the number of votes cast for sheriff was delivered by two colored men, who were candidates, respectively, for the offices of justice of the peace and constable of that township. They testified that they were present during the entire count, seated not more than eight feet from the judges; that John Crocker, one of the judges, took the ballots out of the ballot-box, one at a time, and called out, in a distinct tone of voice, the names inscribed on each ballot; that they, being interested for themselves as well as for the ticket upon which they were running, kept an account; that their manner of keeping the tally was as follows: Whenever a ballot was read, they scored one for the entire Democratic or Republican state ticket, accordingly as the first name on it was Simon P. Hughes or Lafayette Gregg, these two being the rival candidates for governor, and in like manner scored one for the Democratic or Republican county ticket according to the fact whether the ballot that was in the act of being called was headed by the Democratic or Republican candidate for the general assembly; and, if there were any scratches or deviations from the straight party ticket, the names of the candidates so scratched were noted on the paper, and an account kept of the number of scratches, and to whom the scratched votes were given; that the tallies so kept corresponded with the number of votes received by each candidate as announced by the officers of the election at the close of the canvass; that 114 votes were polled at this precinct, of which Dixon received 27, and Orr 87. One of these witnesses further swore that, after the count had been finished, he stood behind the chair of one of the clerks of election, who was transferring the sum total of the votes cast for each candidate from the tally-sheets to the poll-books, and then and there inspected the clerk's figures, and compared them with his own, and that these sums total were carried to the poll-books, and afterwards certified by the judges; and that these documents showed the result of the sheriff's election to be as above stated.

The evidence of these two witnesses was strenuously objected to; and its competency is, indeed, the only point worthy of consideration in the case. Dixon's counsel contend that, as the witnesses do not pretend themselves to have read the ballots, nor to state how each voter voted, but only to show the result by the announcements made in their hearing, and by the footings made by the clerks, their testimony is mere hearsay, or, at the utmost, an attempt to establish by secondary evidence the contents of returns which never had any legal existence, not having been actually transmitted to the county clerk, and that the best evidence of the state of the vote was the testimony of the voters themselves.

The real inquiry is, who received a majority of the legal votes cast in Miller county for the office of sheriff? Upon a contest all such votes must be counted,

whether they were returned or not. Const. 1874, art. 3, § 11; *Govan v. Jackson*, 32 Ark. 553. Where an election has been legally held, and fairly conducted, nothing will justify the exclusion of the vote of an entire precinct except the impossibility of ascertaining for whom the majority of votes were given. Now, the poll-books and tally-sheets, made out and properly certified by the election officers, and the ballots themselves, are the primary evidence of the result of an election; but if these are lost, destroyed, or stolen, this does not destroy the validity of the count, but resort must be had to secondary evidence. The testimony of voters who participated in the election, upon the point for whom their ballots were cast, is admissible. But the secrecy of the ballot is established by law, and a qualified elector cannot be compelled to disclose for whom he voted. It is only when he chooses to waive his privilege that his evidence can be had. Cooley, Const. Lim.; McCrary, Elec. §§ 195, 196, 301, and cases cited.

The judges and clerks who assist in the canvass of the votes may certainly testify, in the absence of election returns and papers, to the number of votes given to each person who is voted for. We are also of opinion that spectators who were present at the count, heard the result announced, and inspected the papers prepared and signed by the officers recording such result, are competent witnesses. Elections are matters of general interest, and section 2688 of Mansfield's Digest directs that the result of the canvass be publicly proclaimed to the people present. Affirmed.

CLEMENT v. CATES and others.

(*Supreme Court of Arkansas*. June 11, 1887.)

1. TENANCY IN COMMON—TRUST RELATION.

The rule that where a person who occupies such a relation to another, by the act or consent of that other, or the act of a third person, or of the law, that he becomes interested for him, or with him, in any subject of property or business, he is prohibited from acquiring rights in that subject antagonistic to the person with whose interest he has become associated, and, if he does so, he holds as trustee for the benefit of that person to the extent of the prohibition, applies to tenants in common by descent with the same force and reason as to persons standing in a direct fiduciary relation to others.

2. SAME.

Where one of several tenants in common by descent purchases an outstanding title, the fact that the common ancestor of all the co-tenants had no title, or a defective title, will not shield him from liability to account to his co-tenants as trustee of the property purchased. The opposite rule would abrogate the doctrine forbidding the purchase by one tenant in common of an outstanding title adverse to his co-tenants.

Appeal from circuit court, Prairie county. In chancery.

J. E. Gatewood, for appellant. *C. E. Warner*, for appellees.

BATTLE, J. In January, 1852, Benjamin A. Boydsen died seized and possessed of certain land in Prairie county, in this state. He died intestate, leaving surviving him Jane Boydsen, his widow, and Joseph, Sarah Ann, and Andrew Jackson Boydsen, his only heirs and distributees at law. Jane, his widow, intermarried with Willis Price, who on the seventh of October, 1857, after his marriage, attempted to convey the land by warranty deed to James A. Hunter. Price's wife joined with him in the execution of the deed, and thereby undertook to relinquish her dower in the land to Hunter. On the twenty-sixth of November following, Hunter conveyed to Samuel Clement, who took possession of the land, and occupied it until some time in January, 1865, when he died intestate, leaving Sarah Clement, his widow, and John C. Clement, Martha Cates, and Judy Davis, who were his children, his only heirs him surviving. Sarah Clement continued in possession of the land, after the death of her husband, until the latter part of 1871, when she died. In De-

cember, 1867, John C. Clement went to his mother, Sarah Clement, and lived with her on the land until her death. Judy Davis also lived on the land with them for a short time, and then died intestate, leaving John and Annie Davis her only children and heirs surviving. On the thirty-first of January, 1872, after the death of his sister Judy Davis, John C. became the guardian of John and Annie Davis, who at that time were, respectively, three and five years old; and remained such guardian until 1881, when he was discharged. On the twenty-second of February, 1872, John C. purchased of Andrew J. and Sarah Ann Boydson their interest in the land. After this he remained in the possession of the land, improved, paid taxes on it, and enjoyed exclusively the rents and profits arising therefrom, and at the time this action was instituted was using, holding, and claiming it as his own. Martha Cates, and John and Annie Davis, by their next friend, brought this action against John C. Clement, in the Prairie circuit court, and asked in their complaint that the purchase of defendant be declared a purchase in trust for the use and benefit of the parties to the action, and that the defendant be declared a trustee for plaintiffs, and be charged with the rents and profits, and that the land be sold for partition. The defendant answered. After hearing the evidence, the court decreed and declared that the defendant held the land in trust for plaintiffs, and that he and they were joint owners thereof, and appointed a master, and directed him to take proof, and state an account of the rental value of the land for 1872, and every year thereafter, and charge the defendant with such rent, and also ascertain the value of the improvements made on the land, and the taxes paid on it by the defendant, and credit him therewith, and with the amount paid for the land when he purchased it. No order was made for the sale or partition of the land. Defendant appealed.

The law forbids a trustee, and all other persons occupying a fiduciary or *quasi* fiduciary position, from taking any personal advantage touching the thing or subject as to which such fiduciary position exists; or, as expressed by another: "Wherever one person is placed in such relation to another, by the act or consent of that other, or the act of a third person, or of the law, that he becomes interested for him, or interested with him, in any subject of property or business, he is prohibited from acquiring rights in that subject antagonistic to the person with whose interest he has become associated." If such a person acquires an interest in property as to which such a relation exists, he holds it as a trustee for the benefit of those in whose interest he was prohibited from purchasing, to the extent of the prohibition. This rule applies to tenants in common by descent with the same force and reason as it does to persons standing in a direct fiduciary relation to others; for they stand, by operation of law, in a confidential relation to each other, as to the joint property, and the duty is imposed on them to protect and secure their common interests. They have a community of interest which produces a community of duty, and imposes on each one the duty to exercise good faith to the others. Neither one can take advantage of the others by purchasing an outstanding title or incumbrance, and asserting it against them. Such an act would be inconsistent with good faith, and "against the reciprocal obligations to do nothing to the prejudice of each other's equal claims which" their relationship created. Such a purchase, notwithstanding the design of the one making it was to the contrary, would be for the common benefit of all the co-tenants, and the legal title acquired would be held in trust for the others, if they should choose, within a reasonable time, to claim the benefit thereof, by contributing, or offering to contribute, their proportion of the purchase money. *Brittin v. Handy*, 20 Ark. 402; *Van Horne v. Fonda*, 5 Johns. Ch. 407; *Sneed v. Atherton*, 6 Dana, 276; *Venable v. Beauchamp*, 8 Dana, 321; *Rothwell v. Dewees*, 2 Black, 618; *Mandeville v. Solomon*, 39 Cal. 125; *Freem. Co-tenancy*, (2d Ed.) §§ 151-163; *Hisp. Eq.* (3d Ed.) §§ 92, 93.

But appellant denies that he sustains the relation of co-tenant to appellees,

because, he says, their father had no title to the land in controversy. It may be true that Samuel Clement acquired no title by his purchase, but it is evident that his heirs had acquired title to one undivided third of the land by adverse possession when appellant purchased,—Joseph Boydsen being barred. So, at the time of his purchase, they were tenants in common of a title. But it was not necessary that Samuel Clement should have title to the land in order to have created, between his children, that relation of trust and confidence which exists between co-tenants by descent. When he died, his widow continued in possession, and a part of the time two of his children, appellant and Judy Davis, occupied it jointly with her. They held as the heirs of Samuel Clement, with their mother, under the deed of Hunter. In taking possession and holding in this way, they held as tenants in common, and acknowledged the heirs of Samuel Clement as co-tenants. Under the statutes of this state they could not have held otherwise. Appellant, in a settlement which he filed as guardian of John and Annie Davis, in effect acknowledged this fact. Now, to hold that appellees are not entitled to the benefit of the purchase of appellant because their father had not a legal title at the time of his death would be a denial of the rule forbidding one co-tenant by descent taking advantage of a defect in the common title by purchasing an outstanding title or incumbrance, and asserting it against his companions in interest. Where is the difference between a *want of title* and a *defective title*? If the outstanding title is paramount to that of the co-tenants, they have in fact *no title*. To hold, therefore, that those holding as co-tenants are only bound by the rule when they have title, is holding that they are bound by it only when it can afford no protection to one against the others; and that they are free to disregard the relation of trust and confidence the rule was adopted to uphold and encourage, and free to violate the good faith it was intended to inculcate, except when neither can injure the other.

Appellant pleaded the seven-years statute of limitation in bar of appellees' right of recovery. Martha Cates was a married woman before the death of Samuel Clement, and remained such until after the commencement of this action. There is no evidence of an adverse holding by appellant in the life-time of Judy Davis. John and Annie Davis were minors when this suit was instituted. It follows this action was not barred by the seven-years statute. It appears that appellant, while he was guardian, paid out money for his wards on account of their interest in the land in question, and charged himself with the pretended value of that interest, and credited himself with the various amounts alleged to have been paid out for them in his settlement, and that this settlement was confirmed, and he has been discharged as such guardian. As he who seeks equity should do equity, we suggest that, in the account to be stated between appellant and appellees, the court below require the master to ascertain the amount lawfully expended by appellant for his wards while he was such guardian, and credit him with the same against any amount that is or should be due John and Annie Davis from appellant in this action, and that appellant be credited in the account with 6 per cent. per annum interest on the money paid by him in the purchase of the land in controversy from the date of payment. Decree affirmed.

LITTLE ROCK, M. R. & T. RY. CO. v. MANEES.

(Supreme Court of Arkansas. June 18, 1887.)

LIMITATION OF ACTIONS—REVERSAL ON APPEAL—LAPSE OF TIME.

Plaintiff sued a railroad company in a justice's court for \$125, for injury to his horse. He recovered the whole amount. On appeal to the supreme court the judgment of the justice, and that of the circuit court affirming it, were vacated, and the case dismissed, on the ground that the justice's jurisdiction of actions for injury to personal property was limited to the jurisdictional amount of \$100. Plaintiff brought a new action in the circuit court, for the same cause, less than a year

after the dismissal, but more than a year after the cause of action accrued. Such actions are barred, unless brought within one year after the injury is inflicted. Mansf. Dig. Ark. § 5540. *Held*, that in view of Mansf. Dig. Ark. § 4497, which provides that where suit is brought within the period of limitation, and plaintiff suffers a nonsuit, or judgment is arrested on a verdict in his favor, or reversed on appeal or error, he may sue again within one year from the time of such nonsuit, arrest of judgment, or reversal, the dismissal of his first action in the supreme court saved plaintiff from the limitation, and a plea of the statute in the second action was bad.

Appeal from circuit court, Drew county.

G. W. Shinn, for appellant. *W. F. Slemmons*, for appellee.

COCKRILL, C. J. There was a previous suit between the parties to this record about the same subject-matter. It was instituted before a justice of the peace, to recover for damages done to the appellee's horse by one of the appellant's locomotives. The appellee had a verdict and judgment, on appeal to the circuit court, for \$125, the amount claimed in the action. On appeal to this court, the judgment was vacated, and the action dismissed, upon the ground that the justice could not entertain jurisdiction for an injury to personal property where the amount in controversy was more than \$100. See *Little Rock, M. R. & T. Ry. v. Manees*, 44 Ark. 100. Within a year after the judgment was vacated, but more than a year after the injury complained of was inflicted, the appellee brought this action in the circuit court for the same cause. The railroad company pleaded, and relied solely upon, the statute of one year as a bar to the action. Mansf. Dig. § 5540. After an agreement by the parties as to the facts, the cause was submitted to the court, without a jury. Judgment was rendered for the plaintiff; the court declaring, as a matter of law, "that the nonsuit in the supreme court saved the plaintiff from the limitation."

Section 4497, Mansf. Dig., provides that, "if any action shall be commenced within the times respectively prescribed in this act, and the plaintiff therein suffer a nonsuit, or, after a verdict for him, the judgment be arrested, or, after judgment for him, the same be reversed on appeal or writ of error, such plaintiff may commence a new action, from time to time, within one year after such nonsuit suffered, or judgment arrested or reversed. * * *" This provision comes from the old Revised Statutes, and it is in terms applicable only to actions limited "as prescribed in this act;" yet, as the chapter of which it was originally a part contained the entire body of the statute law upon the subject of limitations at the time of the revision, it was intended, and has always been treated, as a general provision regulating the practice in all cases not excepted from its operation. See *Walker v. Peay*, 22 Ark. 111. The limitation upon actions for injury to goods or chattels, as regulated by that chapter, was three years, (Mansf. Dig. § 4478, par. 31;) but as far as this particular class of actions is concerned it was changed to one year by the act of February 3, 1875, (Mansf. Dig. § 5540.) This alteration of the law does not take it out of the operation of the provision above quoted. The question is, does the plaintiff bring himself within the letter or the spirit of the statute when he shows that his judgment was vacated in this court, and his action dismissed, because the trial court had not jurisdiction of the subject-matter in the first proceeding instituted to collect his demand?

The case of *Mason v. Howell*, 14 Ark. 199, seems to answer the question in the negative. There the replication to the statute of limitations, which the plaintiff, according to the old practice, filed to the answer, alleged that the judgment in the first proceeding was decided by this court to be null and void; and it was held that a demurrer to it was properly sustained, because it is said a void judgment is no judgment, and therefore there was nothing to arrest or reverse. The case is briefly reported, and it does not set forth the reason why the judgment relied upon by the plaintiff to bring him within the saving clause of the statute was void. But, whatever the reason may have

been, to apply the ruling in that case to the facts of this one would violate the spirit of the other decisions of this court construing the statute. A liberal, and not a close or technical, meaning, has been given to its terms in the other cases. The words "suffer a nonsuit" have not been construed to mean a nonsuit as understood at common law merely, as the term has sometimes been construed in similar statutes, (*Holmes v. Chicago & A. Ry. Co.*, 94 Ill. 439; 2 Greenl. Ev.;) but in this connection it is made to include a voluntary dismissal by the plaintiff, (*State Bank v. Magness*, 11 Ark. 343; *State Bank v. Fowler*, 14 Ark. 159; *Walker v. Peay*, 22 Ark. 108.)

"It is quite apparent," says Judge WALKER, for the court, in *State Bank v. Magness*, *supra*, "that the intention of the framers of the act was to secure that class of suitors from loss who, from causes incident to the administration of the law, are compelled to abandon their present action, whether by their own act or the act of the court, when either would leave them a cause of action yet undetermined, by giving them a reasonable time in which to renew such action. * * * The remedy was evidently intended to be co-extensive with the evil, and will be so held unless some sensible reason to the contrary can be shown." This liberal and "equitable construction," as it is there termed, was reaffirmed in the same language in *Walker v. Peay*, *supra*. The case of *Coffin v. Cottle*, 16 Pick. 383, is there cited and quoted from, with approval. In that case it was decided that where, on a *scire facias* on a judgment, the judgment was held to be null and void on facts alleged in the plea to the *scire facias*, a second action, commenced within a year, might be maintained, upon the ground that such avoidance has the same legal effect, under a statute similar to our own, as if the judgment had been reversed on writ of error, or on arrest of judgment, technically. So, under the similar saving act of James I. c. 16, when a second action was brought within a year after a judgment of outlawry had been declared void on plea, it was held to be within the intent of the statute. 3 Croke, 294.

In Mississippi a judgment, reversed on appeal to the supreme court for want of jurisdiction in the trial court, was ruled to be within the literal terms, as well as the spirit and intention of a statute like our own; so it was held that the reversal brought the plaintiff within its saving, on the institution of a second suit. *Weatherly v. Weatherly*, 31 Miss. 662. See, too, *Woods v. Houghton*, 1 Gray, 580; *Caldwell v. Harding*, 1 Low. 326; *Smith v. McNeal*, 109 U. S. 426, 3 Sup. Ct. Rep. 319.

It cannot be said to be the policy of the state to encourage the citizen to take upon himself the task or the hazard of determining the validity of the proceedings of the courts. Simple and expeditious judicial remedies are provided to test their legality. It is not to be presumed that the framers of this remedial law, the only object of which was to relieve meritorious creditors, intended to invite the debtor who had gone through all the forms of a trial of his cause in a judicial tribunal, and seen the result recorded in the form and with the apparent effect of a binding judgment or decree, afterwards to take the law in his own hands, and wholly disregard the court's proceedings. That, we say, could not have been within the contemplation of the legislature. It is more in consonance with the spirit of the legislation to presume that it was anticipated that every defendant against whom a binding judgment had apparently been rendered, would seek to avoid it by the forms of law, as the railroad company did in this case, and that, when so avoided, the judgment should be deemed arrested or reversed, within the meaning of the act. To construe the statute differently would not leave the remedy co-extensive with the evil the court has said it was designed to correct. Affirmed.

ST. LOUIS, I. M. & S. RY. CO. v. BROWN.

(Supreme Court of Arkansas. June 18, 1887.)

1. LIMITATION OF ACTIONS—PLEADING.

In an action at law, under the Code of Arkansas, the defense of the statute of limitations must be interposed by answer. It cannot be raised by demurrer.

2. APPEAL—SUFFICIENCY OF COMPLAINT—OBJECTION WAIVED.

Where, in the court below, the defendant treats the plaintiff's complaint, and an account annexed to it, as parts of one and the same complaint, he cannot, on appeal, call the statement an exhibit, and complain that it cannot be looked to to aid the allegations in the complaint.

3. RAILROAD COMPANIES—STOCK-KILLING—PLEADING.

An averment in a complaint against a railroad company for injury to live-stock, that the animals were injured by the defendant's trains, is a sufficient averment of negligence on the part of the company.

Appeal from circuit court, Clark county.

Dodge & Johnson, for appellant.

COCKRILL, C. J. In July, 1886, Brown sued the railroad company on the following complaint: The plaintiff, Randolph Brown, states that the defendant, the St. Louis, Iron Mountain & Southern Railway Company, is indebted to him in the sum of \$103 for damages done to personal property, particulars of which are set out in an account herewith filed, leaving due and unpaid the sum above mentioned; wherefore he prays judgment for \$103, as above claimed, and for other relief." Appended to the complaint was a statement charging the company, in separate items, with the value of several cows and hogs, the property of the appellee, which had been injured or killed in Clark county by the appellant's locomotives. The statement showed that the injuries had been inflicted more than one year before suit brought, with one exception,—a hog had been injured within the year. The company offered to confess judgment for the value of the hog, demurred generally to the complaint, and demurred to each item of the accompanying statement, upon the ground that they were severally barred by the statute of limitations. The demurrer was overruled, the company declined to answer, the claims were duly proved, judgment was rendered for the plaintiff, and the company appealed.

Only the questions arising upon the demurrer are presented.

There is nothing in the misnamed statement of account that pertains properly to an exhibit to the complaint. Each of the so-called items was a separate cause of action, and everything that was material in the statement should have been specifically averred in the body of the complaint. Instead of seeking to take advantage of this state of pleadings, the company elected to treat the two parts as one complaint, and upon this lead the court so treated it. It is too late now for the defendant to call the statement an exhibit, and complain that it cannot be looked to to aid the allegations of the complaint.

2. The objection that negligence on the part of the company was not averred is not well taken. It was shown that the stock was injured by the company's train, and this the statute makes *prima facie* evidence of negligence. A legal conclusion need not be alleged.

3. The objection that the court had not jurisdiction because it was not shown by the complaint that the injuries occurred in Clark county, fails because the fact is distinctly shown by the second part of the complaint above referred to.

4. The objection that the action was brought too late could not be taken by demurrer. It has been enacted in at least five of the states that the objection that the action was not commenced within the time limited can only be taken by answer. This was the rule of practice at law in this state prior to the adoption of the Code, though it was otherwise in equity. There is nothing in the Code expressly abolishing the rule, though the old practice in equity now

commonly prevails at law, in the Code states; but this court, following the lead of Kentucky, from whence our Code came, declined to apply the equity rule at law, unless the complaint should show, not only that sufficient time had elapsed to bar the action, but also the non-existence of any ground for for avoiding the statute bar. This has become the settled practice at law under the Code. *Collins v. Mack*, 31 Ark. 684; *Hutchinson v. Hutchinson*, 34 Ark. 164; *Hiley v. Norman*, 39 Ark. 158; *State v. Reed*, 45 Ark. 333.

It is of more practical importance to litigants that the practice in such matters should be fixed and stable than that the court should seek, by a change of front, to conform to a theory of unity or oneness in the form of actions. We adhere to the precedents, and hold that the defendant, having failed to avail himself of the statute of limitations by answer, waived the right. See, too, *Devor v. Rerick*, 87 Ind. 337; *Tarbox v. Supervisors*, 34 Wis. 558; *Rankin v. Turney*, 2 Bush, 555.

Affirmed.

ST. LOUIS, I. M. & S. RY. CO. v. MONDAY.

(Supreme Court of Arkansas. June 18, 1887.)

1. NEGLIGENCE—RAILROAD COMPANIES—TRESPASSER.

A railway company having a legal right to a clear track, except at crossings, owes no duty to a trespasser walking on the track from one station to another until his presence is discovered, and even then those in charge of an approaching train may assume that he will get off the track to avoid a collision, unless they can see from his condition, or the circumstances surrounding him, that he cannot get out of danger.¹

2. SAME.

The liability of a railroad company to a trespasser on its track must be measured by the conduct of its employees after they become aware of his presence there, and not by their negligence in failing to discover him; for, as to such negligence, the contributory negligence of the trespasser will defeat a recovery.¹

Appeal from circuit court, Pulaski county.

Dodge & Johnson, for appellant. *W. L. Terry and Blackwood & Williams*, for appellee.

SMITH, J. Monday brought this action of tort for personal injuries sustained by him while walking on the defendant's track. The answer denied negligence, and averred contributory negligence in the plaintiff. The evidence tended to prove that the plaintiff was intoxicated, and had set out at night to walk along the railroad track from one station to another; that, after daylight, he saw a train coming towards him, while it was yet distant three or four hundred yards; that he did not leave the track, but walked on about 100 yards to a point where a neighborhood road intersected the track, intending to get off there; that, the approaching train being now within 100 yards, his foot became caught and fastened between the rail and the plank crossing; that he waved his hat, and shouted, but the train came right on,—the train-men not observing him; that, in order to save himself, he threw his body outside of the track, and, in doing so, pulled his foot out of his shoe, and, just as his foot got on top of the iron rail, the engine wheel ran over it, and cut off a part of it. The train passed on, nobody on it being aware that the plaintiff was there. Indeed, the engineer, conductor, and brakeman swore most positively that they were in the cab, and on the lookout when the train passed

¹As to the liability of railroad companies for injuries sustained by trespassers on their tracks, see *Little Rock, M. R. & T. R. Co. v. Haynes*, (Ark.) 1 S. W. Rep. 774, and note; *Williams v. Southern Pac. R. Co.*, (Cal.) 13 Pac. Rep. 219; *Mobile & O. R. Co. v. Stroud*, (Miss.) 2 South. Rep. 171.

See, also, *Hughes v. Galveston, H. & S. A. R. Co.*, (Tex.) 4 S. W. Rep. 219.

the crossing, and that it was impossible for the injury to have occurred in the manner the plaintiff stated without their knowledge. But the plaintiff had a verdict and judgment for \$1,500.

From the directions that were given, and the prayers that were refused, it is manifest the court tried the case upon the theory that the railroad company owed the plaintiff the duty of maintaining a sharp lookout, and that it was for the jury to say whether it was guilty of negligence in not discovering the plaintiff's situation and stopping the train. In order to test the correctness of this charge, it must be first determined what was the right of the plaintiff to be upon the track; for rights and duties are correlative terms. "A duty owing to everybody can never become the foundation of an action until some individual is placed in position which gives him particular occasion to insist upon its performance. It then becomes a duty to him personally. The general duty of a railway company to run its trains with care becomes a particular duty to no one until he is in position to complain of the neglect. The tramp who steals a ride cannot insist that it is a duty to him; neither can he when he makes a highway of the railway track, and is injured by the train." Cooley, Torts, 660. A person who goes upon a railroad track without license, or invitation of the company, is a naked trespasser. In *Railroad v. Norton*, 24 Pa. St. 469, it is said: "Until the legislature shall authorize the construction of railroads for something else than travel and transportation, we shall hold any use of them for any other purpose to be unlawful. * * * When a passenger in a railway train is injured without fault on his part, the law presumes negligence in the carrier, for he undertook to carry safely, and we hold companies to the strictest measure of accountability; but that they may be enabled to carry safely the law insists upon a clear track. If, therefore, a man plants himself upon the rail, he must not expect the law to do more for him than to punish wanton injury. If he be injured from the ordinary pursuit of the company's legalized business, let him blame his own rashness and folly." And in *Philadelphia & R. R. Co. v. Hummell*, 44 Pa. St. 378, Justice STRONG remarks: "It is time it should be understood in this state that the use of a railroad track, cutting, or embankment is exclusive of the public everywhere except where a way crosses it. But if the use of a railroad is exclusively for its owners, or those acting under them, if others have no right to be upon it, if they are wrong-doers whenever they intrude, the parties lawfully using it are under no obligations to take precautions against possible injuries to intruders upon it. Ordinary care they must be held to; but they have a right to presume, and act on the presumption, that those in the vicinity will not violate the laws, will not trespass upon the right of a clear track. Precaution is a duty only so far as there is reason for apprehension. No one can complain of want of care in another where care is only rendered necessary by his own wrongful act. It is true that what amounts to ordinary care, under the circumstances of the case, is generally to be determined by the jury; yet a jury cannot hold parties to a higher standard of care than the law requires, and they cannot find anything negligence which is less than a failure to discharge a legal duty. If the law declares, as it does, that there is no duty resting upon any person to anticipate wrongful acts in others, and to take precaution against such acts, then the jury cannot say that a failure to take such precautions is a failure in duty and negligence. And in *Mulherrin v. Delaware, L. & W. R. Co.*, 81 Pa. St. 375, it is declared: "Except at crossings, where the public have a right of way, a man who steps his foot upon a railway track does so at his peril. The company have not only a right of way, but such right is exclusive at all times and for all purposes." Compare, also, *Cauley v. Pittsburgh, C. & St. L. Ry. Co.*, 95 Pa. St. 398, 2 Amer. & Eng. R. Cas. 4; *Finlayson v. Chicago, B. & Q. R. Co.*, 1 Dill. 579, per Mr. Justice MILLER; *Illinois Cent. R. Co. v. Godfrey*, 71 Ill. 500.

The plaintiff being wrongfully on the track, no duty arose in his favor

until his presence was discovered; for the company had the right to run its trains without reference to the possibility that unauthorized persons might straggle upon its track. It was not bound to anticipate such intrusion; and, after he had been seen upon the track by the men in charge of the train, they might act upon the presumption that he would step aside in time to avoid a collision, unless it was also obvious that, owing to his condition, or circumstances over which he had no control, he could not extricate himself from the danger which menaced him. The sole duty which the corporation owed him was not wantonly, or with reckless carelessness, to run over him after his situation was perceived. Its liability must therefore be measured by the conduct of its employees after they became aware of his presence upon the track, and not by their negligence in failing to discover him; for, as to such negligence, the contributory negligence of the plaintiff would defeat a recovery. *Terre Haute & I. R. Co. v. Graham*, 95 Ind. 286, 12 Amer. & Eng. R. Cas. 77; *Johnson v. Boston & M. R. R.*, 125 Mass. 75; *Morrissey v. Eastern R. R.*, 126 Mass. 377; *Wright v. Boston & M. R. R.*, 129 Mass. 440; *Wright v. Boston & A. R. R.*, 142 Mass. 296, 7 N. E. Rep. 866; *Nicholson v. Erie R. Co.*, 41 N. Y. 525; *Chicago & N. W. Ry. v. Smith*, 46 Mich. 504, 4 Amer. & Eng. R. Cas. 535, 9 N. W. Rep. 890; *Illinois Cent. R. Co. v. Hall*, 72 Ill. 222; *Baltimore & O. R. Co. v. Schwindling*, 101 Pa. St. 258, 8 Amer. & Eng. R. Cas. 544; *Tennsbrock v. Southern Pac. C. R. Co.*, 59 Cal. 269; *Van Schaick v. Hudson River R. Co.*, 48 N. Y. 527; *Richmond & D. R. Co. v. Anderson*, 31 Grat. 812; *Lang v. Holiday Creek R. Co.*, 42 Iowa, 677; *Morris v. Chicago, B. & Q. R. Co.*, 45 Iowa, 29; *Masser v. Chicago, B. I. & P. Ry. Co.*, 68 Iowa, 602, 27 N. W. Rep. 776; *Illinois Cent. R. Co. v. Godfrey*, 71 Ill. 500; *Illinois Cent. R. Co. v. Hetherington*, 83 Ill. 510; *McClaren v. Indianapolis & V. R. Co.*, 88 Ind. 319, 8 Amer. & Eng. R. Cas. 217; *Baltimore & O. R. Co. v. State*, 62 Md. 479, 19 Amer. & Eng. R. Cas. 88. These principles have often been announced and applied by this court. *St. Louis, I. M. & S. Ry. Co. v. Freeman*, 86 Ark. 41; *Little Rock & Ft. S. Ry. Co. v. Pankhurst*, Id. 371; *St. Louis, I. M. & S. Ry. Co. v. Ledbetter*, 45 Ark. 246; *St. Louis, I. M. & S. Ry. Co. v. Wilkerson*, 46 Ark. 513; *Little Rock, M. R. & T. Ry. Co. v. Haynes*, 47 Ark. 497, 1 S. W. Rep. 774; *St. Louis, I. M. & S. Ry. Co. v. Fairbain*, 48 Ark. 491, 4 S. W. Rep. 50.

Counsel for the plaintiff have been misled by the analogy of our cattle cases. Our statute makes railroad companies responsible for all damages negligently done to persons and property by the operation of their trains; and the killing or wounding of live-stock on the track is *prima facie* proof of negligence. With us, around all fields in which crops are cultivated, inclosures are required; and horses, cows, hogs, sheep, etc., are allowed to run at large. Now, as railroads are not required to be fenced, it inevitably happens that these dumb creatures frequently stray upon a railroad track; and the owner of them is not guilty of contributory negligence in suffering them to go at large, for such is the universal custom, and was before any railroads were built. Hence their occasional presence upon the track is to be reasonably anticipated; and hence the law imposes upon the persons in charge of a train the duty of keeping a vigilant outlook for them. But no such duty arises in the case of human beings, who are possessed of reason and intelligence. They are presumed to know that a railroad track is a dangerous place to walk on; and, as they are capable of taking care of themselves, they take the risk of the consequences upon themselves if they do walk upon it.

The injury in this case happened at a crossing. This, however, is merely an accidental circumstance, not affecting the merits; for the plaintiff was hurt by reason of his walking laterally or lengthwise of the track, and not in an attempt to cross the railroad at this point. As explained by one of the plaintiff's own witnesses, the crevice between the iron rail and the plank crossing was only about three inches in width, and it would have been im-

possible for the plaintiff to get his foot into this in the act of crossing the track. The only danger was to persons walking up or down the road-bed.

The circuit court tried the case upon an unsound theory, and its judgment must be reversed, and cause remanded for further proceedings.

PRATT v. STATE.

(*Supreme Court of Arkansas. May 28, 1887.*)

ASSAULT—ABILITY TO DO INJURY.

The Arkansas statute defines an assault to be an unlawful attempt, coupled with present ability, to commit a violent injury on the person of another. Upon a trial for assault, defendant requested instructions embodying the statutory rule, but the court modified the same so as to include the idea of an *apparent*, as well as a *real*, ability to commit the crime. *Held error.*

Appeal from circuit court court, Boone county.

O. W. Watkins, for appellant. *Dan W. Jones*, Atty. Gen., for appellee.

SMITH, J. The defendant was indicted for an assault upon the person of one Oxford with intent to kill him, and was convicted of a simple assault. The evidence tended to prove that there was some ill feeling between the parties; that they met at a country store, the defendant standing on a platform raised thirty inches above the ground, and Oxford being on the ground at the distance of four or five feet from the edge of the platform; that the defendant cursed and abused Oxford, brandishing a Barlow knife, and threatening to cut out his heart; that Oxford was not at all alarmed, but invited the defendant to come down from the platform and fight it out; that this the defendant declined to do, but, advancing to the end of the platform, struck at Oxford, who did not move out of his tracks, although he inclined his body.

We have some doubt whether the defendant had either the intention or the ability to do Oxford any bodily hurt. Nevertheless we should not think of interfering with the judgment, if the jury had been properly charged. The defendant preferred the following requests: "(1) Before the defendant could be found guilty of even a simple assault, you must be satisfied from the evidence, beyond a reasonable doubt, that the defendant attempted to thrust or cut the said Oxford with a knife, and that he possessed a present ability with the knife as used to inflict said injury. (2) Although you may believe from the evidence that the defendant cut or thrust at Oxford with a knife with the intent to kill him, you must find him not guilty of any offense, unless you find beyond a reasonable doubt that he possessed the ability to inflict on the said Oxford an injury with the knife as used. (3) An assault is an unlawful attempt, coupled with present ability, to commit a violent injury on the person of another."

The court refused these prayers, modifying the first two by charging that the jury must be satisfied that the defendant possessed the real or apparent ability to inflict injury, and explaining the last, which is our statutory definition of a criminal assault, to include the idea of an apparent as well as a real ability. Whether the power to do the bodily hurt that was attempted was a necessary element in the crime of assault at common-law is a question upon which text writers and judges are much divided. In 2 Comyn's Digest, "Battery," C, it is said to be no assault if a man strike at another at such a distance that he cannot touch him or put him in fear. This implies that the apparent attempt to strike under such circumstances amounts only to a menace. In 2 Bish. Crim. Law, (6th Ed.) § 23, an assault is defined to be any unlawful physical force, partly or fully put in motion, creating reasonable apprehension of immediate physical injury to a human being. And Dr. Wharton's definition is in terms similar. Crim. Law, (9th Ed.) § 603. This view leaves out of the question the ability or inability of the assailant to com-

mit the battery, making the offense to depend on the outward demonstration. According to this view, if A. menacingly point at B. an unloaded gun, which, however, B. believes to be loaded, and is thereby put in fear of immediate bodily injury, A. is guilty of an indictable assault. *Reg. v. St. George*, 9 Car. & P. 483, 38 E. C. L. 285, a *dictum* of Mr. Baron PARKE on a trial at *nisi prius*; *State v. Smith*, 2 Humph. 458; *State v. Sims*, 3 Strob. 137; *State v. Shepard*, 10 Iowa, 126; *State v. Davis*, 1 Ired. 125, 35 Amer. Dec. 735; *Com. v. White*, 110 Mass. 407; 2 Green, Crim. Law Rep. 269, and note, where cases on this subject are reviewed.

Other courts have combated this view as incorrect, holding that the prisoner must have intended and have had the power to carry his menace into effect. *Vaughan v. State*, 3 Smedes & M. 553; *People v. Lilley*, 43 Mich. 521, 5 Crim. Def. 783; *Chapman v. State*, 78 Ala. 463, 56 Amer. Rep. 42. We are not called upon to decide between these conflicting views, for the language of our statute has settled the question. The intention and the ability to commit the battery must both be shown before an assault of any kind can be made out. Indiana and Texas at one time had the same statute, and it was uniformly held, we believe, that the intent and the present ability to execute must be conjoined. *State v. Swails*, 8 Ind. 524, 65 Amer. Dec. 772, and note, where the later Indiana cases are collected; *Robinson v. State*, 31 Tex. 170; *McKay v. State*, 44 Tex. 43; *Jarnigan v. State*, 6 Tex. App. 465.

It follows that the qualification of the defendant's prayers, to the effect that apparent power to do bodily harm was sufficient, was liable to mislead the jury; and for this error the judgment is reversed.

MARCUM v. COMMONWEALTH.

(Court of Appeals of Kentucky. June 2, 1887.)

HOMICIDE—SELF-DEFENSE—INSTRUCTION.

Upon a murder trial, the court instructed the jury on the law of self-defense, in substance, that if defendant, at the time of the killing, had reasonable grounds to believe, and did believe, that deceased had sought him for the purpose of killing or doing him great bodily harm, and was then manifesting an intention to commence an attack upon him, that defendant was not bound to retreat, but had the right to stand his ground, and defend himself to the extent of taking deceased's life. *Held*, on the facts, a proper instruction, and favorable to the accused.

Appeal from circuit court, Lawrence county.

G. W. Castle, for appellant. P. W. Hardin, for appellee.

BENNETT, J. The appellant, having been indicted in the Lawrence circuit court for the murder of Elisha Ferguson, and having been tried in said court for said crime, and having been convicted and sentenced to serve in the state penitentiary for the term of 14 years, and the court having overruled his motion for a new trial, he has appealed to this court. There are no exceptions to the court's refusing the instructions offered by the appellant. The lower court gave seven instructions to the jury, which fully embodied the law of the case. The appellant excepted to none of these instructions except No. 3. The first part of that instruction correctly defined the law of self-defense. The second part told the jury, in substance, that if appellant, at the time he killed Ferguson, had reasonable grounds to believe, and did believe, that Ferguson had sought him for the purpose of killing him, or doing him great bodily harm, and was at the time of killing manifesting an intention to commence an attack upon him, then he was not bound to retreat, but had the right to stand his ground, and defend himself, even to the extent of taking Ferguson's life. Certainly the appellant has no grounds to complain of this instruction, as it was quite as favorable to him as the law justified. It was in proof before the jury that Ferguson and the appellant were enemies; that each had

made threats against the other; and they, previous to the killing, had had a fight, in which Ferguson was seriously wounded with a knife; that on the day of the killing Ferguson and his wife were passing along a footway that led by Mrs. Marcum's yard, Ferguson having his gun; that a young man, at the request of appellant, called in appellant's dog, which was outside of the yard fence; that Ferguson said, "Let him," meaning the dog, "come on, and I will kill him;" that appellant asked Ferguson if he meant him; Ferguson replied that he meant any one that came out, and at the same time presented his gun; appellant, who was sitting on the porch, got up, and went in the house, and got his gun; that Ferguson's wife pushed his gun aside, and also pushed him along the path a considerable distance; appellant went through the house, and into the back yard, and rested his gun upon a post, and took deliberate aim at Ferguson, and fired upon him, and killed him; that at the time Ferguson was killed he was talking to a brother of the appellant, and looking in a different direction from appellant, and probably did not see him, nor know that he was in harm's way.

This proof in some particulars was contradicted by appellant's witnesses, but the jurors were the sole judges of the credibility of the witnesses; and, if we had the right to review their finding, which we have not, we would not hesitate to say that their verdict was mild enough.

The judgment is affirmed.

BANE v. TRAVELERS' INS. CO.

(Court of Appeals of Kentucky. June 2, 1887.)

INSURANCE—ACTION ON POLICY—PAYMENT OF PREMIUM.

Defendant insurance company issued to plaintiff an accident policy for 12 months from January 10th. For the premiums plaintiff gave an order on his employer for \$20, payable in installments of \$5 each, to be deducted from wages for January, February, March, and April. The drawee of the order did not accept it, but paid the January and February installments. He did not pay those of March and April, plaintiff not working during those months. May 1st, plaintiff resumed work. May 10th, there was due him more than \$10, and May 28th he met with the accident for which the action on the policy was brought. The company did not demand the balance of the order from the drawee, did not notify plaintiff of its non-payment, or return or offer to return it, or notify plaintiff that the contract was at an end. The policy, by its terms, divided the twelve months into four periods, of two, two, three, and five months, respectively, and provided that each of the four installments of the order should apply to the payment of the premium for a single period, and that no liability should be incurred by reason of an accident occurring within a period for which the installment should not have been actually paid. *Held*, that the action could not be maintained.

Appeal from common pleas court, Jefferson county.

S. B. Toney and Brown, Humphrey & Davis, for appellant. *James S. Pirtle*, for appellee.

HOLT, J. The portions of the accident policy issued on the tenth day of January, 1883, by the appellee, the Travelers' Insurance Company, upon the life of Patrick Bane, which are material to the consideration of this case, read thus:

"The Traveler's Insurance Company of Hartford, Conn., in consideration of the warranties made in the application for this policy, and of an order on the Texas Pacific Railway Company for the sum of twenty dollars, payable by installments in accordance with said order, does hereby insure Patrick Bane in the principal sum of two thousand dollars for the term of twelve months, commencing at 12 o'clock noon on the day and date of this policy; the said sum to be paid to Mark Bane, if surviving: * * * provided always, that, in the event of any claim for injury to the insured before the actual payment of the first installment under the aforesaid order, then from any amount found to be justly due by reason of said injury may be deducted the sum of

all the installments called for by said order, whereupon the order shall be canceled, and the premiums for the full term of this policy receipted for as fully paid; but, if the sum found to be due under said claim shall be less than the unpaid installments covered by said order, then the sum adjudged to be due to insured shall be credited on account of the installments due or to become due under said order. It being expressly understood and agreed that the first, second, third, and fourth installments specified in the aforesaid order shall apply only to the payment of premiums for the first, second, third, and fourth insurance periods of two, two, three, and five months each, and in the order named. It is also agreed that there shall be no liability under this policy for any claim by reason of personal injuries, as aforesaid, occurring in either of the said insurance periods for which the respective installments of premiums shall not have been actually paid, except as herein provided for delay in payment of the first installment as the premium for the first insurance period.

* * * If the company shall so elect, this policy may be canceled at any time, by refunding to the insured the premium paid by him, less a *pro rata* part thereof for the time said policy has been in force."

This is the order referred to in the policy:

"PAYMASTER'S ORDER FOR \$20.

"To the Texas Pacific Railway Company: Please pay to the Travelers' Insurance Company of Hartford, Conn., or its authorized agent, the sum of twenty dollars, by installments as follows: First installment, five dollars, to be paid and deducted from my wages for the month of January, 1883; second installment, five dollars, to be paid and deducted from my wages for the month of February, 1883; third installment, five dollars, to be paid and deducted from my wages for the month of March, 1883; fourth installment, five dollars, to be paid and deducted from my wages for the month of April, 1883,—the first installment being the premium for two months, the first insurance period under a policy of insurance issued to me by said company, and bearing even date and number herewith; the second installment being the premium for two months, the second insurance period under said policy; the third installment being the premium for three months, the third insurance period under said policy; and the fourth installment being the premium for five months, the fourth insurance period under said policy,—all in accordance with the provisions and conditions of said policy, and my application for the same.

[Signed] PATRICK BANE."

The policy was delivered to the insured, and the order to the insurance company. The insured worked for the railway company during January and February, 1883, but not during March and April following. He resumed work for it on May 1, and was killed on May 28, 1883. The order was never accepted by the railway company, but was left with it by the insurance company. The installments from the January and February wages were paid to the appellee by the railway company; but those for March and April were not paid, as the insured earned nothing during those months. On the tenth day of May, however, there was more than \$10 due him from the railway company, and at his death the sum of \$47.70, all earned during the month of May, 1883. The insurance company never demanded payment of the balance of the order of the railway company, and never notified the insured of its non-payment, or that the contract of insurance was at an end, and never returned the order to him, or offered to do so.

The insurance company contends that, by the terms of the contract, the several payments were to pay for insurance in several periods,—thus the first payment for two months, or from January 10th to March 10th; the second payment for two months, or from the last-named date to May 10th,—but that, if the third payment was not in fact made, then the insurance ceased at the end of the second period; in short, that the insurance was on the installment

plan, and that the failure to pay the installment *ipso facto* worked an end of the contract.

The beneficiary under the policy says, however, that, by a fair construction of the contract, the period of insurance was 12 months; that, in consideration of it, the insured gave the order for \$20; that the provision in it as to how it was to be paid was merely directory, and but an indication to the drawee as to how he was to reimburse himself; and that it was an *executed* contract of insurance for a year. Moreover, if the order was not a bill of exchange, by reason of being payable out of a *particular* fund, that yet it was binding on the drawer as a common-law order, because, *prima facie*, it imported an indebtedness by him to the insurance company; and as it neither returned the order to him, nor notified him of its non-payment, nor that it elected, in consequence thereof, to consider the contract at an end, there was a waiver of any forfeiture or right of forfeiture upon the part of the company, even if, under the contract, it had this right.

In considering this question, the character of accident insurance must be borne in mind, and that the policy is a peculiar one. Undoubtedly, the rights of the parties should be reciprocal. The insurance company should not be allowed to occupy such a legal attitude that it can say, in case the insured lives, "You owe this order;" but in case of his death, that "the insurance has expired by reason of its non-payment." The manifest injustice of such an advantage has led to the adoption of the rule in this state that where an insurance company has taken the personal obligation of the insured to pay a premium at a particular time, on pain of forfeiture, the right to rely upon a forfeiture is waived by retaining the obligation after maturity, without notice to the insured of an intention to consider the policy void.

Here, however, the policy and the order constitute one contract, and there is no conflict between them. The order was to be paid in installments by the employer, out of the wages of the employe for specified months. They were not earned when the order was given, and the assignment could not operate until the insured was entitled to the money. It was not an assignment of twenty dollars to be paid out of any money that might become due to the insured, but only five dollars out of his wages for each of four specified months, during two of which he earned nothing. Undoubtedly, the drawee in the order had no right to pay the balance due upon the order out of the May wages. The assignment did not embrace them, and such payment, if made, would have been at his peril. If made, and it subsequently appeared that the insured had assigned his May wages to another party, such party could have compelled payment from the employer, because the transfer to the insurance company was of specific wages.

It therefore makes no difference that, when the second period of insurance expired, the insured had a sufficient amount of wages owing to him by the railway company for the month of May to have paid the balance of the premium, or that this continued to be the case until his death. The only real question, it seems to us, is whether the insurance company was required to return to the insured the order, and notify him that the contract of insurance was at an end, upon peril, if it did not do so, that it should operate as a continuation of the contract.

By the express terms of the contract the insurance was to cease at the end of the second period if the premium for the third period was not paid. It is evident that the parties to the contract looked alone to the wages that were expected to become due from the railway company for the payment of the premium. It is unreasonable to suppose that the credit would otherwise have been given by the insurance company. Railroad employes, as a general thing, are transitory persons, and it would be destructive of the accident insurance business as to them if by the mere giving of an order to the insurer, to be paid out of a fund to be earned by them in the future, they could compel the in-

suror to carry the insurance, although they should fail to work, because they might not be hunted up and the order returned.

In this instance the insured knew that he had not earned the wages which he had assigned in order to continue the policy. If he had lived, and the insurance company had attempted to collect the balance of the order out of his May wages, could he not have claimed successfully that he did not transfer them, and that he had chosen to let the policy lapse? He knew that the expected fund had not been earned; that by the express condition of the policy its continuation depended upon payment in that way. The right of election was with him, and not with the company, under such circumstances. It was his duty, if he desired to continue the policy, to have paid the installments, and his failure to do so terminated the liability of the company.

It is really a misnomer to say that the policy in this instance was forfeited by the non-payment of the premium. The insurance, by the express terms of the policy, ceased because of such non-payment. The payment of the premium was a condition precedent to the continuation of the risk, and even a court of equity will not interfere to release one from the consequences of such a failure. The order in this case, in view of the circumstances, did not bind the drawee personally, and with the cessation of the policy the entire contract was at an end.

The case of *Lyon v. Travelers' Ins. Co.*, 55 Mich. 145, 20 N. W. Rep. 829, differs from this one in the controlling circumstance that there the insured had earned the wages out of which the premium was thus to be paid, thus providing for its payment; and they were in fact owing by the employer, and subject to the control of the insured. Judgment affirmed.

COMMONWEALTH v. SHERMAN.

(Court of Appeals of Kentucky. June 4, 1887.)

1. QUI TAM AND PENAL ACTION—PLEADING—AMENDMENT.

Where a penal action is erroneously brought in the name of the "state" of Kentucky, an amendment styling the plaintiff the "commonwealth" of Kentucky is permissible; and process on the amendment is not necessary.

2. SAME—CIVIL ACTION—JURISDICTION.

Where a statute provides that the penalty imposed for its violation may be "sued for" in the name of the state, suit is properly brought in a court having jurisdiction of civil causes only.

3. SAME—IMPRISONMENT FOR NON-PAYMENT—CONSTITUTIONAL LAW.

In a *qui tam* action brought in the name of the state to recover a penalty, the appellate court will not consider the question of whether the statute imposing the penalty, and authorizing the action, may not be open to the constitutional objection that it gives the court unlimited discretion as to the term of imprisonment which may be imposed in case of non-payment of the fine, the clause of the statute relating to imprisonment being severable from the rest of the statute.

4. STATUTES—REPEAL—QUI TAM ACTION—MITIGATION OF PENALTY.

In Kentucky the statute has abolished the common-law rule that if, pending a trial or an appeal, the law imposing the penalty or creating the offense is repealed, the repeal works a remission of the penalty, but has provided that, if the repealing act mitigates the penalty imposed by the act repealed, such mitigated penalty may be imposed. *Held*, that this rule of construction must be applied where, pending a *qui tam* action for the penalty imposed by Kentucky act of March 12, 1870, in the case of one acting without a license as agent for an insurance company, the act of April 19, 1886, amending the earlier act, and, *inter alia*, mitigating the penalty imposed thereby, was enacted.

Appeal from common pleas court, Jefferson county.

Helen & Bruce and P. W. Hardin, for appellant. *W. P. D. Bush*, for appellee.

HOLT, J. The act of the legislature entitled "An act for the incorporation and regulation of life insurance companies," approved March 12, 1870, provides:

"Sec. 42. Every person who shall transact any business as an agent of any life insurance company without first procuring the license required in this act, or who knowingly procures payment, or any obligation for the payment of any premium for insurance by fraudulent representations, or after revocation of his license, shall be punished by fine not exceeding one thousand dollars."

"Sec. 48. Every fine, penalty, or forfeiture for any neglect of duty or violation of the provisions of this act, shall be *sued for*, in the name of the *state of Kentucky*, by the attorney general or prosecuting attorney of the district or county in which the company or agents so violating shall be situated, when no other provision is made by this act; and one-half of such penalty, when recovered, shall be paid into the treasury of the commonwealth, and one-half to the informer of such violation, other than an officer whose duty it is to enforce the law; and in case of the non-payment of such penalty, fine, or forfeiture, the officer or agent of any company so offending, and guilty of neglect or malfeasance, shall be liable to imprisonment for a period not less than six months in the discretion of the court having cognizance thereof."

This action was instituted by the attorney general, June 1, 1883, in the Jefferson court of common pleas, in the name of the "state of Kentucky" and against the appellee, Ward B. Sherman, to recover a judgment for \$1,000 for an alleged violation of this law. A demurrer to the petition was presented, upon the ground—*First*, that the court had no jurisdiction; and, *second*, that the plaintiff had no legal capacity to sue. It was sustained upon the last-named ground, and the appellant then amended by inserting the "commonwealth of Kentucky," as the name of the plaintiff. Thereupon the court sustained the demurrer upon the first ground, and dismissed the petition.

Authority was expressly given by the section last cited to sue in the name of the "state of Kentucky." It is said, however, that this was repealed by section 11 of the Criminal Code, which took effect January 1, 1877, and which is as follows: "A public offense of which the only punishment is a fine may be prosecuted by a penal action in the name of the *commonwealth of Kentucky*, or in the name of an individual or corporation, if the whole fine be given to such individual or corporation. The proceedings in penal actions are regulated by the Code of Practice in civil actions." The constitution provides that the style of all process shall be "the commonwealth of Kentucky." By the amendment, however, the plaintiff was so styled; and this was but a correction of what was at most but a mistake in the name of the party. It was not the substitution of a new and different person as plaintiff, but merely gave the formal statutory name of the party as prescribed by the Code. The words "state" and "commonwealth" are used interchangeably by the legislature and the judiciary; and, admitting that it was necessary, yet it did nothing more than give truly the name of the person intended to be stated. Process on the amendment was therefore unnecessary. Moreover, the court, after it was filed, acted, as must be presumed, by the consent of the appellee, upon the demurrer to the jurisdiction of the court; and it results that, although the suit was brought in the name of the state, yet, as the correction related merely to the name of the party, that the commonwealth can now question the judgment below by this appeal.

It is earnestly urged, however, that the court of common pleas had no jurisdiction, upon the ground that this is a *penal* action. Section 48, *supra*, merely provides that the fine may be "*sued for*," without naming the court in which it may be done; and the argument against the jurisdiction is based upon the third subsection of section 13 of the Criminal Code, which says: "The circuit courts shall have general jurisdiction for the trial of all prosecutions and penal actions, unless exclusive jurisdiction be given to other courts." Presumably the lower court sustained the demurrer to the jurisdiction upon the idea that the action was in the nature of a criminal proceeding, being for a fine, and that a court having only civil jurisdiction could not entertain it. (Section 63

of the Civil Code provides, however, that an action may be brought in the county wherein the cause, or some part thereof, arose, "(1) for the recovery of a fine, penalty, or forfeiture imposed by a statute." These two provisions of the Code were substantially contained in the old Code, and yet this court, in 1879, upon a cause of action arising in 1875, and in the case of *Com. v. Avery*, 14 Bush, 625, which was an appeal from the Jefferson common pleas court in an action to recover a forfeiture, sustained its jurisdiction. Undoubtedly, the legislature may authorize a civil action to be maintained for a forfeiture. It has in this instance said that it may be "*sued for* in the name of the state of Kentucky." Moreover, as we understand the law, the jurisdiction of the Jefferson circuit court is confined by special statute to indictable offenses, save cases may be transferred to it by the common pleas court. If the act of 1870 be open to constitutional objection because of unlimited discretion in the court as to imprisonment in case of the non-payment of the fine, yet that question is not now presented, because this is a *qui tam* action for the penalty merely, and the clause of the statute relating to imprisonment is severable from the balance of the section; the latter being complete within itself, and capable of execution in accordance with the legislative intent. It does not appear, nor is it admitted, that the appellee, Sherman, is the agent of a company furnishing life insurance upon the *assessment* plan; and as the act of April 19, 1884, was confined to companies of such character, it cannot be called to his aid, as this record is presented as repealing the act of March 12, 1870. An amendment to the latter act was, however, passed by the legislature on April 19, 1886, providing that the penalty for its violation should be a fine of "not less than fifty nor more than one hundred dollars, and shall be imprisoned until such fine shall be paid or replevied; and jurisdiction is hereby given and conferred upon justices of the peace, police, city, and county court judges for the trial of said misdemeanors, and the enforcement of the penalty herein imposed: provided, that no one convicted under this act shall be imprisoned longer than fifty days in default of payment of the fine; that all laws and parts of laws inconsistent with the provisions of this act are hereby repealed." It is charged that the alleged violation of the law by the appellee, Sherman, occurred in 1883.

By the common law a person is not liable to the infliction of a penalty unless the offense is unlawful, or the law imposing the penalty in force at the time of the trial, as well as at the time of the commission of the unlawful act. If the statute under which the proceeding was instituted has been repealed, then no judgment can be had enforcing the penalty. The repeal of the law is itself a remission, and Judge COOLEY says: "And if a case is appealed, and pending the appeal the law is changed, the appellate court must dispose of the case under the law in force when their decision is rendered." Cooley, Const. Lim. 477. This rule has, however, been changed by statute in this state. Section 23 of chapter 21 of the General Statutes, the title of which is "Construction of Statutes," provides: "No new law shall be construed to repeal a former law as to any offense committed against the former law, nor as to any act done, any penalty, forfeiture, or punishment incurred, or any right accrued or claim arising under the former law, or in any way whatever to affect any such offense or act so committed or done, or any penalty, forfeiture, or punishment so incurred, or any right accrued or claim arising before the new law takes effect, save only that the proceedings thereafter had shall conform, so far as practicable, to the laws in force at the time of such proceedings. If any penalty, forfeiture, or punishment be mitigated by any provision of the new law, such provision may, by the consent of the party affected, be applied to any judgment pronounced after the new law takes effect." *Acree v. Com.*, 13 Bush, 353.

This rule of construction must be considered as a part of every law repealing a former law by which a penalty was imposed; and it results that a law

still remains to be vindicated as to offenses committed prior to the repeal by the subsequent act of the legislature. It must be considered as having had in view this statutory rule of construction when it passed the act of April 19, 1886; and there is no provision in it indicating that the repeal provided by it was to affect any prosecution then pending under the former law, or that offenses theretofore committed should not be punished by it. The repealing act can have no further effect, as to offenses previously committed, save, in case of guilt, to mitigate the punishment by the consent of the accused; and only repeals all former laws inconsistent with it as offenses subsequently committed.

Judgment reversed, and cause remanded for further proceedings consistent with this opinion.

HOBBS and others v. McMAKIN.

(Court of Appeals of Kentucky. June 4, 1887.)

JUDGMENT AGAINST ADMINISTRATOR—OPERATION AND EFFECT—WIDOW OF INTESTATE.

A judgment against an administrator does not conclude the widow of the intestate in a suit to subject land conveyed by him to her in consideration of love and affection only. She may disprove the fact of his indebtedness.

Appeal from circuit court, Nelson county.

Geo. S. Fulton, for appellants. Wm. Johnson, for appellees.

PRYOR, C. J. James B. Hays and others instituted an action in the Washington circuit court against John T. Shields as the administrator of Alex. McMakin, deceased, and others, for the settlement of an alleged partnership, and the payment by the partners of the losses, if any, sustained by the firm. The members of a certain grange undertook to run a store in which certificates of stock were issued as evidences of membership. It was adjudged in the action that Alex. McMakin, deceased, was a partner, and indebted to the firm in the sum of \$223. An execution issued on the judgment against his administrator, John Shields, and was returned, "No property found." The surviving members of the firm filed the present suit in equity against the appellee, Martha McMakin, the widow of Alex. McMakin, and others, seeking to vacate or set aside a conveyance made by the deceased to his wife and others of a valuable tract of land, and subject it to the payment of the judgment against McMakin's administrator. The widow filed an answer in which she denies any indebtedness by her husband to the firm, and further denying that he ever was a member or a stockholder in the organization. She says that she was a stockholder by reason of the payment by her of her own means for the stock, and had received dividends on her stock, but that her husband was at no time a member of the firm. There is proof conducing to show that the decedent was a member, by those who saw him at the meetings connected with the business of the firm, and, by one or more witnesses, that he paid for his stock; but there is no evidence that he ever held a certificate of stock, received any dividends; and, in addition, other testimony by members that the decedent was not a member.

It is plain, we think, that the money paid for the stock to Hobbs was paid by the wife, or by the husband, for her benefit, and that McMakin was not in fact a member. Those testifying for the firm have no recollection that the widow was ever a member, or paid anything for stock. She was not a party to the proceeding to wind up the firm, and in which the judgment was rendered against the personal representative of her husband, while it is evident that she was a stockholder, as she produces her certificate as to dividends, and such other proof as leaves no doubt on the subject. It was the widow who was the stockholder, and not the deceased husband; and her right to question the justice of the debt, although judgment has been rendered

against the administrator of her deceased husband, cannot be questioned. The conveyance to the wife was no doubt voluntary. Still, as the alienee from the husband, a judgment against his personal representative is not conclusive as to the husband's liability when seeking to subject land to which she has title from her husband, although the conveyance has no other consideration than that of love and affection. It devolves on the party seeking to enforce such a judgment to show the liability of the debtor by averment and proof, and at most, as against the heirs, it can only be regarded as *prima facie* evidence of the liability of the decedent. While a judgment against the debtor himself would be conclusive as to his heirs and personal representatives, when the liability is evidenced only by a judgment against the personal representative, and the real estate once owned by the debtor is sought to be subjected in the hands of the vendee, the evidence of the liability must be shown as if no judgment had been rendered against the personal representative. The judgment, as was said in the case of *Alexander v. Quigley's Ex'rs*, 2 Duv. 399, is only evidence to establish the fact that an unsuccessful effort had been made to make the debt out of the personal representative. In this case, the widow (appellee) was not a party to the action in which the judgment was obtained. There is no privity between her and the representative of her deceased husband, and the judgment against the personal representative is no evidence, as against her, of the liability of her husband. The facts of this record demonstrate that no liability ever existed, and therefore the petition was properly dismissed. See *Nourse v. Ramsy*, 2 Bibb, 547; *Richards' Adm'r v. Porter's Heirs*, 6 Mon. 1; *Litsey v. Smith's Adm'rs*, 10 B. Mon. 74; *Ewing's Heirs v. Handley's Ex'rs*, 4 Litt. (Ky.) 346.

There is no such state of pleading in this action, or in the original action against the personal representative, as would have made the husband liable by reason of the stock taken in the organization by his wife. Judgment affirmed.

BERRY v. BRISLAN and others.

(Court of Appeals of Kentucky. June 7, 1887.)

COSTS—PART OF PENALTY IN VIOLATING CITY ORDINANCE—SECTION 2, CH. 28, GEN. ST. KY.; SECTION 287, CRIM. CODE KY.

The provision of section 2, c. 28, Gen. St. Ky., that "the laws of costs are not penal;" and of section 287, Crim. Code Ky., that, if the punishment of an offense be a fine, the judgment may direct imprisonment until it be paid, the extent of imprisonment, however, not to exceed one day for each two dollars of the fine,—apply to costs and fines in commonwealth cases, and are not inconsistent with a provision of a city charter, and of a municipal ordinance enacted under the authority thereof, making the costs a part of the penalty, in prosecutions for the violations of by-laws and ordinances of the city, and empowering the court to require them to be discharged by labor at the rate of 50 cents per day, if not paid.

Appeal from circuit court, Franklin county.

W. H. Julian and H. S. Julian, for appellant. John B. Lindsey and Wm. Cromwell, for appellee.

BENNETT, J. The appellant was fined in the police court of the city of Frankfort one dollar and costs, on a charge of drunkenness and disorderly conduct. The costs amounted to \$5.25. *Capias pro fine* issued against the appellant for said fine and cost, and was placed in the hands of the appellee Brislan, the marshal of the city of Frankfort, who arrested the appellant by virtue of said *capias*, and delivered him to the keeper of the city work-house; and the keeper of the work-house confined him at labor until he discharged the fine and cost at the rate of 50 cents per day. The appellant, after his arrest by appellee, tendered to him one dollar, the amount of the fine, and demanded his release, but the appellee refused to accept the one dollar and release the appellant. After the appellant's release from service in the work-

house, he sued the appellee, on his official bond, for false imprisonment. The petition and answer agreeing as to the foregoing facts, the lower court dismissed the petition. The appellant has appealed to this court.

Section 2 of chapter 26, of the General Statutes, provides that "the laws of costs are not penal;" and it is provided by section 287 of the Criminal Code that, "if the punishment of an offense be a fine, the judgment may direct that the defendant be imprisoned until the fine be paid,—specifying, however, the extent of imprisonment, which shall not exceed one day for each two dollars of the fine." The provision of the statute *supra* has reference to the costs in commonwealth cases, and declares that such costs are not penal. The provision of the Criminal Code *supra* has reference to fines imposed by the commonwealth.

This court, in the case of *Com. v. Wilson*, 3 Ky. Law Rep. 777, construed the provision of the statute and Code *supra* as denying the right to imprison a defendant for cost on a *capias pro fine* which issued for a fine imposed by the commonwealth. When we remember that the costs in commonwealth cases are not, by the statute, a part of the penalty or fine, but are only incidental expenses incurred in the way of officers' and witnesses' fees, the conclusion reached in the case *supra* could not be avoided. On the other hand, if the costs were, by statute, made part of the penalty, no one would doubt that the defendant might be imprisoned for the non-payment of the costs.

Sections 18 and 23 of the charter of the city of Frankfort, and the amendment thereto, provide, in substance, that the police court of the city may require all offenders against the by-laws and ordinances of the city who fail to pay or replevy their fines, and all fees and costs, to discharge the same by labor in the city work-house, or on the streets, at the rate of 50 cents per day. The ordinance of the city, which was passed in pursuance of the provisions of the charter, and the amendment thereto, provides, in substance, that, in case an offender against the by-laws and ordinances of the city shall fail to immediately pay or replevy his fine and costs, a *capias pro fine* shall be issued against him for the fine and costs, directed to the marshal of the city, who shall deliver such offender to the keeper of the city work-house, and he shall safely keep such offender until he shall have discharged said fine and costs by labor in said work-house, or on the streets and alleys of the city, at the rate of 50 cents per day. So, by the city charter, the costs incurred in prosecuting offenders against the penal by-laws and ordinances of the city is made a part of the punishment or penalty. And it is well settled that an offense against the by-laws and ordinances of a city and the state are quite distinguishable, and the prosecution at the suit of each proceeds upon different grounds. The one proceeds upon the ground of preserving the peace and good order of the city; the other proceeds upon the ground of preserving the peace, good order, and dignity of the state. And the punishment for violating the peace and good order of the city may be different from that prescribed by the state for the punishment of the same acts. In other words, an act may be a penal offense under the laws of the state, and further penalties, under legislative authority, may be imposed for the commission of the same act by the city by-laws; and the enforcement of the one would not preclude the enforcement of the other. See *Kemper v. Com.*, 3 S. W. Rep. 159, Ky. Law Rep. April, 1887.

We conclude, therefore, that the provision of the General Statutes, and the the provision of the Criminal Code, *supra*, have reference to fines and penalties imposed under the laws of the state, and have no reference to fines and penalties imposed by cities, under authority of law, against those who offend against their by-laws and ordinances. And where the charters of cities, as in this case, authorize the confinement of offenders against their by-laws and ordinances until their fines and costs are discharged by labor or otherwise, such by-laws and ordinances make the costs a part of the punishment or pen-

alty, and are not in conflict with either provision of the statute or Code *supra*; and that such by-laws and ordinances are not in conflict with either the state or federal constitution is too plain for argument.

The judgment of the lower court is affirmed.

RITT'S ADM'X v. LOUISVILLE & N. R. Co.

(Court of Appeals of Kentucky. June 9, 1887.)

1. MASTER AND SERVANT—NEGLIGENCE—RAILROAD COMPANY.

If, in obedience to the order of the conductor in charge of a freight train about to start, the foreman of the car-repairers goes under it to fix a defective brake, and is run over by the backing of the train while he is known by the conductor to be there, the railroad company, the common employer of both, is liable under the rule of *respondens superior*.

2. NEGLIGENCE—PROVINCE OF JURY.

It being, on the evidence, a doubtful question whether, at the time a car-repairer while under a freight train about to start was run over by the backing of the train, the train was in charge of its conductor, who ordered the car-repairer under the train, or of the yard-master, (in the former case the railroad company being liable, and in the latter not,) *held*, in an action against the company, that the question was for the jury; that for the court to order a verdict for defendant on the ground that the train was in charge of the yard-master was error.

Appeal from circuit court, Warren county.

Edward W. Hines, Rodes & Settle, and Wright & McElroy, for appellant.
Wm. Lindsay and Mitchell & DuBose, for appellee.

HOLT, J. Benjamin F. Ritt, while in the employ of the appellee, the Louisville & Nashville Railroad Company, as foreman of car-repairers in its yard at Bowling Green, Kentucky, lost his life on the night of May 27, 1884, under these circumstances: The road south of said place to Nashville, Tennessee, is one division, and that running north of it, to Louisville, Kentucky, is another; making Bowling Green what is known as a terminal point, and at which the engine, caboose, and entire crew of all through freight trains are changed. When such a train reaches there, those in charge of it are relieved, and the yard-master takes charge of it. It is his duty to superintend the making up of trains, and the movements of the cars and engines in the yard.

It is the duty of the foreman of the car-repairers, together with his assistants, to examine the incoming and outgoing cars, and make all needful repairs. In the case of a through train the new conductor and fresh crew, who are to take charge of it, and conduct it to its destination, are required to be at the yard a certain length of time before the time fixed for its departure, and it is the duty of the conductor, before leaving, to inspect the train. If the foreman of the car-repairers learns in any way that a car is in bad condition, he must repair it; and, in case this will require more time than the stoppage of the train permits, he reports to the yard-master, and the car is taken from the train, and sent to the repair-shop. The yard-master and the foreman of the car-repairers are in the main sovereign in their particular sphere of labor, but the one may call upon the other to do certain things. So, too, it being the duty of the conductor to see, before his train starts forward, that it is in proper condition, it appears to necessarily follow that he may direct any necessary repair that may be needed, and to this end may call upon the foreman to have it done. An employe in one department of the service may, in some states of case, or under certain circumstances, command the services of an employe in another department. *Louisville & N. R. Co. v. Collins*, 2 Duv. 115. If a conductor, just as he is ready to start upon a journey, discovers a defective brake, he should surely have the power to order its repair.

Upon the night of the accident a through freight train arrived from Nashville. It was switched upon a side track, in order that other trains might

pass upon the main track during the 25 minutes stop there. The crew, including the conductor, that had brought it in left it; the new one and new conductor, who were to take it on, being there ready to enter upon the performance of the duty. When the train first arrived, the deceased, as foreman, with one of his assistants, had gone along the train and inspected it. Before the accident occurred, all necessary changes, if any, in the composition of the train had been made,—in the language of the witnesses was “made up.” The new conductor had passed along it, and inspected it, and nothing remained to be done by him before starting save to receive his orders at the telegraph office, and receipt for them. At this juncture he was informed by the conductor who had brought the train in that the brake upon the rear was not in good condition. The yard-master appears to have been present at this time; but, instead of referring the matter to him, the new conductor sought the deceased, and informed him of the trouble, and told him, in substance, to attend to it. He testifies that he “requested” him to see to it. A fair construction of what was said makes it amount to a direction to attend to it; and, if the conductor was then in charge of the train, the doctrine of *respond-eat superior* applies. If it and its movements were then subject to his order, he was *pro hac vice* the superior of the deceased, and the representative or *alter ego* of the company. They went together to the car. The deceased remarked, in substance, that he could fix the brake if the train did not start. The reply of the conductor was: “I have not got any orders yet; I am not ready to go,” and thereupon the deceased went under the car. In a few minutes the signal sounded for backing the train, and it at once did so, and Ritt was run over and killed. His administratrix now seeks to recover damages upon the ground that his death was the result of the *willful* neglect of the appellee.

After the testimony in her behalf had been offered in the lower court, it peremptorily instructed the jury to find for the company; and of this she now complains. This action of the court was based upon the ground that the conductor had no control of the train in the yard; that its movements, save when it started upon its journey, were entirely subject to the orders of the yard-master; that the conductor had nothing to do with them save to give the order to move out after he received his orders; that the entire testimony showed this to be the case; and that there was a total absence of any evidence even *tending* to show otherwise.

As this record stands, those immediately in charge of the engine at the time of the accident are not chargeable with neglect, because they had no notice that any one was under the train. It also appears that neither the conductor nor the deceased knew that the engine had been attached to the train. A curve in the track prevented them from seeing it, and they had not been informed of it. It was the custom, when a car-repairer went under a car, for the foreman, or one of his assistants, to notify those in charge of the engine of it, so that it would not move until he came from under it. It is urged that the deceased was not a subordinate; that he was the foreman of the car-repairers; and that it was his duty, upon the occasion when he was killed, to have given this notice, and thus have prevented the accident. This, however, is not so if the conductor was at the time in charge of the train, and for the occasion his superior. If so, he had a right to rely upon his seeing that the train did not move, and that he was protected in the hazardous duty which he had been directed to perform. When he went under the car, none of his assistants were at hand; the conductor was present; and, while what the latter said related to the car starting on its journey, yet it is fair to presume that the deceased risked himself under the car owing to the presence of the conductor and what he said to him. If, in point of fact, the conductor was then in charge of the train, if he then was, for the occasion, the superior of the deceased, then, when he directed him to go under the train to make

the repair, thus exposing him to danger, it was his duty to see that he was protected. If a superior orders a subordinate into a place of peril, it is his duty to protect him, and, in the performance or omission of this duty, the superior represents the principal. The attitude which the conductor then occupied was a question of fact to be determined from all the testimony and circumstances in evidence.

It is not proper for us to review the testimony, or give an opinion of the weight to which it may be entitled. It is sufficient to say that it was the duty of the conductor to inspect the train, and have any necessary repair made. He certainly had charge of it for the purpose of putting it in order for the journey; it was "made up;" and some of the witnesses say, in substance, that when this has been done, and the conductor has inspected it, and taken the numbers of the cars, and the train is ready to go, that it is known as "his train," and is under his control, subject to change or stoppage while in the yard by the yard-master. There appears to be a time upon such an occasion when it may be questionable who has control of a train. There is certainly good reason for the yard-master having control of the movements of the cars in a yard where there may be various trains moving, and at the same time; but a state of case may arise when it is difficult to tell whether a train yet remains under his control, or has passed under that of the conductor, or is at least in his charge, subject, perhaps, to interference by the yard-master. Whether this had occurred in this instance was a question of fact, to be gathered from all the evidence and circumstances shown by it; and without further comment, as the case must be retried, it seems to us that such a state of case was presented that the question should have been allowed to go to the jury. There was not an entire absence of testimony tending to show that, when the deceased met his fate, the conductor was not in charge of the train; and any doubt upon the question should be resolved in favor of the right of the jury to pass upon it.

Judgment reversed and cause remanded for a new trial consistent with this opinion.

SMITH v. COMMONWEALTH.

(*Court of Appeals of Kentucky. June 2, 1887.*)

1. HOMICIDE—EVIDENCE.

On a murder trial a witness was permitted to testify that defendant, while drunk and alone, talked to himself and threatened to kill the deceased. *Held* properly admissible, as tending to show the state of defendant's feelings towards the deceased.

2. CRIMINAL PRACTICE—CONTINUANCE.

A continuance was applied for on account of the absence of two witnesses, one of whom was actually present on the trial, and the testimony of the other would, if admissible, have been merely cumulative. *Held* no error to deny the application.

3. SAME—CHARGE OF JURY—OATH OF SHERIFF.

In the absence of evidence to the contrary, it will be presumed that the principal sheriff, as well as his deputy, were in fact sworn, according to law, before taking charge of the jury, even though the fact of swearing may not appear affirmatively in the record.

4. WITNESS—CREDIBILITY—INSTRUCTIONS.

It is not necessary to instruct the jury that they are the sole judges of the weight of the evidence and of the credibility of witnesses.

5. TRIAL—INSTRUCTION—REQUEST TO CHARGE.

A refusal to give an instruction requested does not prejudice where the whole law applicable to the case has been embodied in instructions already given.

6. NEW TRIAL—DISCRETION OF TRIAL COURT.

A motion for a new trial on the ground of newly-discovered evidence being addressed to the discretion of the lower court, its decision thereon is not subject to revision.

7. APPEAL—OBJECTION NOT TAKEN BELOW.

The attorney for the commonwealth in his argument denounced the defendant as a vagrant and scoundrel. *Held* that, while this was improper, yet as no objection was made at the time, and the trial court was not asked to stop him, the appellate court would not order a reversal.

8. SAME—REVIEW OF EVIDENCE.

The Kentucky court of appeals can reverse a conviction only for errors of law occurring at the trial, substantially prejudicing the rights of the appellant, and not because the evidence may, in the opinion of the court, fail to sustain the verdict.

Appeal from circuit court, Whitley county.

R. L. Euell and Smith & Perkins, for appellant.

LEWIS, J. Premising that this court can reverse a judgment of conviction for a criminal offense only for errors of law occurring at the trial, to the prejudice of the substantial rights of the appellant, and not because the verdict may, in our opinion, be not sustained by the evidence, we will consider the various grounds relied on, of which we can take cognizance.

1. One of the witnesses on account of whose absence the continuance was applied for was actually present at the trial. The evidence of the other would, if true, have shown a threat by the deceased, based upon a remote condition, the existence of which does not appear; and the evidence, even if admissible, would have been merely cumulative.

2. The evidence of the witness Sutton was to the effect that he heard the defendant at night, when drunk and alone, say, talking to himself, that he would kill the deceased, one A. R. Coon, and some one else. We do not think the court erred in admitting the evidence, and permitting the jury to give such weight to it as they might think it deserved. It tended to show the state of the defendant's feelings towards the deceased; and, as there was room for doubt as to how and by whom the fight was commenced that terminated in the homicide for which the defendant was being tried, the evidence was proper and pertinent. Moreover, threats and ill feeling on the part of the defendant were proved by other witnesses. The witness Sutton, it is true, states he did not hear all the defendant was saying; but he testifies distinctly that defendant was threatening to kill the deceased.

3. It does not appear that, at the time the attorney for the commonwealth used the alleged improper language in his argument to the jury, any objection was made, or that the court was asked to stop him. When an attorney for the commonwealth in his argument to the jury says or does what is unauthorized, improper, and to the prejudice of the rights of the defendant on trial for a criminal offense, it is the duty of the court, and the presumption is it will, if appealed to, put a stop to and direct the jury to disregard it in making up their verdict. The attorney for the commonwealth has the right to endeavor to show, and in his argument to characterize, the testimony of witnesses as false; and, while it was improper for him to denounce the defendant as a vagrant and scoundrel, still as no objection was made at the time, and attention of the lower court was not called to the breach of propriety, we cannot reverse the judgment on that ground.

4. The record shows that on the eighteenth of the month, while the trial was pending, the jury was placed in the custody of a deputy-sheriff who was admonished and sworn as the law directs; but on the twentieth, Sunday having intervened, the jury appeared in open court in charge of the sheriff; and counsel contends, as it does not appear that the latter officer was sworn to keep the jury together, and to suffer no person to speak to or communicate with them on any subject connected with the trial, and not to do so himself, as provided by section 245, Crim. Code, that the judgment should be reversed. The presumption exists, and, nothing to the contrary appearing, we must conclude, that, although it does not appear from the record, the lower court did its duty, and that the principal sheriff, as well as his deputy, before taking charge

of the jury, was in fact sworn according to law in such cases. Moreover, even if there was the omission of duty by the court and sheriff now complained of, no objection was made at the time, nor was it made a ground for a new trial.

5. After a careful consideration of the instructions given by the court, we are able to perceive no error in any of them. The two offenses of murder and manslaughter are accurately and fully defined, and the law of self-defense and apparent necessity is set forth in such language as to enable the jury to readily and clearly understand the grounds upon which they were authorized and required to acquit the defendant. The jury must know, without being told, that they are the sole judges of the weight of the evidence, and credibility of the witnesses, and it was therefore unnecessary to instruct them in regard thereto, as was done in instruction No. 5. But we perceive nothing in that instruction that calls especial or invidious attention to any particular witness, or that would justify the jury in believing the court gave more or less weight to one than the other witnesses who testified. The refusal of the two instructions asked for the defendant did not prejudice him, because the whole law applicable to the case had been embodied in the instructions already given by the court.

6. Whether a new trial should have been granted upon the ground of newly-discovered evidence was in the discretion of the lower court, and the decision thereon is not, as has been heretofore decided, subject to revision by this court.

Perceiving no error of law to the prejudice of the substantial rights of appellant, it is our duty to affirm the judgment, as is now done.

MCHARRY v. IRVIN'S Ex'rs, etc.

(Court of Appeals of Kentucky. June 9, 1887.)

1. FRAUD—UNDUE INFLUENCE—RELATIONSHIP.

A son-in-law obtained from his mother-in-law a conveyance to a trustee of all her property in consideration of certain life annuities; said property at her death to be turned over to him, and, in case of his death in the mean time, giving him an unconditional power of appointment by will. It appeared that such property was represented to her by her son-in-law as worth \$50,000, when it was in fact worth more than double that sum; that said son-in-law had exclusive management and control of the entire estate from the time of his marriage into the family to the date of the deed; that grantor had implicit confidence in him; that, though the deed stated that a settlement and accounting had been made to grantor, such in fact had not been made; and that the deed operated to disinherit a son of the grantor. *Held*, the deed should be set aside as made upon a grossly inadequate consideration, and as obtained by the undue influence and fraud of the beneficiary.¹

2. SAME.

Such a conveyance is a deed of bargain and sale, and is not such a family settlement, nor is the relationship of the parties such, as to overcome the presumption of undue influence arising from the agency of the beneficiary.

3. SAME.

In an action to set aside a conveyance for fraud and undue influence, where testimony has been given tending to show that a deed was executed by the grantor willingly, and with full knowledge of its contents, the testimony of the grantor that she was ignorant of its contents, but signed it at the instance of her son-in-law, the beneficiary thereunder, because she had perfect confidence in him, is competent.

4. LIMITATION OF ACTIONS—CONTINUOUS ACCOUNT—PRINCIPAL AND AGENT.

Where the relations of a principal and agent are continuous, and no accounting has ever been had between them, there is nothing to set the statute of limitations in operation as to their mutual claims.

Appeal from Louisville law and equity court.

¹As to what constitutes undue influence, and its effects, see *June v. Willis*, 30 Fed. Rep. 11, and note; *Kerrigan v. Leonard*, (N. J.) 8 Atl. Rep. 503; *Conover v. Conover*, Id. 500; *Clutter v. Clutter*, (Ky.) 4 S. W. Rep. 182, and note; *Carter v. Tice*, (Ill.) 11 N. E. Rep. 529, and note.

On petition for rehearing. For opinion in original hearing, see 3 S. W. Rep. 374.

Goodloe & Roberts and Edw. J. McDermott, for appellant. *A. P. Humphrey, Geo. M. Davie, and Muir & Heyman*, for appellant and petitioner.

LEWIS, J. We did not base our opinion upon testimony of appellant that was incompetent. The value and amount of the McHarry estate that went into the hands of Irvin as agent, and his disposition of it, so far as shown, his purpose to possess himself of the whole of it, the means resorted to in order to accomplish that purpose, and his consequent liability to appellant, all satisfactorily appear independent of her testimony. Her evidence was not relied on, nor necessary to convince us that the paper of May 12, 1880, by which, without reason or equivalent, she gave up all her interest in the estate, and became entirely dependent, was procured by the undue influence of Irvin, and signed by her without understanding its nature and effect. Brown, the attorney and executor of the will of Irvin, and Lindenberger, one of the parties to the deed of December, 1882, and also executor, both testified to what took place in regard to it, before and after as well as at the time it was executed; and the inference intended by appellees to be drawn, and which must necessarily be drawn, from their testimony, left unexplained, is that appellant executed the deed freely, voluntarily, and with full knowledge of its contents, purpose, and effect, and consequently is bound by it. It was therefore clearly competent for her, under subsection 2, § 606, Civil Code, to testify concerning the same transaction, and, in connection therewith, to state she executed the deed because Irvin requested her to do so, and did not understand, or attempt to understand, it, because she had confidence in him, and believed he would ask her to do only what was right.

We cannot understand why so much space is occupied in the petition for rehearing to prove that appellant's testimony, as a witness, that she had confidence in and trusted Irvin, is incompetent, or how, even if it was so, appellees have been prejudiced thereby, when the same fact is plainly and conclusively shown by other evidence in the record, substantially admitted in the pleadings. Appellant is made to say it in the sixth clause of the deed, and counsel concedes it in a subsequent part of the petition for rehearing.

It seems to us clear that the deed in question is one of bargain and sale; for it is expressly stated therein that, for the consideration of an annuity of \$3,500, to be paid during her life, she grants, bargains, sells, and conveys unto Linderberger all the ascertained balance of \$50,000, her right of dower, and all accumulations thereof, rents, issues, profits, and avails of every kind, and all her estate, real, personal, and mixed, wherever situated, to be paid over and delivered at her death to, and held and enjoyed by, Irvin in fee-simple, subject to his unconditional power of appointment by will in case he dies before her.

But, let it be conceded that the transaction was mixed with motives of bounty, still Irvin, the beneficiary, was not absolved from the duties imposed upon him as her agent. The relation of parent and child is, of course, to be always considered in determining, as a question of fact, whether a gift or bounty from one to the other has been unfairly obtained; for the same implication or presumption of undue influence or fraud does not arise in such case, as when the parties are strangers, and the relation of principal and agent exists. But there is no reason for a rule, nor is there a rule, which will enable a son-in-law who is her agent to profit by a gift or purchase obtained from his mother-in-law by undue influence or fraud, or exempt him from the consequences thereof, if the fact be established by proof.

The lower court dismissed this action without passing upon the question of limitation, and we did not therefore refer to it in the original opinion except incidentally; but as the question is made in the pleading, and litigation and ex-

pense will perhaps be saved by determining it now, we will do so. There is no question made, nor is there any room for any, as to either the fact or nature of the agency. But it appears that, soon after the marriage of Irvin to the elder daughter, the entire estate was by appellant placed in his hands as her agent for an indefinite time, and that the agency never was abandoned by him, nor revoked by her, nor was a settlement made between them, but it continued until December, 1882, when the deed in question was made. It seems to be well settled that, the confidential relation of principal and agent being thus established and continuing, the statute of limitation has no application, the reason being, as aptly stated, that, "while the relation continues, there is a privity between the parties; and there is nothing to set the statute of limitations in operation." In our opinion, therefore, the statute constitutes no bar to the recovery by appellant in this action of what she may be entitled to from Irvin as her agent.

It was not intended, by anything said in the opinion, to prevent necessary investigation and proof, in the discretion of the lower court, of the true amount to which appellant may be entitled.

The opinion was rendered in this case after a thorough investigation of the evidence, and consideration of all the questions of law, and we perceive no reason suggested in the petition for rehearing sufficient to require a change of it. Petition overruled.

KINCAID and others v. MCGOWAN and others.

(Court of Appeals of Kentucky. May 31, 1887.)

1. DEED—DESCRIPTION—RESERVATION OF MINERALS AND TIMBER.

The grant of a tract of land excepting parcels previously conveyed in said tract will not pass the minerals, timber, and mill-site on said parcels, where same were reserved by the grantor in the original conveyance of such parcels.

2. QUIETING TITLE—ACT KENTUCKY, MARCH 9, 1854.

Under the act of Kentucky, March 9, 1854, any person having the legal title and possession of land may bring an action in equity, in the circuit court of the county where the land or some part of it may lie, against any person setting up claim thereto, for the purpose of establishing and quieting his title to said land.

3. SAME—PARTIES.

In an action to quiet title under the above statute, all persons setting up claim to the land may be joined in the suit as defendants, although each claims a separate parcel of the land, under a distinct right.

Appeal from circuit court, Menifee county.

Wm. Lindsay and S. F. J. Trabue, for appellants. *Peters & Tyler, H. C. Lilly, and T. Turner & Son*, for appellees.

BENNETT, J. The appellants' petition contains three paragraphs; the first against William Gray, the second against the appellees, and the third against John M. Clayton. The allegations of the petition, which are common to all of the paragraphs, are that on the fourth day of January, 1796, the commonwealth of Virginia granted to Dean Timmons 22,000 acres of land which lie in Menifee and Wolfe counties, this state; and that Thomas Duckham, on the ninth day of June, 1843, he being the owner thereof, sold said survey of land to Edward Kincaid, the appellants' ancestor, and Samuel Plummer, except the tracts previously sold by Thomas Duckham to Powell Rose, James Cox, and J. P. McGowan; that on the fourth day of October, 1846, Samuel Plummer sold his undivided interest in said land to Edward Kincaid, who thereby became the owner of the whole, and held and owned said land at the time of his death, except the tracts which he had previously sold to Dr. William Congleton, Spencer, and John ——— and George Centers; that the appellants, as the children and grandchildren of Edward Kincaid, he having died intestate, inherited said land from him, and that they own and are in the actual possession of the same, except said parcels sold by Edward Kincaid and

the tracts sold by Duckham to Powell Rose, James Cox, and J. P. McGowan.

The first paragraph of the petition alleges that William Gray holds a deed to 500 acres of said land; that the deed purports, on its face, to have been executed by Thomas Duckham as the attorney in fact of Edward Kincaid, but that said Duckham had no authority from Edward Kincaid to make said conveyance; and that the said deed is void, but nevertheless cast a cloud upon their title, which the appellants ask the chancellor to remove, by declaring said deed to be void, etc.

The second paragraph alleges that the appellees "are setting up some sort of claim to some part of, or interest in, the said balance of the said 22,000 acre tract, under some contract made with Thomas Duckham, the vendor of Edward Kincaid. Appellants also allege that they do not know the exact nature of the appellees' claim, but do know that they are giving out in speeches that they own, and have the right to hold, possess, and sell, portions of said plaintiffs' lands, the minerals under and timber upon certain other parts of said survey of 22,000 acres, which minerals and timber belong to these plaintiffs." It is also alleged that the claim of the appellees, although groundless, impairs the value of the appellants' land, and casts a cloud upon their title. The chancellor is asked to compel appellees to exhibit any title they may have to said land, or to the minerals and timber under and upon any land, lying within the said 22,000 acre survey; and that the appellants' title be quieted, etc.

The third paragraph alleges that John W. Clayton "asserts that he holds title to some portion of the said balance of the 22,000 acre survey, as the remote vendee of Thomas Duckham, and gives out publicly that he can sell and pass a good title to purchasers, and that these plaintiffs have not a good title;" whereby he greatly impairs the vendible value of their estate. They also allege that the claim of Clayton is groundless. They ask that he be required to exhibit his claim of title, and that their title be quieted, etc.

Upon motion of the appellees, the lower court required the appellants to elect to proceed on the first paragraph or second and third paragraphs. The appellants, excepting to the ruling of the court, elected, under protest, to proceed on the second and third paragraphs. Thereafter the appellants amended the second paragraph of their petition. The appellees then entered a general and special demurrer to the second paragraph of the appellants' petition as amended, both of which were sustained by the lower court, and, the appellants electing to stand by their pleadings, the second paragraph was dismissed. They have appealed to this court.

The amended petition sets out a more specific description of the land claimed by the appellants. It also exhibits two deeds of conveyance from Thomas Duckham to James P. McGowan; the first dated the second day of February, 1842, and the second dated the twenty-first of November, 1842. The first deed conveys a certain boundary within the 22,000 acre survey, but "reserves" to the grantor "all minerals and mines in the bowels of the boundary" conveyed, "and one-half of the timber included in said boundary," "and a mill-site on Grady creek." The second deed conveys a certain other boundary of land within said 22,000 acre survey, but reserves to the grantor "one-half of all the mines and minerals in the bowels of the earth" within said boundary, and "one-half of the timber thereon, except on the south side of the river." On that side he reserves all of the timber except that which is on "Swift Camp." It is alleged in the appellants' amended petition that the minerals and timber claimed in their original petition are the minerals and timber reserved in these two deeds. The special demurrer raises the question of the appellants' right to these minerals and timber. We will dispose of that question first.

The appellants' contention is that they are entitled to the minerals and timber reserved by Duckham in said conveyances, by virtue of his deed to Ed-

ward Kincaid and Samuel Plummer, dated the ninth of June, 1848, which conveyed to them all of the 22,000 acre survey of land, only deducting therefrom what Duckham had sold and made deeds to prior to that date; in other words, that Duckham's reservations in said deeds, being a landed estate of inheritance in himself, were included in his conveyance of the entire 22,000 acre survey, which conveyance to Edward Kincaid and Samuel Plummer only excepted the surface conveyances previously made by him. An estate in fee in land carries with it all metals and minerals thereunder, unless the metals and minerals are excepted in the conveyance, or "have before been severed in ownership, and the right thereto vested in some other person." The surface and the metals and minerals may be a distinct property from each other by separate conveyances from individuals. See Bing. Real Prop. 288.

Minerals in place are land. They are subject to conveyance. The surface right may be in one man, and the mineral right in another. Both, in such a case, are land-owners; they own separate and distinct corporeal hereditaments. See *Caldwell v. Fulton*, 81 Pa. St. 475. The owner of land may convey a surface estate in fee in it, and reserve to himself an estate in fee in the minerals, or any particular species of them; in which case the vendee holds a distinct and separate estate in the surface or soil, and the vendor holds a distinct and separate estate in the minerals. By this severance each estate is subject to the laws of descent, of devise, or conveyance. See *Adams v. Briggs Iron Co.*, 7 Cush. 361. Also, by the severance, each estate is as distinct property in the respective owners as is the property in a two-story house where the title to the lower story is in one person, and the title to the upper story is in another person. An action of ejectment will lie in behalf of the owner of the surface to recover it; also an action will lie on behalf of the owner of the mineral estate to recover it; also the right of either owner may be barred by the statute of limitations.

Now, then, Duckham sold to McGowan two parcels of land out of a larger boundary which he owned. These two parcels of land were each designated and set apart by metes and bounds, thereby becoming separate and distinct tracts of land, not only from each other but from Duckham's remaining portion of the survey. The title to the surface or soil, however, was only conveyed to McGowan in each of these boundaries, together with such portions of the minerals and timber as above set forth. Duckham retained his title to the other minerals and timber; also a mill-site on one of the tracts. The interest that he retained was a separate and distinct interest in the two boundaries; which interest, by the said conveyances by metes and bounds, became separate and distinct from the remaining portion of the survey. Indeed, it not only became a distinct interest from the remaining portion of the survey, but a distinct and separate estate from the surface estate which was conveyed to McGowan. So Duckham owned, after these two conveyances, an absolute estate in all of the remaining portion of the 22,000 acre survey, and also owned a distinct estate in the other two parcels, consisting of minerals, timber, and a mill-site. He sold to Edward Kincaid and Samuel Plummer the remaining survey, which he called, in the deed of conveyance, land. Of course this, by operation of law, passed title, within that boundary, to the vendees, to the center of the earth, and included the minerals therein. In that deed he expressly deducted the parcels of land theretofore conveyed. In these parcels he owned a mineral and timber interest and a mill-site. These parcels were separate parcels from the portions sold to Kincaid and Plummer; also Duckham's interest therein was separate from said portion.

Now, it seems to us clear that the deed from Duckham to Kincaid and Plummer did not embrace the separate and distinct mineral and timber interest and mill-site that Duckham owned in these two tracts of land which had been previously separated from the portion of the survey sold to Kincaid and Plummer. Bainbridge, on the Law of Mines and Minerals, (American Ed.

side page 129,) says: "When the mines form part of the general inheritance, they will of course be transferred along with the lands, without being expressly mentioned in the conveyance; but, when they form a distinct possession or inheritance, a distinct title to them must also be established." "In the latter situation the mines will still, of course, retain the qualities of real estate, and will be transferred by conveyances applicable to the particular disposition of them intended to be made." So it seems that the mineral and timber interest and mill-site reserved by Duckham in these two tracts of land, being a distinct interest from the surface right conveyed, and also being separated from the balance of the 22,000 acre survey by designated boundaries, it would require apt words to convey these interests. To illustrate: Suppose the mill-site reserved had had upon it a fine flouring-mill, or there had been a valuable stone quarry (which is a mineral interest) opened on the land, or a fine lead or silver seam on it, worth thousands of dollars; would it be contended that the conveyance of the adjoining portion of the survey (we say adjoining because the two tracts had become separated from it by metes and bounds) would include these interests? Surely not. The unhesitating answer would be that these were distinct and separate interests, which could only be conveyed by apt words. We think, therefore, that the lower court did right in sustaining the special demurrer to the second paragraph of the petition.

The next question is, was the general demurrer rightfully sustained? It is distinctly alleged in the petition that the appellants have the legal title to all of the balance of the 22,000 acre survey after deducting the parcels previously sold by Duckham, and the parcels sold by Edward Kincaid after his purchase; and that they are in the actual possession of said balance, less about 1,000 acres occupied by squatters. It is also alleged, in substance, in the first paragraph, that Gray claims title to 500 acres of this balance, under a deed which is void. It is alleged in the second paragraph that the appellees claim some of this balance by some kind of title derived from Thomas Duckham, etc. It is also alleged that Clayton claims a part of said land by some kind of title derived from Duckham, etc.

By an act of the legislature approved March 9, 1854, it is provided "that hereafter it shall and may be lawful for any person having both the legal title and possession of lands, to institute and prosecute suit, by petition in equity, in the circuit court of the county where the lands or some part thereof may lie, against any other person setting up claim thereto; and if the plaintiff shall be able to establish, and does establish, his title to said land, the defendant shall be by the court ordered and decreed to release his claim thereto," etc. This act was not repealed by the general statutes, and is now in full force.

Pomeroy, in his work on Remedies and Remedial Rights, (section 369,) says: "The very object of the proceeding [action to quiet title] assumes that there are other claimants adverse to the plaintiff, setting up titles and interests in the land, or other subject-matter hostile to his. Of course, all these adverse claimants are proper parties defendant, and, if the decree is to accomplish its full effect of putting all litigation to rest, they are necessary defendants." He further says, on the same page, that "this action has been greatly extended by statute, especially in the western states, and is there an ordinary means of trying a disputed title between two opposite claimants. The general scope of these statutes is as follows: The plaintiff must be in possession, claiming an estate in the lands; the adverse claimant or claimants must be out of possession, and must assert a hostile title or interest. In this condition the possessor of the land, without waiting for any proceeding, legal or equitable, to be instituted against him, may take the initiation, and by commencing an equitable action may compel his adversaries to come into court, assert their titles, and have the controversy put to rest in a single judgment.

It is plain, therefore, that this statutory suit is the converse of the legal action of ejectment."

So it is clear that by the act of the legislature of the ninth of March, 1854, any person having the legal title and possession of land may bring an action in equity, in the circuit court of the county where the land or some part of it may lie, against any person setting up claim thereto, for the purpose of establishing and quieting his title to said land. But for this remedy, what remedy would the owner of the legal title and possessor of the land have? He cannot bring an action of ejectment, because he has the possession of the land. The adverse claim, however worthless it may be, clouds his title, and may be used injuriously to embarrass and belittle it, and to greatly depreciate its market value; for prudent persons would neither buy the property at a fair value while thus affected, nor loan money upon its security, although assured by the best lawyers that the adverse claim was worthless. The object of the statute was therefore to provide a certain remedy notwithstanding the fact that equity, independently of the statute, affords substantially the same remedy. The suit authorized by the statute of the ninth of March, 1854, is the converse of the legal action of ejectment, (Pomeroy, *supra*;) and this court in *Woolfolk v. Ashby*, 2 Metc. (Ky.) 288, having decided that an action of ejectment will lie against as many persons as hold an adverse possession of the land, although each one holds the possession of a distinct parcel from the other, and by a distinct claim of right, it follows that under the statute, *supra*, in an action to quiet the title to land, all persons setting up claim thereto, whether each claims a separate parcel of the land or by distinct right, may be joined in the suit as defendants. Also, it seems clear that in an equitable action to quiet the title to land, independently of statutory authority, all of the adverse claimants, whether by independent titles or not, may be joined as defendants. Indeed, as the object to be accomplished is the putting of all litigation about the title to rest, it is not only desirable, but proper, to make all adverse claimants defendants. See Pomeroy, *supra*.

In the case of *Scott v. Means*, 80 Ky. 460, the petition did not disclose that there was a controversy between the parties as to the location of the boundary. It simply alleged that the defendants had trespassed upon plaintiffs' lands and slandered their title. For trespass upon land, or the slander of title, an action at law for compensatory damages is ordinarily an adequate remedy; therefore the court held, in that case, that an action in equity to quiet title, and settle the question as to the alleged trespass, would not lie; also that, as the plaintiffs' right to the possession of the land in dispute could be settled by an action at law, such action at law should have preceded an action in the nature of a bill of peace.

The other cases relied on by appellees involve the same principle. Those cases are unlike this. Here the appellants, as alleged by them, are the legal owners of the land, and have the actual possession of it. The appellees are not complained of as trespassers or slanderers of the title, but as adverse claimants of title, which beclouds the appellants' title, and injures the market value of their land. For this wrong there is no redress except by an action in equity to quiet title. We think that the lower court erred in sustaining the general demurrer to the second paragraph of the petition, and in ruling the appellants to elect.

For these reasons the judgment of the lower court is reversed, and the case is remanded, with directions for further proceedings consistent with this opinion.

HOLT, J., not sitting.

KELLER and others v. STANLEY and others.*(Court of Appeals of Kentucky. June 7, 1887.)***1. QUIETING TITLE—TITLE UNDER WILL—IMPEACHMENT.**

Where, in an action to quiet title, it appears that the ultimate source of defendant's title, as of plaintiffs, is a certain will, defendant is in no position to question its validity, or that it was, in due form of law, probated and admitted to record in the state where the land lies.

2. SAME—PURCHASE LIS PENDENS.

A., concealing from the court the fact that he was the owner of a life-estate in certain land, and therefore liable for taxes and paving assessments, instituted a proceeding to enforce a pretended lien on the land, based, as he alleged, on payments of such taxes, etc., made at the request of the owner of the life-estate, and in behalf of herself and her children, the remainder-men. In this proceeding a sale of the entire estate was ordered, and A. became the purchaser. Within the time limited by law the remainder-men duly instituted the statutory proceeding to retry the case, and obtained a judgment setting aside the judgment obtained by A., and the sale made thereunder. After the inception, and before the termination, of this proceeding of the remainder-men, A. conveyed the land to B., and B. conveyed it to C. *Held*, that the remainder-men could maintain a suit against C. to quiet their title.

3. LIMITATION OF ACTIONS—QUIETING TITLE—SUIT BY REMAINDER-MEN.

The statute of limitations has no application to a suit brought by remainder-men to quiet their title as against one who, owning the life-estate only, claims the fee.

Appeal from Louisville law and equity court.

LEWIS, J. By will, executed and admitted to record in the state of Mississippi in 1843, and subsequently recorded also in the clerk's office of the Jefferson county court, William Cotton devised to Mary Bryant for life, and at her death to her children, the lot of land in controversy, situated in the city of Louisville. April 10, 1847, Mary Bryant, her husband uniting with her in the deed, conveyed her interest in the lot to Henning, who in November, 1847, conveyed the same to Delph; and March 10, 1856, the latter conveyed the same interest to Michael Fillion, there being the following recital in the deed made to him: "The estate hereby conveyed being an estate for life of Mary Bryant, and no more, (see Will-Book No. 3, p. 357, Cotton to Bryant; and Deed-Book 68, Bryant and wife to Henning; and Book 69, Henning to Delph.)" February, 1863, Fillion instituted an action in the Louisville chancery court against the unknown children of Mary Bryant and Charles Bryant, her husband, asking judgment for a debt set up by him against them, and for the enforcement of an alleged lien on the lot to satisfy it. In his petition he stated the lot in question had been devised by William Cotton in the manner mentioned; that he had paid for Mary Bryant and her children, at her request, \$——, state and city taxes thereon, and for curbing and paving in front of it, whereby a lien was created; but concealed from the court the fact he was the owner of the life-estate therein, and his own consequent liability for the taxes and assessments. Upon the ground the defendants were then non-residents of the state, and could not be summoned to answer, an attachment was issued and levied upon the lot, and June 26, 1863, judgment was rendered in that action for the sale of the whole estate therein, as well the interest of the plaintiff himself, though not so recited, as of the children of Mary Bryant, in order to satisfy his alleged debt and costs of the action. And the sale having, in pursuance of that judgment, been made, was, October 16, 1863, confirmed, and the commissioner's deed directed to be made to the plaintiff, who was the purchaser. But it appears by the record of that case that April 17, 1864, there was the following proceeding: "Came the defendants, Charles and Mary Bryant, Mary B., Sarah A., and John W. Bryant, by counsel, and filed their answer herein, with notice executed on the plaintiff, and said defendants moved the

‘court to retry this case.” It further appears that April 20, 1864, the defendants executed and filed the bond for costs required in such cases.

With the answer mentioned they filed written evidence of title, and the several conveyances by which the plaintiff had become, or was in 1856, before the taxes and assessments mentioned in the petition accrued, the owner of a life-estate in the lot. They denied in the answer they were liable as owners of the interest in remainder for such taxes and assessments, or that the plaintiff was requested by Mary Bryant to pay taxes therefor, and prayed for judgment in their favor, and all proper relief. April 22, 1870, final judgment was rendered in that action, setting aside the judgment of 1863, and the sale made thereunder, and dismissing the petition of the plaintiff Fillion. This action was instituted August 22, 1883, by Mary Stanley and others, children of Mary Bryant, and devisees of the will of William Cotton, against I. H. Keller and wife and L. V. Keller. In their petition, the plaintiffs, after reciting the history of their title to the lot, and of the action of Michael Fillion against them, allege that the judgment rendered in that action in 1863 was fraudulently obtained by him; that July 18, 1864, he attempted to convey the entire estate in the lot to one Bensinger, and the latter, September 25, 1864, attempted to convey the same to L. V. Keller, who with her husband claims she is the owner in fee thereof, and holds the lot adversely to the plaintiffs, whereby there exists a cloud upon their title, and the market value of their estate in the lot is impaired. The relief prayed for in the petition is that the deed from Fillion to Bensinger, and the one from him to the defendant L. V. Keller, be set aside and held for naught so far as either of them purport to convey an estate in the lot greater than for the life of Mary Bryant; that the plaintiffs be adjudged the owners thereof, subject only to such life-estate, and that their title be quieted. And the final judgment of the lower court was that the plaintiffs are the owners of the remainder in fee of the lot; that the deeds mentioned operated to invest the defendant L. V. Keller with only such life-estate, and that the judgment of 1863 in favor of Michael Fillion, and sale under it, are void, and divested the plaintiffs of no interest. Keller and wife having appealed from that judgment, we will now consider the several grounds relied on for reversal.

1. As appellant claims under the will of William Cotton, it does not seem to us she is in a position to call in question its validity, or deny that it has been in due form of law probated and admitted to record in this state.

2. Nor can she defeat the action upon the ground the lot in controversy is not sufficiently identified; for not only is it described in the deed from Delph to Fillion, but also in the action the latter instituted against the present appellees.

3. We do not deem it necessary to determine whether the judgment of 1863 was fraudulently obtained by Fillion, the plaintiff in that action, nor whether the court had jurisdiction to render it; for both these questions were finally and effectually disposed of by the judgment rendered in 1870 upon the retrial of the action. And the first of the two principal questions arising on this appeal is what effect that judgment had upon the claim of the appellants. By section 445 of the former, substantially the same as section 414 of the present, Civil Code, it is provided that “where a judgment has been rendered against a defendant or defendants constructively summoned, and who did not appear, such defendants, or any one or more of them, may, at any time within five years after the rendition of the judgment, appear in court, and move to have the action retried; and, security for the costs being given, they shall be admitted to make defense, and thereupon the action shall be retried, as to such defendants, as if there had been no judgment, and upon the new trial the court may confirm the former judgment, or may modify or set it aside; may order the plaintiff to restore any property of the defendant obtained by the plaintiff under it, and yet remaining in his possession.” Section 448, corresponding

to section 417 of the present Code, is as follows: "The title of the purchaser in good faith to any property sold under an attachment or judgment shall not be affected by the new trial permitted by section 445, except the title of property obtained by the plaintiff, and not bought of him in good faith by others."

As the defendants in the action instituted by Fillion, being only constructively summoned, did appear in court within five years after the rendition of judgment for sale of the lot, moved to have the action retried, and gave bond for costs, it is obvious that Fillion, if he had not previously sold to Bensinger, would have been divested, by the judgment of 1870, of whatever title or interest he acquired under the judgment of 1863. But the effect of the judgment of 1870 upon the title of appellant L. V. Keller depends upon whether Bensinger bought of Fillion in "good faith," by which term, as judicially interpreted, is meant a purchase made, not merely for consideration, but also without notice to the purchaser of an adverse claim to the property by others; for, as said by this court in *Hardin v. Harrington*, 11 Bush, 367, quoting Lord HARDWICK, "the taking of an estate after notice of a prior right makes one a *mala fide* purchaser;" and, as held in the same case, constructive as well as actual notice will affect a purchaser. Hence a purchaser *pendente lite* is always treated as one with notice. *Owings v. Myers*, 3 Bibb, 278. In *Haues v. Orr*, 10 Bush, 431, it was said: "It is a well-settled rule of law that a party purchasing property which is the subject of litigation takes it subject to the judgment that may be rendered in the case. This rule is one of necessity, for otherwise a party might be defeated in the pursuit of his legal rights by repeated alienations by the person in wrongful possession of the property sued for. But, in order to bind the purchaser by a judgment rendered in the case to which he was not a party, a judgment must be the result of litigation pending at the time of the purchase, and not of a new litigation commenced afterwards."

The simple inquiry, then, is whether, at the time Bensinger bought the lot from Fillion, it was the subject of litigation pending between the latter and appellees. If so, both he and appellant L. V. Keller are bound by the judgment of 1870, though neither of them was a party to the litigation; for, if the purchase by Bensinger was made pending the litigation, that by appellant, being subsequent, was also. The record in the case of Fillion against the appellees shows that everything required by section 445 to be done by defendants constructively summoned in order to have the action against them retried, was done by appellees in April, 1864, and thereafter, until the judgment of 1870 was rendered, the litigation, for every purpose contemplated by the Code, was pending between the parties to the action. It is true, there is in the record before us what purports to be a notice to the plaintiff by the defendants in that action, executed April 14, 1868, that they would, on next motion-day, move to have the action retried; but in the proceedings of April 17, 1864, before mentioned, it is recited that the defendants *then* filed their answer, with notice executed on the plaintiff, and moved for a retrial of the action, and three days thereafter executed bond for costs. The subsequent notice, therefore, even if given, was not necessary, nor does it prove the litigation was not already pending. The formal prayer in the answer to set aside the judgment of 1863, and sale under it, and to restore the property to the defendants, and divest the plaintiff of the title thereto, was not necessary in order to put the lot in litigation; for when it appears to the court, upon the retrial of such an action, that the plaintiff had no cause of action against the defendants, the judgment restoring the property to the defendants, and divesting the plaintiff of the title thereto, thus wrongfully acquired, necessarily follows, unless bought of him in good faith by others. As, therefore, the purchase by Bensinger was not made until July, 1864, nor that by appellant L. V. Keller until September, 1864, we think they must be regarded as purchasers *pendente lite*, and consequently the judgment of 1870 operated to di-

vest the latter of all interest in the lot in dispute, except an estate for the life of Mary Bryant.

4. The right of the owner of the fee in remainder to maintain an action during the tenancy for life, and against the life-tenant, to establish his claim to the land, or to quiet his title, was recognized by this court in *Simmons v. McKay*, 5 Bush, 25, and is not denied by counsel for appellant; but it is contended that, as it is an action for relief, not provided for in chapter 71, Gen. St., according to section 9, art. 3, it can only be commenced within 10 years next after the cause of action accrued. It has been repeatedly held by this court that limitation does not, during the existence of the particular estate, run in favor of the life-tenant against the owner of the estate in remainder; and, this being so, it would seem that an action to quiet his title might be instituted by the remainder-man at any time before the termination of the particular estate; for we cannot understand how a right to establish a claim to land, or to quiet title to land, may be barred by limitation, and the right to recover the possession exist for an indefinite period afterwards. In our opinion, the statute of limitations is no bar to this action. Judgment affirmed.

SHORT v. COMMONWEALTH.

(Court of Appeals of Kentucky. June 11, 1887.)

1. HOMICIDE—SELF-DEFENSE—APPREHENSION OF DANGER.

An instruction on a murder trial, making the right of self-defense dependent upon whether defendant believed, and had reasonable grounds to believe, that he was then in danger of death or *great* bodily harm at deceased's hands, is proper.

2. SAME—EVIDENCE.

The accused was on trial for the murder of one Carey Jones. A witness was permitted, against defendant's objection, to testify that while the witness was in a front room, and the accused was, with deceased and several other persons, in a back room, immediately before the affray, he heard some one say: "Carey, you know Doc. shot me for nothing." The reply was: "Yes, he did." That the first speaker then said: "You are a gentleman for acknowledging it, but you acted * * *," applying a vile epithet. The answer was: "I did not do anything, and I will cut your guts out." *That soon thereafter the deceased and the accused, with the other persons, passed through the room where witness was, out into the scene of the crime.* Held, that said testimony was admissible, though the witness could not, while in the front room, see any of the parties, nor recognize the voices; that the accused was sufficiently connected with the conversation by the portion of the testimony in italics.

Appeal from circuit court, Mercer county.

P. B. Thompson, Sr., and Ben Lee Hardin, for appellant. *P. W. Hardin*, for the Commonwealth.

HOLT, J. The testimony in this case, as is usual in those of this character, is conflicting as to who began the difficulty, which ended in the death of Carey Jones at the hands of the appellant, John Short. The jury, however, not only saw and heard the witnesses, but probably knew them; and it is sufficient to say that there is evidence to support the conviction for manslaughter. A reversal is asked upon the ground that the court misinstructed the jury, and admitted incompetent testimony.

The complaint is made that the right of the accused to be excused for the killing was made to depend upon whether he believed, and had reasonable grounds to believe, that he was then in danger of death or *great* bodily harm at the hands of the deceased; and it is urged that the right of self-defense should not be made to rest upon whether the impending bodily harm is *great*. The objection is to the use of the word "great;" and it is said that the words "bodily harm" should be used in an instruction without the adjective; that no more is required. The right of self-defense, however, is based upon the law of nature, and arises from necessity. This being so, the law, out of a sacred regard for human life, does not permit it to be imperilled upon slight

occasion, and to prevent the danger of some slight or trifling bodily harm. Therefore the expression "great bodily harm" has been in use from the earliest period of the law; and the very danger now urged by counsel, to-wit, that the use of the word "great" is misleading to the jury, would arise in case of its non-use.

The killing occurred in the court-house yard. Shortly before it took place, the deceased and the accused, together with at least three other persons, were in the back room of the clerk's office, drinking whisky. A witness, who at this time was in the front room, was permitted, over the appellant's objection, to testify that he heard some one say: "Carey, you know Doc. shot me for nothing." The reply was: "Yes, he did." That the first speaker then said: "You are a gentleman for acknowledging it, but you acted * * *," applying a vile epithet. The answer was: "I did not do any such thing, and I will cut your guts out." This witness says that, when this conversation was taking place, he could not see any of the parties, nor did he recognize the voices, but that the deceased and the accused were, with the other parties, then in the back room, and soon after passed through the room where he was, out into the court-house yard; Jones going first, and the appellant, together with the others who were in the back room, soon following.

When the deceased first got out into the yard, and when Short was not present, he asked another witness for a knife, and was told that he was drunk; and, in response to this, he said that "they wanted to run over him over there," pointing to the clerk's office. This evidence was not allowed to go to the jury, over the objection of the accused. Waiving the question whether it was not one continued quarrel from the time of the conversation in the back room of the clerk's office, where it evidently began, until the deceased was stabbed, and whether, in view of the situation of the parties, all that was said during that time could not properly be proven as a part of the transaction, yet the evidence of the last-named witness was more favorable than prejudicial to the accused, as by it the fact was brought out that the deceased was, at the immediate time of the quarrel, endeavoring to get a knife. It is at least questionable whether this is not also true of the testimony as to the conversation in the clerk's office. The threat, "I will cut your guts out," then made, evidently did not come from the appellant, but from the person addressed as "Carey;" and, when considered in connection with the fact that the deceased, just afterwards, was trying to borrow a knife, it seems to us that the evidence favored the accused, and not the state. It was, however, competent in our opinion.

If the witness had not only failed to see those engaged in the conversation, or to recognize them by their voices, but had also been unable to state that the accused was present, or, even if present, to testify to any circumstance connecting him with the conversation, or showing that he was a party to or approving of what was then being said, and of the quarrel then in progress, then the evidence would not have been competent. The witness stated, however, that both the accused and the deceased were then in the room where the conversation was occurring. One of the parties engaged in it was addressed as "Carey," which was the Christian name of the deceased; and the witness says that, as the accused passed out of the room where the conversation had been in progress, he remarked, "By God! I will stand by you;" thus showing that he was a party to the quarrel.

Upon this state of the case we think the testimony was admissible. Judgment affirmed.

DANIELS v. COMMONWEALTH.

(Court of Appeals of Kentucky. June 16, 1887.)

BURGLARY—MILL-HOUSE.

On a trial for feloniously breaking into a mill-house in the night-time, wherein corn, flour, and meal were stored for sale, the court charged the jury that they could inflict the punishment for burglary, viz., confinement from two to ten years. *Held* error; that the facts charged do not constitute burglary, nor the crime mentioned in section 4, art. 5, c. 29, Gen. St., consisting of "feloniously breaking any dwelling-house, or any part thereof, or any out-house belonging to or used with any dwelling-house, and feloniously" taking "away anything of value," etc.; but that the crime charged falls within the case of crimes denounced by section 4, art. 6, c. 29, Gen. St., the punishment of which is fixed by confinement between one and five years, at the discretion of the jury.

Appeal from circuit court, Morgan county.

Wood & Day, for appellant. *P. W. Hardin*, for appellee.

BENNETT, J. The appellant was indicted in the Morgan circuit court for feloniously breaking into a mill-house in the night-time, wherein corn, flour, and meal were stored for sale, with the intent to steal therefrom. He was found guilty of the crime charged, and his punishment fixed at two years' confinement in the state penitentiary; and, the court having overruled his motion for a new trial, he has appealed to this court.

The trial court instructed the jury that the minimum punishment was two years, and the maximum punishment ten years. The appellant complains of this as error, because, as he contends, the minimum punishment is one year, and the maximum five years. Article 5, c. 29, § 1, Gen. St., fixes the punishment of the common-law crime of burglary at confinement in the state penitentiary not less than two nor more than ten years. The crime of burglary at common law consists in breaking and entering a mansion-house in the night-time with intent to commit a felony. And the term "mansion-house" includes all out-buildings which are parcels thereof, though they are not contiguous to it. All buildings within the same common fence and used by the same family are considered as parcel of the mansion. If they are separated from the mansion house, and are not within the same common-law fence, though occupied by the same family as parcel thereof, then it is a question for the jury to determine from the evidence whether they are parcel of the mansion-house. It is clear that the facts charged in the indictment do not constitute the crime of burglary at common law. It is also clear that the facts charged do not constitute the crime mentioned in the fourth section of said article. The crime therein mentioned consists, among others mentioned, "in feloniously breaking any dwelling-house, or any part thereof, or any out-house belonging to or used with any dwelling-house, and feloniously" taking "away anything of value," etc. But the crime charged does fall within that class of crimes denounced by section 4, art. 6, c. 29, Gen. St., the punishment of which is fixed by confinement in the state penitentiary not less than one nor more than five years, at the discretion of the jury. We think that the trial court should have instructed the jury under this section of the statute, and not under either section of the fifth article.

The judgment overruling the appellant's motion for a new trial is reversed, and the case remanded, with directions to grant a new trial, and for further proceedings consistent with this opinion.

BATES and others v. BATES.

(Court of Appeals of Kentucky. June 9, 1887.)

FRAUDULENT CONVEYANCE—CONDUCT OF PARTIES—PRESUMPTION.

An insolvent, being in destitute circumstances, conveyed certain real estate in trust for the benefit of his wife and children, and subsequently sold the same to his

brother, who was possessed of ample means. The brother took possession of the land, made improvements, paid the taxes, and used the land as his own for more than 27 years, when an action was finally instituted by the heirs at law of both the trustee and vendor to recover the same. *Heid*, assuming that the brother knew of the trust, and disregarding the statute of limitations, that the circumstances of the insolvent, his failure and that of the *cestuis que trust* to take or lay claim to the land, and the fact that the brother treated it in every way as his own for so long a time, raised a conclusive presumption that all parties regarded the trust deed as in fraud of creditors and inoperative, and that the sale to the brother was therefore valid.

Appeal from circuit court, Henry county.

John W. Rodman and Willoughby Rodman, for appellants. *Geo. C. Drane*, and *J. A. Donaldson*, for appellee.

PRYOR, C. J. Lewis Sanders held bonds for title to 500 acres of land lying in the county of Gallatin. One of the bonds was executed to him in the year 1827 by Boulden J. Prentiss for 400 acres of the tract, and for the remaining 100 acres he held the bond of Willis Roberts, dated in April, 1836. The land mentioned in the two bonds is the land in controversy. Lewis Sanders, by his title-bond, and by an assignment of the bonds of his vendors, sold this land in November, 1839, to Lewis B. Bates, who entered into the possession under his purchase, and so continued in possession until the year 1844, at which time he sold the land to his brother John C. Bates, and assigned him the bond of Lewis Sanders, and also transferred and delivered to him the bonds of the vendors to Sanders. John C. Bates then entered into the possession as owner, and shortly after, desiring for some reason to have the title vested in his (John's) wife and children, surrendered to his brother Lewis the bond he held for title, or the bonds assigned to him, and Lewis then executed to John C. Herndon, in trust for the benefit of his wife and children, a writing by which they were invested, or Herndon as trustee for them, with the equitable title to the land. This writing is dated on the thirtieth of March, 1852; so at that date Herndon, as trustee, held the entire land for John's wife and children.

John C. Bates continued in the possession, and neither Herndon, nor the wife and children of John C. Bates, ever took the control or the possession, in fact, of the land. It must be assumed, however, that John Bates held the possession for the purposes of the trust, and not adverse to their claim. In December, 1854, John C. Bates, who had passed the entire equity to Herndon for the benefit of his (John's) family, sold this tract of land to his brother T. W. Bates, and placed him in possession, and obtained from Lewis Bates, the brother who originally purchased of Sanders, an assignment of the Sanders bond. The assignments both to Herndon as trustee, and to T. W. Bates by Lewis, were made on separate instruments, and not by indorsement on the bonds. The trustee, John C. Herndon, died in the year 1856, some four years after the execution of the trust. John C. Bates died in the year 1876, 24 years after the creation of the trust, and about 22 years after the sale to his brother T. W. Bates. So, at John Bates' death, his wife and children held Lewis Bates' bond for title executed to Herndon in 1852 for this land, and T. W. Bates held his (Lewis') bond for title, dated in December, 1855. John Bates, who had originally purchased from Lewis, made the two sales, both to the trustee and to the appellee; Lewis executing such writings as John required.

This action was instituted in the year 1882, in the Gallatin circuit court, by the heirs at law of John C. Herndon, the trustee, and the widow and heirs of John C. Bates, against T. W. Bates, to recover the 500 acres of land. They allege that T. W. Bates is their tenant, and refused to deliver the possession, and that, if not tenant, he purchased from his brother John C. Bates with full notice of their equity, and should be compelled to surrender the land. The tenancy is denied; and the purchase, and possession by T. W. Bates under

it, are facts relied on by him as a defense to the action. Further denying any notice of the sale to Herndon as trustee, and alleging or insisting that, if a sale was made to the latter, it was voluntary, and for the purpose of defrauding his (John Bates') creditors, and therefore his rights as a *bona fide* purchaser cannot be affected by the fraudulent transfer to Herndon.

Many interesting legal questions have been presented and discussed by counsel that, although pertinent to the issue, will not require consideration, as we understand the facts of this record. It is manifest from the testimony that no possession of this land, or any part of it, was had by either the father of these beneficiaries, or their trustee, from the date of the sale to T. W. Bates, in the year 1854, up to the death of John C. Bates, in 1875 or 1876. The farm at the date of the sale to T. W. Bates, although in bad repair, was worth from six to eight hundred dollars rent for each year, and no claim for rent was asserted against him by either the trustee or his brother John; and, so far as this proof demonstrates, no benefit whatever was derived from the land by either John C. Bates or his family for the period of nearly 22 years, the time intervening between the sale by John to Theodore and the death of John, that took place in the year 1875 or 1876. The one brother and his family, from their own statements, was in almost a destitute condition, while the other, Theodore, was a thrifty, prosperous business man; and yet this record discloses the fact, if the theory of counsel for appellant is to be adopted, that T. W. Bates, whose means were ample, was permitted to use and cultivate this farm for near 22 years, without accounting to John or his family for rents, and no claim of ownership by John and his family or their trustee, or even a claim for rent, was asserted during this long period. The rent of the farm at that day would have been ample for the support and maintenance of John Bates' family; and to hold that T. W. Bates was the tenant of his brother or the trustee during that period, with no obligation to pay rent, and none in fact paid, would be entirely inconsistent with the facts of this record, and equally inconsistent with the manner in which the ordinary business affairs of life are conducted even between brothers.

It is claimed by the appellants that the appellee, T. W. Bates, entered upon this land as the tenant of John Bates in the year 1851, under a written lease, by the terms of which the appellee was to hold the possession of the land for five years, to indemnify him as the surety of John to Fellows & Co., of Louisville, for near \$1,200. This lease was recorded in the Gallatin county clerk's office, and is certainly conclusive that it was executed by John Bates. T. W. Bates denies that he ever knew of such a lease until this action was instituted, in 1882, and claims that he had no control over the land in any manner from the year 1851 up to the date of the purchase made by him in 1854. While the testimony conduces to show that Claxon was the tenant of John Bates, and on the land from 1851 until 1854, it is doubtless true that this lease was executed with the knowledge of the appellee, and the lapse of time may account for his want of recollection with reference to business transactions had near 30 years prior to the time at which he was called to testify. Discrepancies in statements made as to what transpired in the business affairs of life by those who were parties to the transaction, after the lapse of more than a quarter of a century, must necessarily exist, and conduce more to sustain the good faith as to the statements than to impress the mind with the belief that the witness is swearing at random. It is plain, however, from the proof, that T. W. Bates was not the tenant of his brother John from 1851 until 1854; and if he was the tenant, and had purchased in 1854, we cannot well see how this would affect his manner of holding. That John C. Bates did sell him the land is evident from the writings entered into between the brothers. The writing in 1854 is consistent with the lease of 1851. He may have entered as tenant, and then become the owner by purchase, but, as before stated, the decided weight of the testimony shows that he never entered under the lease.

Having considered the facts with reference to the conduct of John C. Bates and his family, their mode or means of living, and acquiescence in the possession by the appellee for so many years, as evidence of the want of title in them or their trustee, it is proper to notice the acts and conduct of the appellee with reference to this land, in order to determine the manner of his holding. The writing under which he entered in 1854 evidences the sale. He then took the actual possession of the farm through his tenant Gullion, and has been in the actual possession from that day until this action was brought, in the year 1882, a period of nearly 28 years. He listed the farm during the entire period as his property, paid the taxes upon it, and asserted and exercised the entire control of the premises. He erected upon the land several dwellings; dug two or three wells; built some 600 rods of stone fence; cut and opened ditches to reclaim the wet land; ceased to cultivate the land, or much of it, from the date of his purchase, putting it in grass, and gradually improving the land from year to year. Its management was that of the careful and prudent owner, and not that of the tenant, who by cultivation must obtain from the soil at least the amount of rent to be paid for the privilege of cultivating it. This conduct and claim of ownership, with the actual possession, with the parties who are now claiming it, and those directly interested in them in the neighborhood of the land, without an assertion of title or right, at least during the life of John C. Bates, is conclusive of this case.

The acts of all the parties repel the idea that the appellee was only a tenant, and not a purchaser. Besides, those who lived near the land learned from John C. Bates that he had sold it to his brother; and in running the present Short Line Railroad through the land the damages were awarded the appellee as the real owner, and not one word of complaint was heard as to his right to the money.

John C. Bates became insolvent as early as 1847; his creditors were attempting to make their debts by coercive measures; executions were returned "No property found," and his embarrassed condition and scarcity of means reduced his family to almost absolute want. There is some evidence of an improved pecuniary condition about the time this sale was made; and, whether so or not, the testimony of the appellee is that he paid the money, and in this statement he is sustained by Gullion. There is a discrepancy between the statements of appellee and Gullion as to the amount paid at particular times, but this is not remarkable after the lapse of so many years. Their recollection must necessarily vary, both as to dates and amounts; and the fact exists, undisputed by any one, that the appellee was able to pay for the land during the period he held it, and that his brother should have permitted him to hold it for 20 years and more, without making payment, with his great need of money, is incredible, and inconsistent with any rational view to be taken of the facts presented in this record.

It results, therefore, that the appellee either purchased the land without notice of the prior sale to the trustee, or that the trustee was invested with title to prevent the creditors of John C. Bates from making their debts, and that all the parties regarded the transfer as in no wise preventing him from making a sale of the land. The latter theory, it seems to us, is the proper solution of the questions involved. While the witnesses who have been examined for the purpose of establishing notice on the part of the appellee attempt to detail conversations with him that took place many years prior to their testifying, it may be assumed that the appellee knew of the transfer; but at the same time it is evident that the object in view was to hinder and delay the creditors of the vendor; and the appellee, occupying the position of a purchaser for value, must hold as against the voluntary transfer made by the debtor to his wife and children without any consideration. The presumption against this gift must be conclusive, where there has been a sale for value, and a possession under it for nearly 28 years. The transfer to Herndon,

the trustee, was *for the use and benefit* of Elizabeth M. Bates and her children, and whether this created a life-estate in the wife, with remainder to the children, or created a joint estate, is immaterial. The bond was executed by Lewis Bates, at the instance of John Bates, and John's bond for title surrendered to him. After this, in 1855, Lewis, at the instance of John Bates, executed to the appellee a bond for title, transferring to him the Sanders bond that was then on file in a suit involving the purchase money due by Sanders; the appellee *agreeing to take the same, with all incumbrances in regard to the title, without any recourse on Lewis Bates*. The incumbrances evidently referred to the lien existing, and not to the sale made by Lewis, at the instance of his brother, to Herndon.

The appellee agreed to pay John Bates the full value of the land, \$10,000 and the presumption of payment must necessarily arise after such a long period; and when this presumption is aided by the testimony of the appellee, corroborated by two or more witnesses who testify to facts within their own knowledge, as to the payment of the money, there is but little room for doubt on the subject. Although the bonds were executed in each instance by Lewis Bates, they were in fact sales made by John Bates. The right of the trustee, who was invested with the title, to sue the appellee, who was in possession, existed for several years prior to the death of the trustee. The statute of limitation then began to run, and the possession by the appellee ripened into a perfect title prior to the death of John Bates, whether the sale was made by him or his brother Lewis. Without, however, basing the right of the appellee upon the issue as to limitation, we are disposed to adjudge that all the parties, Lewis, John, and the trustee, regarded the transfer to the trustee as inoperative; and this accounts for the sale to the appellee, and an acquiescence in his claim and possession from 1854, until John's death, in 1876, and even after that period, as this action was not brought until the year 1882.

It is well settled that a voluntary fraudulent conveyance does not affect subsequent purchasers in good faith, even with actual notice. *Mason v. Baker*, 1 A. K. Marsh. 208; *Lewis v. Love's Heirs*, 2 B. Mon. 345; *Enders v. Williams*, 1 Metc. (Ky.) 346. We might well affirm this judgment upon a want of notice, on the part of T. W. Bates, of the sale to Herndon, but, as the testimony is conflicting, we have assumed that he knew of that transfer, and that, the object in view of making that transfer being well understood by the parties to it, no importance was attached to its legal effect when John undertook to sell to others. It is certainly unreasonable to suppose that any one possessed of the most ordinary business capacity would enter upon, improve, and care for such a farm as the one in controversy, for such a period as embraced the energy and enterprise of his manhood, without being the owner, or otherwise interested than to hold at the mere sufferance of those who at their will and pleasure could demand the right to enjoy the fruits of his labor.

The judgment below is affirmed.

JENKINS v. COMMONWEALTH.

(Court of Appeals of Kentucky. June 11, 1887.)

JURY—IMPANELMENT—CHALLENGES.

Under the Criminal Code of Kentucky, each party to a criminal prosecution is entitled to a *full* panel of jurors, found, upon examination, qualified to try the case, before being required to exercise the right of peremptory challenge to the individual juror; and, whenever the number is lessened by challenge of either party, the panel must be again filled before being passed on, and so on until the jury is completed.

Appeal from circuit court, Franklin county.

Indictment for murder.

The Criminal Code of Kentucky contains the following provisions:

"Sec. 191. When an error of fact in a criminal prosecution is about to be tried, the clerk shall draw, in the manner directed by the General Statutes, the names of twelve jurors, who, if not challenged by the parties, nor excused by the court, shall compose the trial jury.

"Sec. 192. When a juror is excused, or challenge to a juror sustained, the clerk shall draw the name of another juror to fill the panel, until the list of standing jurors is exhausted, when the court shall order such a number of qualified jurors as it shall deem sufficient to complete the jury, to be summoned by the sheriff, and the panel shall be filled, from time to time, from the jurors so summoned, and, if they be exhausted, similar orders may be made for summoning other jurors until the jury is completed."

"Sec. 201. The challenge to the individual juror is either (1) peremptory, or (2) for cause.

"Sec. 202. It must be taken before he is sworn in chief, unless the court, for good cause, permit it to be made at any time before the jury is completed."

"Sec. 215. The challenges to the juror shall first be made by the commonwealth, and then by the defendant, *and each party must exhaust his challenge to each juror before the other begins.*"

James A. Scott, L. F. Johnson, and P. U. Major, for appellant.

The crowning error of all was the refusal by the court below to follow the settled law and practice, as laid down by this court in the *Munday* and *Edrington Cases*, in the impaneling and selection of the jury. In this case 12 jurors were drawn and sworn to answer questions. The first one questioned was legally qualified to try the case, but, before the fact could be ascertained that the others were qualified, the court compelled both the commonwealth and the appellant to exercise the peremptory right of challenge, saying, at the time, that no other opportunity would be given. It turned out, upon examination, that some of the remaining 11 were disqualified, and ordered to stand aside by the court, so that appellant did not have 12 qualified jurors in the box from which to choose. As fast as the jurors stood aside for cause, the court ordered the clerk to draw the name of others, who took the places of the disqualified jurors, and remained dumb until the examination of those remaining had been proceeded with; the idea of the court being that the Code only required a full box to be presented, without regard to qualifications. This makes a much stronger case for the appellant than the *Munday Case*. In that case the 12 jurors composing the panel were found, upon examination, to be qualified. The court never required the commonwealth or Munday to exercise the peremptory right of challenge before they had been inquired of touching their qualifications. There the defendant complained of the court's ruling that, if any of the 12 previously found to be competent were left unchallenged, they would be regarded as accepted. In the opinion of this court, reversing that case, this language is used: "Under the Code, each party is entitled to have a full panel of twelve jurors, found, upon examination, qualified to try the case, before being required to exercise the right of challenge to the individual juror." See *Munday v. Com.*, 81 Ky. 236.

In the *Edrington Case* the clerk drew the names of 12 jurors, "and each juror was examined touching his qualifications, and as each juror was examined, if he was found to be competent, the parties were required to either accept or challenge him." See Bill of Exceptions, 25, in the case of *Edrington v. Com.*, Taylor circuit court, 1885, not reported. In that case this court, in its opinion reversing the judgment of conviction for manslaughter, said: "Instead of requiring the attorney for the commonwealth to pass upon the first juror found upon examination to be qualified, and, if accepted, to require the defendant to pass upon him as seems to have been done in this case, a full panel of 12 jurors, found upon examination qualified to try the case, should

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have been presented to the commonwealth for its acceptance or challenge, and, if accepted, then the full panel should have been presented to the accused for his acceptance or challenge." "We think the accused had the right to a full panel, upon being called on to accept or reject any one juror, and that the court erred in denying the right, and therefore the judgment must be reversed." The error of the court in *Edrington's Case* is identical with the error of the court in appellant's case, except that in this case the same error was repeated until the jury was completed. In that case the defendant was convicted for only two years; in this case the appellant, in the morning of his life, is doomed to have the prison doors close upon him forever. Crim. Code, §§ 192, 215; *Edrington v. Com.*, MS.; *Munday v. Com.*, 81 Ky. 236; *Mickey v. Com.*, 9 Bush, 595.

P. W. Hardin, for appellee.

LEWIS, J. In the case of *Munday v. Com.*, 81 Ky. 233, it was decided that, under the Criminal Code, each party in the trial of a criminal prosecution is entitled to a full panel of jurors, found upon examination qualified to try the case before being required to exercise the right of challenge—that is, peremptory challenge—to the individual juror; and, whenever the number is lessened by challenge of either party, the panel must be again filled before being passed on, and so on until the jury is completed. In that case the lower court seems to have observed the above rule in the formation of the trial jury; and the question presented in the appeal of the defendant was whether, after having failed to accept or peremptorily challenge a particular juror found after examination qualified, and only presented for the acceptance or challenge of both the commonwealth and the defendant, he had the right thereafter to do so; and it was held he had not.

In the case of *Edrington v. Com.*, decided November 24, 1885, MS. op., the rule laid down in *Munday v. Com.* was adhered to, the following language being used: "A full panel of twelve jurors, found, upon examination, qualified to try the case, should have been first presented to the commonwealth for its acceptance or challenge, and all not then challenged should have been regarded as accepted. Then the full panel should have been presented to the accused for his acceptance or challenge, and all not then challenged should have been regarded as accepted, and not subjected to be again passed on by either party. But, in case of the challenge of one or more by either party, the vacancies should have been filled from time to time, so as to present to each party for acceptance or challenge twelve qualified jurors, including those already accepted." By the term "qualified jurors," used in the connection it was, it could not well be understood otherwise than jurors found qualified, after examination, to sit in that particular case.

The mode described in the two opinions referred to, and which this court decided was the proper one in the formation of the jury, was disregarded and violated by the lower court in this case, and the judgment is therefore reversed, and remanded for a new trial consistent with this opinion.

WILSON v. COMMONWEALTH.

(Court of Appeals of Kentucky. June 16, 1887.)

Appeal from circuit court, Owen county.

Wm. P. Thorne, for appellant. *P. W. Hardin*, for appellee.

LEWIS, J. * * * The mode described in the two opinions referred to, [*Munday v. Com.*, 81 Ky. 233, and *Edrington v. Com.*, MS.] and which this court decided was the proper one in the formation of the jury, was disregarded and violated by the lower court in this case, and the judgment is therefore reversed and remanded for a new trial consistent with this opinion. See *Jenkins v. Com.*, ante, 816.

PARRISH and others v. PARRISH'S TRUSTEES.

(Court of Appeals of Kentucky. June 18, 1887.)

WILL—CONSTRUCTION.

A testator having in his will made devises of specific personal property to his son, D. N., who was at that time an infant, and to the testator's widow, made provision for the education of said D. N.; and directed that the residue of his estates should go to his wife during life or widowhood, or until his son's majority, whichever should first occur. After either one of these events the widow was to have a certain specific part of the estate, and the testator's son D. N. the balance in fee-simple. The testator then directed: "Subject to the interest devised by this will to my wife, I give the whole of my estate to my son D. N.; but, should he die without lawful children or grandchildren living at the time of his death, then in that event the whole of the estate devised to him is to go and belong to my wife." *Held*, in an action to construe said will, that, whether the estate given to D. N. be an absolute or defeasible fee, the children of D. N. can in no possible event claim any interest therein as devisees under the will of their grandfather.

Appeal from common pleas court, Clark county.

J. M. Benton, for appellants. *Geo. B. Nelson* and *W. M. Beckner*, for appellees.

LEWIS, J. D. A. Parrish, the only son, and T. A. Parrish, the widow, of D. W. Parrish, deceased, having, by a joint deed, conveyed certain property claimed by them under the will of the decedent to appellees W. B. and G. B. Nelson in trust for the payment of their debts, the assignees instituted this action for the purpose of obtaining a judicial construction of the will, Charles S. Parrish, the infant child of D. N. Parrish, being made a defendant; and, the lower court having adjudged that the infant defendant had no estate under the will, he, by his guardian *ad litem*, appeals to this court. After having, in his will, made devises of specific personal property to his son, who was at the time, 1877, an infant, and to his widow, and made provision for the education of his son, the testator proceeds as follows: "The whole of the residue of my estate not herein specifically given to my wife and son I give to my wife for and during the time she may remain my widow, or until my son shall arrive at the age of twenty-one years, whichever shall happen first. From and after my son's attaining his majority, or the marriage of my wife, if she shall marry, she is to have such portion only of my estate as is specifically bequeathed to her in the second clause of this will, and such portion of and interest in the balance of my estate as the law gives to a widow by way of dower and distribution, and my son is to have the balance of my estate in fee-simple. Upon the arrival of my son at the age of twenty-one years, he is to have five hundred dollars in addition to the specific legacies hereinbefore mentioned. The whole balance of the estate herein devised to him may, in the discretion of my wife, or, in the event of her marriage before he attains the age of twenty-one years, of his guardian, be placed under his control, and shall be when he shall have attained the age of twenty-five years. Subject to the interest devised by this will to my wife, I give the whole of my estate to my son, Dabney Nelson Parrish; but, should he die without lawful children or grandchildren living at the time of his death, then, in that event, the whole of the estate devised to him is to go and belong to my wife."

The only theory upon which Charles S. Parrish, the infant child of D. N. Parrish, or any other children he may have, could claim any interest under the will, is that D. N. Parrish takes thereunder only a life-estate, and that, upon his death, such of his children or grandchildren as may survive him will be entitled to a remainder interest, not as his heirs at law or devisees, but under the will of their grandfather. It seems to us clear that the testator did not intend to give D. N. Parrish merely a life-estate. On the contrary, his language is, "My son is to have the balance of my estate in fee-simple." It is equally clear that under the will he does not take an absolute fee; for the

language is plain and unambiguous that, if he should die without lawful children or grandchildren living at the time of his death, in such event the whole of the estate devised is to go to and belong to the testator's wife. Nor can the time of his death be fairly made to refer to either the life-time of the testator, or the period between the death of the testator and the time of the son arriving at the age of 25; for it could not have been contemplated that, in the course of nature, the son would die upon the age of 25 leaving grandchildren. According to the only construction that can be properly put upon the will, the widow was given the whole estate during the time she remained a widow, or until the son arrived at the age of 21 years; the remainder in fee to the son, subject, however, to be defeated in case of his death without children or grandchildren, in which event it goes to the widow. But whether the estate devised to D. N. Parrish be an absolute, or, as we think it is, a defeasible fee, his children can in no possible event take any interest therein as devisees under the will of their grandfather. As the widow and son of the testator unite in the conveyance to appellees, they have acquired an absolute and indefeasible title to the property conveyed, or at least so much of it as was devised by the testator D. W. Parrish. Judgment affirmed.

ESTEP v. COMMONWEALTH.

(Court of Appeals of Kentucky. June 16, 1887.)

1. HOMICIDE—SELF-DEFENSE—RIGHT TO REMAIN IN DWELLING-HOUSE.

To defend his own wife and himself from a murderous assault, committed in defendant's house by deceased and his wife, defendant shot deceased with a pistol. On trial for murder, the court, in instructing on the law of self-defense, made it a condition of the right to take the life of deceased that defendant had no other safe means of escape from the danger. *Held* erroneous and misleading, as it implied a duty of defendant to leave his own dwelling-house. Defendant had a right to remain in his house, and defend himself and its inmates.

2. SAME.

An instruction making defendant's right of self-defense depend on the fact that deceased had sought him out for the purpose and with the intent to kill him, or inflict great bodily harm, and was when the shot was fired manifesting an intention to commence the attack, is erroneous. A person, when assaulted in his own dwelling, is not in any case required to retreat therefrom to avoid his assailant; but if he believes, and has reasonable grounds to believe, that one is about to take his life, or inflict great bodily harm upon him, in his own dwelling-house, he has the right to defend himself then and there, and is not required to escape therefrom.

3. SAME.

Defendant requested the following instruction: That if the jury "believe from the evidence that, at the time of the difficulty, the wife of the deceased was making an assault upon the wife of the defendant, and that the deceased was present aiding and abetting his wife in making said assault, and the defendant believed, and had reasonable grounds to believe, that death or great bodily harm was then about to be inflicted upon his wife, he had a right to use all necessary means to protect his wife, even to slaying the deceased." *Held*, that a refusal to give the instruction was error.

Appeal from circuit court, Pike county.

Connally & Cline and *R. T. Burns*, for appellant. *P. W. Hardin*, for appellee.

LEWIS, J. Appellant being indicted for the murder of Martin Scarberry, brother of his wife, was convicted of manslaughter, the homicide occurring, according to the testimony, under the following circumstances: The residences of the two men were not much more than one-quarter of a mile apart, and on the day of the killing the wife of the deceased, leaving him a short distance from it, went alone into the dwelling-house of appellant, where he, his wife, and others were, and, without speaking to any of them, seized a tin cup; whereupon appellant's wife said to her she took a good deal of authority there, to which she replied that she took enough to get her things, and would also take

her tea-kettle; and the other then told her to take her things, get out of the house, and stay out. She did then go out, but soon returned with a rock under her apron, took a seat, and remarked she intended to stay there an hour for aggravation. The two women, between whom there appears to have been ill feeling, then renewed the quarrel, but what was said by them does not appear. While they were thus engaged, the deceased rapidly approached the house, having rocks in his hands; but, when near to it, he sat down on a log, and, after sitting there a moment, he sprang into the house, and, jumping up two or three times, said with an oath, having the rocks still in his hands, he was the first man who ever jumped into that house. Thereupon his wife threw the rock she had under her apron at the wife of appellant, which struck the side of the house near her head. The two women then clinched each other, and fell upon the floor. The wife of the deceased, having the advantage, commenced to hit the other in the face with her fist. Appellant, who does not appear from the testimony to have previously said or done anything, then went up to the deceased, and putting his hands on his shoulder, said: "Martin, old brother, you take your wife out of here, and I will take care of mine, and let us have no fuss. Peace is the best thing." To which the deceased replied with an oath, he had come there for satisfaction, and was going to have it. He, in that connection, in the language of the witness, asked appellant "about some talk;" in reply to which the latter said "he had not had it," and asked if that would not satisfy him. But the deceased again said he had come there for satisfaction, and was going to have it. Appellant then started as if going to part the women, who were still fighting, when the deceased pushed him back, saying: "G—— d—— you, stand back, or I will kill the last G—— d—— one of you." A woman present testifies that she also started to part the women, but was likewise shoved back by the deceased, who then threw up his right hand, still having the rocks, and was at that time shot by appellant with a pistol, the ball entering his back, as the witnesses say, where the suspenders crossed, and from the effects of the shot he died in a few days. The two women continued to fight after the shot was fired until parted by appellant and the women who had before attempted to do it. The evidence shows that the deceased was the best man in the neighborhood as to physical strength, and his character for violence was bad.

As the jury alone have the right to judge of the weight to be given to the evidence, and the credibility of the witnesses, the only question before us is whether the lower court properly and fully instructed as to the law applicable to the case.

In the third instruction it is made a condition of the right of appellant to take the life of the deceased that he had no other safe, or apparently safe, means of escape from the impending danger to himself. The instruction in that particular is erroneous and misleading; for it implied a duty of appellant to escape, even by leaving his own dwelling-house, which had been entered by the deceased in a lawless manner, and with what was equivalent to a threat of violence to the inmates; whereas he was not required to leave it, but had the right to stand his ground, and defend himself, as well as the inmates of his house. In the fourth instruction the right of the appellant to stand and defend himself is made to depend upon the fact that the deceased had sought him out for the purpose and with the intent to kill him, or inflict great bodily harm; and was, when the fatal shot was fired, manifesting an intention to commence the attack. No such conditions are or should be annexed to the right of a person to defend himself when assaulted in his own dwelling-house, nor is he in any case required to retreat therefrom to avoid his assailant; but if he believes, and has reasonable grounds to believe, one is about to take his life, or inflict great bodily harm upon him in his own dwelling-house, he has the right to defend himself then and there, and is not required to escape therefrom.

Instruction No. 2, asked by appellant, and refused by the court, it seems to us is even less favorable to the appellant than he was entitled to have it. It is as follows: "If they believe from the evidence that, at the time of the difficulty, the wife of the deceased was making an assault upon the wife of the defendant, and that the deceased was present, aiding and abetting his wife in making said assault, and that the defendant believed, and had reasonable grounds to believe, that death or great bodily harm was then about to be inflicted upon his wife, he had a right to use all necessary means to protect his wife, even to slaying the deceased." We are unable to perceive upon what ground the lower court refused that instruction; for the defendant was certainly entitled to an instruction embodying substantially the principle contained in it.

It certainly could not have been upon the supposed want of evidence that the deceased did aid and incite his wife in making the assault, for she did not throw the rock with which she had armed herself until the deceased had forcibly and violently entered the house similarly armed, and obviously with hostile intent. Moreover, when appellant requested him to take his wife away, that there might be peace, he refused to do so, and even with force prevented appellant from separating the two women. But in our opinion it was unnecessary that the deceased should have aided and abetted his wife in making the first assault with the rock upon the wife of the appellant, in order to give the latter the right to rescue his wife from her assailant, and defend her against further violence. His wife having been unlawfully assaulted with a rock, and then being beaten in his own house, he had the unquestionable and unconditional right to go to her rescue and defense; and if, by force or threats, the deceased endeavored to prevent him, he had the right to oppose force to force; and if he at the time believed, and had reasonable grounds to believe, his wife was in immediate danger of losing her life, or suffering great bodily harm, he had the right to use whatever reasonable means were necessary, or reasonably appeared to him to be necessary to rescue or defend her, even to taking the life of the deceased.

For the errors indicated the judgment is reversed for a new trial and further proceeding consistent with this opinion.

DAVIS v. DAVIS.

(Court of Appeals of Kentucky. June 16, 1887.)

1. DIVORCE—DECREE—REVERSAL.

Although the court of appeals of Kentucky has not power to reverse a judgment for divorce, still, where, in the husband's action, the court below erroneously strikes out from the wife's answer a good and valid defense, and erroneously denies her application for leave to file an amended answer setting up a valid affirmative ground for divorce and alimony, and grants a divorce to the husband, denying alimony to the wife, the appellate court will reverse the judgment, and remand the case, in order that a proper provision for alimony be made to the wife.

2. SAME—ACTION BY HUSBAND—ALIMONY.

Where a wife who had a young son and daughter by a former marriage, on going to her husband's home, found there two daughters of the husband, each the mother of a bastard child, and living, openly, the lives of lewd women; and where the husband also, by his lewd, adulterous conduct and cruelty, made her home unendurable, and unfit for the occupancy of her children: *held*, on appeal from a judgment of divorce in the husband's favor, on the ground of abandonment by her, that she was justified in abandoning his home, and was entitled to alimony, notwithstanding the statute, literally construed, only gives alimony where the divorce is obtained by the wife, (Gen. St. Ky. c. 52, art. 3, § 6;) it being clear that the husband was in fault, and that the decree should have been in the wife's favor.

Appeal from circuit court, Boyd county.

R. C. Burns, for appellant. Prichard & Cobb, for appellee.

LEWIS, J. Appellee, the husband, instituted this action against his wife, appellant, for judgment of divorce from the bonds of matrimony, upon the alleged ground that a few days more than one year previously she, without any cause, wrongfully abandoned him, leaving his residence, and going to the state of Missouri, where she then resided. At the first term of the court after the institution of the action, appellant, though only constructively summoned, entered her appearance, and filed an answer, denying she wrongfully or without cause abandoned the plaintiff. She states that at the time of their marriage appellee sought her in the state of Missouri, where she then resided, and by reason of his representations she was induced to marry him, sell her property at a sacrifice, and come with him to Kentucky; that from the time of their marriage to the separation she was a faithful and devoted wife, but his conduct was so vulgar, adulterous and lewd as to render his home and society unendurable for a decent woman, and he was, besides, cross, quarrelsome, and abusive; that at the time of their marriage she had a daughter just grown, who was virtuous and chaste, and a son about 14 years of age, both of whom were dependent upon her for a support, and that in consideration of her agreement to marry him, appellee agreed for her two children to come to Kentucky, and to reside with appellee as members of his family, and they did do so; but that appellee had two grown daughters, members of his family, then and so continued until the separation, each of whom was the mother of a bastard child, and were lewd women, and that appellee fraudulently concealed that fact from her. And she in substance states that she left the residence of appellee to prevent the contamination of her own children, and the blasting of her daughter's reputation, by the association which a residence with appellee and his two daughters required.

Upon motion, the court struck out all that part of the answer which related to the conduct of appellee towards her, and the character and conduct of his daughters. Subsequently, appellee moved to file two amended answers, but her motion in each instance was overruled. In addition to the allegations contained in the original, she states in the amended answers substantially that, after having left the residence of appellee, she sent messages to him to visit her for the purpose of preparing a home for her apart from his lewd daughters, but he returned no answer, and thereupon she went to the state of Missouri, having no other place to go. In the second amended answer, which was made a counter-claim, she states that after their marriage he habitually behaved towards her in such cruel and inhuman manner as to indicate a settled aversion to her, and was so violent and abusive to her as to make her afraid to live with him. She therein prayed judgment for divorce, and, as was also done in her original answer, asked for alimony. But the lower court rendered judgment divorcing the parties, and dismissing her counter-claim.

As this court has no power to reverse a judgment for divorce, the only question presented by this appeal for our decision is whether, assuming the statements made by appellee in her pleadings to be true, she is entitled to alimony. Section 6, art. 3, c. 52, Gen. St., provides that, "if the wife have not sufficient estate of her own, she may, on a divorce obtained by her, have such allowance out of that [estate] of her husband as shall be deemed equitable, and be restored to the name she bore before marriage, if she desires it."

Though the judgment rendered is that "the plaintiff, William Davis, and the defendant, Sarah Davis, be, and they are hereby, divorced from the bonds of matrimony as husband and wife," yet it cannot be considered literally "a divorce obtained by her;" for her answer and counter-claim were dismissed, and a divorce upon the ground of "abandonment by the one party of the other for one year," by the terms of section 1, same article, can be granted only "to the party not in fault." It is true, section 2 provides that "a judgment of divorce authorizes either party to marry again;" but such judgment can, for

the cause mentioned, be strictly rendered in favor of but one of the parties. If, however, the allegations made by appellant be true, it is clear, not only that appellee was in fault, and consequently not entitled to the judgment of divorce, but she was entitled to it, and, as a necessary sequence, also to alimony.

We have thus an erroneous judgment, which cannot be reversed by this court, nor overruled by the court which rendered it, except upon the joint application of the parties, that nevertheless, if given its full effect, operates, not merely to give appellee a divorce to which, as the record stands, he was not legally entitled, but to deprive appellant of alimony to which she was entitled, and that would have followed the judgment which the court ought to have rendered. For if it be true, as alleged by her, that he, after their marriage, habitually behaved towards her in such cruel and inhuman manner as to indicate a settled aversion to her, a statutory cause for divorce existed, and she was entitled to a judgment divorcing her from him; and the lower court ought to have permitted her amended pleadings filed, and the issue thus tendered to be tried. Moreover, if it was true, as alleged by her, that his two daughters had bastard children, and continued, as members of his family, to be guilty of fornication, appellee was not only justified, but impelled by considerations that neither moral nor municipal law requires to be disregarded, to leave the house of appellee, and take her daughter and son with her. For it seems to us that if appellee tolerated the conduct of his daughters which it is alleged they were continually guilty of, saying nothing about the monstrous and bestial crime indirectly charged against him, her abandonment of him, if in the meaning of the statute she did abandon him, was as much the result of his fault as if he had, by the actual use of physical force, compelled her to fly to save her life. But we do not understand that the mere act by the wife of leaving or departing from the abode of the husband, or from him, is necessarily abandonment, in the statutory sense of the word, nor that he may not himself be guilty of abandonment by compelling her, as a condition of living together, to expose herself and children to a moral pestilence. But, whether such treatment of her by him be regarded as strictly abandonment or not, we are satisfied it is, in the true meaning of the statute, "behaving towards her in such cruel, inhuman manner as to destroy permanently her peace or happiness," if she be a chaste woman.

The question then arises whether appellant can be deprived of alimony, to which she was, as this record is presented to us, entitled, simply because the judgment of divorce was not "obtained by her," as should have been the case, but improperly and illegally obtained by the husband instead of her. It seems to us that, while judgment of divorce is not subject to reversal, it was not intended, nor should the statute be construed so as to permit such judgment, to illegally and disastrously affect property rights of either party.

In the case of *Hulett v. Hulett*, 80 Ky. 364, this court used the following language: "The marital obligation of the husband imposes upon him the duty of supporting and maintaining the wife; and in a case where the husband has abandoned the wife, or where his treatment of her is such as to compel her to flee to the parental roof, why, as was said in the case of *Butler v. Butler*, should the chancellor acknowledge the right, and deny the remedy?" The question in that case was as to the right of the wife to maintain an independent action for alimony, without regard to a divorce; and the following language, used in *Butler v. Butler*, 4 Litt. 206, was quoted with approval: "The chancellor before the statute, and since, in cases not embraced by it which have strong moral claims, had and has jurisdiction to decree alimony, leaving the matrimonial chain untouched; and these authorities deciding in favor of the jurisdiction should prevail."

To deprive the wife of alimony in a case like the one before us, in our opinion, would be contrary to the spirit and policy of the law. If, therefore, ap-

pellant left the domicile of appellee for the causes stated by her, she did what she should be commended for and upheld in, and the erroneous judgment in favor of appellee should not operate to deprive her of alimony.

The court, we think, erred in sustaining the motion to strike from the original, as well as in overruling the motion to file the amended, answers. Judgment is therefore reversed, and cause remanded for further proceedings consistent with this opinion.

TERRELL v. ROWLAND and others.

(Court of Appeals of Kentucky. June 16, 1887.)

1. EXECUTORS—ACCOUNTS—PLEADING—APPEAL.

Where, in a proceeding to surcharge and falsify an executor's account once settled, the averments of the pleadings are so general as to be open to objection, if no objection is made, and the parties go to trial, the appellate court will consider the accountant's right to certain credits relied on by him as made out by the pleadings.

2. SAME—ALLOWANCE OF DEMAND—VERIFICATION.

The provision of sections 35, 39, art. 2, c. 39, Gen. St. Ky., that no demand against a decedent's estate shall be paid by the personal representative, or allowed him as a credit, unless such demand shall have been verified by the written affidavit of the claimant, should not be so applied as to preclude, in a suit to open an executor's account, the allowance of an unverified demand allowed on the original settlement 13 years before; the executor and the testator having been partners, and the executor having been cognizant of the fact that the copartnership owed the demand, and having paid, in good faith, not only the testator's share, but his own; especially when the executor's written deposition, stating the fact, is of record in the suit to open the account; such deposition being more satisfactory than an *ex parte* affidavit would have been, and properly operating, *nunc pro tunc*, as such affidavit. Nor has the rule that a surviving partner cannot, by settling a claim against the copartnership, bind the estate of the deceased partner, any application.

3. SAME—COMPENSATION—PARTNER AS EXECUTOR.

A partner is not, in the absence of an agreement, entitled to compensation for winding up the business of the firm after its dissolution; and, if he is executor of the estate of his deceased copartner, he cannot make such compensation a charge against the estate.

Appeal from circuit court, McCracken county.

J. M. Bigger, for appellant. *T. E. Moss* and *J. W. Bloomfield*, for appellee.

HOLT, J. Isaac Clark died testate in November, 1858, leaving his widow, Juliana Clark, and his five children,—Fannie, who married the appellee Reuben Rowland, Ora, Luella, Luther H., and Anna Clark,—as his devisees. The last named died intestate, and without heirs, in 1860. The testator, at the time of his death, owned a large estate, consisting of lands in Illinois and in some two or three counties in this state, town lots in the city of Paducah, and considerable personalty, but embracing no money. His indebtedness at that time was also considerable. He appointed the appellant, T. F. Terrell, in whom he appears to have had great confidence, his executor, giving him, by the terms of the will, much discretionary power in the conduct of the estate. Thus he authorized him to sell the Illinois lands "at such time and on such terms as he may think proper for the interest of my estate;" sell certain portions of his estate in Kentucky when his youngest child should become of age, "at such time, and on such terms, as he may deem proper;" improve such of certain town lots as he might deem best; rent out the property save that devised to the widow; compromise any debts due the testator if, in the opinion of the executor, the interest of the estate required it; provide for and superintend the support and education of his children,—the will expressly providing that, by reason of this last provision, no guardian should be appointed for them. In short, the executor was given the entire management of the estate, and the control of the greater portion of the property, with large discretionary power; it providing, however, that the children were to come into possession of certain portions of it, which were not to be sold, at the peri-

ods named in the will, while the executor was authorized to sell other portions of it at any time, in his discretion, and other portion at such time after the youngest child became of age as he might deem best. The will also provided that the executor should not be required to settle his accounts in the county court as often as required by the general law; "but that he do so as soon after my death as practicable, say within three months, and at least once every five years thereafter;" and, in speaking of his compensation, it says: It is my desire and wish "that my executor shall receive a full, ample, and liberal compensation for his service in the discharge of his duties in the management of my estate. It is not my wish to confine his compensation merely to what the law would allow him, as in many cases his services to my estate would be worth much more than the law allows."

The appellant, Terrell, at once assumed the execution of the responsible and arduous trust thus confided to him; returned an inventory of the estate to the proper court, but made no settlement until October 8, 1868, when he did so, and it was confirmed by the county court. It embraced a great many items of debit and credit, and a balance was found due the executor of \$3,037.13, leaving in his hands, however, unpaid notes belonging to the estate amounting to \$14,400.59. In this settlement the executor was allowed for his services \$3,464.54, being the 5 per cent. allowed by the statute upon the amount disbursed, and also \$5,000, or \$500 per year, for the period from his qualification to the date of the settlement. He was also allowed as credits what in that settlement is known as voucher No. 309, for \$6,699.30, being an execution debt in favor of the Commercial Bank of Kentucky against the firm of Clark, Terrell & Co., and voucher No. 310, for \$113, being the sheriff's half commission upon said debt, and both of which sums were paid by the appellant.

In 1871 the appellees Rowland and wife brought an action against the appellant to compel a settlement of the estate, but abandoned it, expressing regret that they had instituted it, and a belief that the management of the estate by the appellant was the best possible under the circumstances. Thus matters continued until February 18, 1882, when Rowland and wife brought this action, seeking to review and surcharge the county court settlement of 1868, to compel a settlement of the estate by the appellant, and a division of any assets in his hands, and to procure a partition of the unsold lands. The widow and other devisees were made defendants, and they, by cross-pleadings against the appellant, sought the same relief. Upon the one side gross mismanagement and fraud is charged; while upon the other this is denied *in toto*, and it is asserted that the estate has been so managed that but for its indebtedness would have consumed it, leaving the widow and children paupers, whereas they now have an estate equal or exceeding in value all the property owned by the testator at his death, and free of debt.

After a careful reading of the entire and voluminous record we are satisfied that the charges of bad faith and fraud upon the part of the executor are unfounded. The case was referred to a commissioner, before whom the appellant appeared, with a full statement in writing of his receipts and expenditures, and its correctness is supported by his testimony. In addition to the compensation allowed him in the settlement of 1868, he claimed \$7,092, of which \$3,026 is for 5 per cent. upon the disbursements by him since 1868, and \$4,066 is for extra services for that period, or at the rate of \$800 a year. Among the credits claimed by the executor is one represented by voucher No. 119. A brief history is necessary to a correct understanding of it.

In 1856 the firm of Terrell, Clark & Co. was formed for the purpose of engaging in the rolling-mill business. It purchased, at heavy expense, a rolling-mill in Paducah, Kentucky, and operated it for a short time. The firm was composed of the appellant, Terrell, who owned one-sixth interest, J. H. Terrell, who represented a like interest, D. Watts and D. A. Given, of the firm of Watts, Given & Co., owning one-third interest, and the testator, Isaac

Clark, who had a like interest. The enterprise proved a disastrous one pecuniarily, and in the midst of it Clark died. At this time the business was in such condition that it could not be settled as between the partners. The war came on. The military took possession of and used the mill, and it was finally sold by the surviving partners at a heavy loss. While it was operated by the firm, their accounts were kept upon the books of the banking firm of Watts, Given & Co. All of the members of this firm were not members of the firm of Terrell, Clark & Co., and the latter became largely indebted to the former firm. Some of this indebtedness, according to the testimony of the appellant, Terrell, accrued before, and some of it after, the death of Clark; but it is not shown what portion was in existence before his death, or what accrued after; and, indeed, the items of it are not shown at all. The appellant, Terrell, attended mainly to winding up the business of the firm; and he testifies that he, as one of the survivors, and as the executor of Clark, together with the other surviving members of the firm, made a settlement with the survivors of Watts, Given & Co., and after examination of the books of the latter firm in 1868, it was then ascertained and agreed between them that Terrell, Clark & Co. were indebted to Watts, Given & Co. in the sum of \$34,549.77, of which Clark's portion was one-third, or \$11,515.59. Watts, Given & Co., by written assignment, transferred \$8,000 of this last-named sum to one Britt; and when Terrell, as executor, paid it off, it amounted to \$8,840. They also gave an order on him, as executor of Clark, to one J. H. Terrell for the balance; and, when paid, it amounted to \$3,663.11.

The appellant presented to the commissioner an account of what he had paid out for Terrell, Clark & Co., not including, however, the sums paid to Britt and J. H. Terrell, credited by what he had received of firm assets, leaving a balance in his favor of \$2,795.02, of which Isaac Clark's portion would be the one-sixth, or \$931.67. He also filed an account against his testator's estate in his favor, and as growing out of the firm matters of Terrell, Clark & Co., for the sums thus paid Britt and J. H. Terrell, and the \$931.67, crediting it by vouchers No. 309, for \$6,699.30, and No. 310, for \$113, of the county court settlement of 1868, leaving a balance due him of \$6,622.48, for which he claims credit with the estate of his testator; and this claim is known in this record as "Voucher No. 119." The commissioner allowed the credits for vouchers Nos. 309 and 310 as given in the settlement of 1868 to stand; allowed to the appellant the balance of \$6,622.48 as per voucher 199; and remitted the question of the executor's compensation to the court. It reduced the claim of \$7,092, for services, to \$5,000; charged the executor with the amount of vouchers Nos. 309 and 310 of the county court settlement; and rejected voucher No. 119,—thus refusing to allow him the sums paid by him to the Commercial Bank, Britt, and J. H. Terrell, and the \$931.67 aforesaid. Of this he now complains; and this action of the lower court, as this record stands, is alone to be considered.

The charges against the executor, that he improperly compromised the Boone and Larman debt; that he negligently failed to sell the rolling-mill at a fair price, and when he could have done so, or the Illinois land, and with the proceeds of the latter have improved the Paducah lots; and that he negligently failed to rent them out for a term of years, and have them improved in payment of the rent, are, in our opinion, unsustained by the record. In any event, we cannot review them, as there is no cross-appeal.

It is urged that the judgment below must be affirmed because the entire record has not been brought up by the appellant. The appeal was granted by the lower court before the repeal of the law requiring the filing of an assignment of errors; and, as it is a suit to settle the estate of a decedent, the appellant presented this assignment of errors to the trial judge, and he directed what parts of the record should be copied for the appeal. This, however, was done after the legislature had by the act of April 4, 1884, repealed the law re-

quiring errors to be assigned. Since its repeal, however, and now, an appellant in a chancery cause may bring up so much of a record as he deems necessary to the determination of a question involved. He does this at his peril, however, because if, upon the hearing, it appears that portions of either the pleadings or the evidence bearing upon the question have been omitted, the judgment below will be affirmed as in an ordinary action when all of the evidence is not before this court. *Brockle v. Brockle*, MS. opinion, April 3, 1886. This does not, however, appear in this case. The record shows that this estate was so complicated, and the duties growing out of the trust so numerous, that much labor was not only necessarily imposed upon the executor, but was in point of fact performed by him. He was, however, allowed for services, in the county court settlement, \$8,464.54. The judgment appealed from makes him a further allowance of \$5,000; and, in addition to this, he is allowed a considerable sum, as against the widow and three of the children, for attending to business for them which did not fall within his duties as executor, but which it is probable he could attend to the more easily by reason of being such personal representative. It is evident that the lower court carefully examined the case, and the conclusion arrived at in this respect will not be disturbed.

It is contended that the pleadings of the appellees do not support an attack upon the settlement of 1868. *Prima facie* the law presumes it to be correct. One seeking to surcharge and falsify a county court settlement of this character must, by pleading specifically, aver what items are incorrect, and state why they are so. In fact, this rule applies to a settlement of any character. For instance, in the case of a settled account between partners, the complaining party must distinctly specify the fraud or errors in his bill. *Adams*, Eq. 452. This rule of pleading has been applied in surcharging the settlements of fiduciaries, although persons under disability may be interested. The averments of the pleadings in this case in this respect are quite general. Briefly stated, they aver, as to each item of credit, that it is not verified or proven, and is unjust, and that the settlement was fraudulent. No objection, however, was made to the pleadings. The issue as presented by them was formed, and upon it the parties went to trial. Moreover, the question of the appellant's right to a credit for the vouchers 309 and 310 was again presented in this suit by the appellant himself, by his crediting the amount of them in voucher 119, as heretofore stated. We will therefore, even if it be a matter of doubt, consider the question as fully made by pleading, whether the appellant was entitled to credit by the vouchers which the judgment now in question rejected. It should be borne in mind that, when the county court settlement was made, in 1868, that two of the children of the testator were of age; and the credits for vouchers Nos. 309 and 310 were of record, and remained unchallenged by them or the widow until this suit was brought,—a period of over 13 years. Under such circumstances it should be presumed that the credit is correct; and, even if it appear that it should not at the time have been allowed, yet, if it is shown that the estate has not been injured, it should not now be disturbed. The judgment in favor of the Commercial Bank against Terrell, Clark & Co. was against the appellant as an individual, as well as executor of Clark. This being so, it should be presumed, at least after this lapse of time, that an affidavit as to the claim was made before the rendition of the judgment as required by the statute relating to claims against decedents. If there were assets of the firm of Terrell, Clark & Co. sufficient to pay it, or the debt owing to Watts, Given & Co., then these claims should have been paid out of them, and no part of them charged to Clark's estate. It is manifest, however, that this was not so, and that the firm, as such, was insolvent. The judgment being against the appellant individually, the creditor had the right to compel him to pay it all. If this had been done, then, as Clark's estate owed one-third of it, certainly any court would, in settling

with Terrell as executor, have permitted him to retain what he had paid as such third, and which had thus become his claim against the estate, provided it was made to appear that it was just as against Clark, although the original creditor had never made the statutory affidavit to the claim.

It appears that the appellant, as executor, paid the entire claim because he knew that the estate of his testator had not paid its proportion of the indebtedness of the firm. Conceding, however, that Clark's estate should only have been charged with one-third of it, and that the appellant should have been credited by only this much in the settlement of 1868, yet if the claim of the appellant, represented by voucher No. 119, is correct, then, as Clark's estate is therein credited by the full amount of vouchers 309 and 310, it results that the credit given for them in the county court settlement should stand, because the estate has not been injured.

It is contended that the appellant is not entitled to credit for the sums paid by him to Britt and J. H. Terrell in discharge of Clark's portion of the indebtedness of Terrell, Clark & Co. to Watts, Given & Co.—*First*, because it is not shown that any such indebtedness existed, and no itemized account of it is presented; and, *second*, because the statutory affidavit as to the claim was never made by Watts, Given & Co., nor was the claim proven. Sections 35 and 39 of article 2 of chapter 39 of the General Statutes provides: "All demands against the estate of a decedent shall be verified by the written affidavit of the claimant, or, in his absence from the state, by his agent, or, if dead, by his personal representative, stating that the demand is just, and has never, to his knowledge or belief, been paid, and that there is no offset or discount against the same, or any usury therein. * * * No demand against a decedent's estate shall be paid by his personal representative, or allowed as a credit by any commissioner or court, which is not verified by affidavit as required herein."

Manifestly, this statute was intended to furnish to the personal representative something to guide him in the settlement of claims against the decedent, and as to which he would in the great majority of cases have no knowledge. This being the reason for its existence, it should not be held to be an inexorable rule in courts of equity when suits are brought by the heir or devisee against the personal representative for a settlement and distribution of the assets in his hands after the payment of the debts. The spirit of the statute should be looked to for a construction and as a guide in its application. A personal representative may not know whether a claim is just or contains usury, or whether there is any set-off or discount against it, and *therefore* the law requires it to be verified and proven. Suppose A. presents a claim to B., the administrator of C., and demands its payment. B. says: "You must prove it." A. replies: "You know all about it; I will prove it by you." B. thereupon pays it without proof of it, since he does know all about it. Can it be said that a court of equity, in a controversy between him and the heir or devisee, cannot give him credit by it when it is shown to the court that it was a just claim? We think not. If so, then justice is defeated instead of promoted. It is clear that the claims of the Commercial Bank and of Watts, Given & Co. had a real existence, and that they were just demands. When this is shown in a contest between the personal representative and the distributee, is the latter to be allowed to gainsay their payment in a court of equity under the letter of a statute which was enacted to compel a showing of their justness in order that they might be paid?

When the claims were held by the bank and by Watts, Given & Co., the appellant was *himself* a competent witness to prove them, and could have been required to do so by the claimants. His deposition in this case, subject, as he was, to a cross-examination, is more satisfactory than an *ex parte* affidavit would have been. It operates *nunc pro tunc*, and authorizes the chancellor to allow the claims. The appellant testifies that the accounts of Terrell, Clark & Co.

upon the books of Watts, Given & Co. were open at all times to the inspection of the members of the firm; that he was at the time familiar with them, and knows that they were correct; that the surviving members of the two firms got together in 1868, and made a settlement; and, while he cannot now give the items, he knows that a balance of \$34,549.79 was found due to Watts, Given & Co., and that it was correct. There is no one else left now to testify as to it. The appellee Juliana Clark, testifying in March, 1883, says that the other members of the two firms are dead. As an evidence of the good faith in the matter, the appellant, as an individual, and member of the firm of Terrell, Clark & Co., paid his one-sixth of the indebtedness thus found due; and, indeed, it appears that all the members of the firm have paid their proper share of it. The appellant was a party to the settlement, both as a surviving partner and as the executor of Clark. It is true that the law in this state, as laid down in numerous decisions of this court, does not permit one partner, after the dissolution of the firm or a surviving partner, to settle a claim against the firm, and bind the other partner or his individual estate. *Montague v. Reakert*, 6 Bush, 393; *Merritt v. Pollys*, 16 B. Mon. 355; *Bacon v. Hutchings*, 5 Bush, 597. A surviving partner may, however, make a settlement by way of ascertaining what is owing to a creditor. In this case, however, the executor was individually liable for the entire debt due to Watts, Given & Co. They could have compelled him to pay all of it. If he had done so, will it be contended that he could not have retained enough of the funds of the estate in his hands, as executor, to reimburse himself as to the portion which was in fact owing by his testator. When he paid the portion of his testator, as he unquestionably did, it became a debt in his favor against the estate of his testator; and, as he now shows it to be a just claim, it should have been allowed.

The above views are in harmony with those expressed in the cases of *Overly's Ex'r v. Overly's Devises*, 1 Metc. (Ky.) 117; *Lucking's Adm'r v. Gegg*, 12 Bush, 298; *Berry v. Graddy*, 1 Metc. (Ky.) 553; and *Hoyt v. Sprague*, 8 Reporter, 616; and seem to us to accord with the equitable rule laid down in *Perry on Trusts*, (section 485:) "That the *cestui que trust* ought to save the trustee harmless when the trustee has honestly, fairly, and without the possibility of gain to himself, paid out money for the *cestui que trust*."

The account presented by the appellant, which shows a balance owing to him from Clark, Terrell & Co. of \$2,792.05, and with one-third of which, or \$931.67, he charges the estate of his testator, contains an item of credit in his favor of \$5,000 for winding up the business of the firm. It is true, it appears that he mainly attended to it, but the business of the firm was not carried on after Clark's death, and the appellant was the executor of Clark; and, in the absence of any agreement authorizing it, it is the general rule that a surviving partner is not entitled to compensation for such services.

It is said in 8 Kent, Comm. 64, note b: "The surviving partner or partners who collect the debts, adjust accounts, and wind up the concern, have no compensation for trouble or services unless the same be stipulated. The same rule applies as if the original partnership had continued." The same rule is laid down in *Collyer on Partnership*, sections 199 (note 1) and 328, and especially if the survivor be the executor of the deceased partner. Exceptions to this general rule may and do, under modern decisions, arise, but we see no reason for departing from it in this instance.

The item for pay for these services should be disallowed; and it results that, instead of there being a balance in appellant's favor on this account presented by him of \$2,792.05, that he is indebted to the firm in the sum of \$2,207.95, and that Clark's estate should be credited with one-third of it, or \$735.98, as against the appellant. The item of credit in his favor in voucher No. 119, of \$931.67, should therefore be expunged, and instead thereof the estate should be credited by \$735.98; but, subject to this correction, this voucher should be allowed. It is manifest that the executor paid the debts to

the bank, Britt, and J. H. Terrell. This was done for the benefit of the estate; and it is now shown that they were just, and in this contest between the executor, who has acted in good faith, and the devisee, it would be inequitable not to allow him credit for them.

Judgment reversed, and cause remanded for a judgment and further proceedings in conformity to this opinion.

CARVER GIN & MACHINE CO. v. BANNON and others.

(*Supreme Court of Tennessee. May 17, 1887.*)

FRAUDULENT CONVEYANCES—PARTNERSHIP—SECURING INDIVIDUAL DEBT.

There being no fraud in fact, a partnership creditor cannot impeach, as fraudulent in law, a conveyance of partnership property in trust to secure an individual debt of the partners.¹

Appeal from chancery court, Shelby county.

Wm. M. Randolph, for complainant. *Gautt & Patterson* and *H. C. Warinner*, for defendant.

CALDWELL, J. Under the firm name and style of F. J. Bannon & Co., Albert Paine and F. J. Bannon were partners in the ownership and operation of a cotton-gin in the city of Memphis. In the course of the business, for partnership purposes, and in the name of the firm, they contracted certain debts with the Carver Gin & Machine Company, evidenced by several acceptances. Subsequently Albert Paine, F. J. Bannon, and Margaret Bannon, in their individual names, executed their two joint notes to M. Gavin for \$750 each, and on the same day Paine and Bannon conveyed their partnership property in trust to Sullivan, to secure the judgment of the two notes to Gavin. Some 10 months thereafter the Carver Gin & Machine Company filed this bill to set aside the trust conveyance as a fraud upon the partnership creditors, and to subject the property herein described to the payment of said obligations. There is no proof of an intention to defraud the creditors of the firm, and we think the conveyance is not fraudulent in law, as against such creditors. It is true that the effect of the conveyance is to appropriate copartnership assets, in the first instance, to the satisfaction of other than copartnership liabilities; but such appropriation is not unlawful, being made in good faith. The creditors of the firm have no lien upon the firm property. It is the partner who has the lien or equity, and the partnership creditors, by appropriate proceedings in court, may avail themselves of that equity *through lien*, but not otherwise; and if, by any means, that equity is extinguished as to the partner, its benefit is lost to the partnership creditors. No equity is left to either of the partners in this case, for each of them has joined in a conveyance of the firm property, without reservation in behalf of the creditors of the firm.

Speaking upon this subject, Mr. Kent says: "But creditors have no lien upon the partnership for their debts. Their equity is the equity of the partners, assenting to the payment of the partnership debts. These are just and

¹ PARTNERSHIP—FIRM PROPERTY—INDIVIDUAL DEBTS. So long as a firm is solvent, all its members assenting, the individual debts of the parties may be paid out of the firm assets, *Roop v. Herron*, (Neb.) 17 N. W. Rep. 353; but if the firm is insolvent at the time the transfer of the firm property to make such payment is made, it is fraudulent and void as to existing creditors of the firm, *Goodbar v. Cary*, 16 Fed. Rep. 317; and one partner may not pay his private debts out of the assets of the firm, for this would be a fraud upon his partners, *Gallagher's Appeal*, (Pa.) 7 Atl. Rep. 237; *Caldwell v. Bloomington Furniture Co.*, (Neb.) 23 N. W. Rep. 336; *Willis v. Bremner*, (Wis.) 19 N. W. Rep. 403; *Vernon v. Upson*, Id. 400; *Powers v. C. H. Hamilton Paper Co.*, (Wis.) 18 N. W. Rep. 20. See, also, *Johnston's Appeal*, (Pa.) 9 Atl. Rep. 76, and note; *Crook v. Rindskopf*, (N. Y.) 12 N. E. Rep. 174; *Saunders v. Reilly*, Id. 170; *Tait v. Murphy*, (Ala.) 2 South. Rep. 317.

obvious principles of equity, on which we need not enlarge, and they have been recognized and settled by a series of English and American decisions." 3 Kent, Comm. 65, side page.

In *Ex parte Ruffin*, 6 Ves. 119-126, Lord ELDON said: "It is the case of two partners, who owed several joint debts, and had joint effects. Under these circumstances, their creditors, who had a demand upon them in respect of those debts, had clearly no lien whatsoever upon the partnership effects. They had power of suing, and, by process creating a demand, that would directly attach upon the partnership effects. But they had no lien upon or interest in them in point of law or equity. * * * In all those ways the equity is not that of the joint creditors, but that of the partners, with regard to each other, that operates to the payment of the partnership debts."

The same doctrine was recognized and applied in the subsequent cases of *Ex parte Williams*, 11 Ves. 3-5, and *Ex parte Kendall*, 17 Ves. 526. In the latter this language was used: "* * * and, in all these cases of distribution of joint effects, it is by force of the equities of the partners among themselves that the creditors are paid, not by force of their own claim upon the assets, for they have none." Numerous cases are collected in note to the case of *Silk v. Prime*, 2 Lead. Cas. Eq. pt. 1, pp. 393, 396, which sustains the proposition that the equities of the partnership creditors depend upon the equities of the partners themselves, and consequently may be defeated by the *bona fide* appropriation of the firm assets by the partners. Judge STORY says that the partnership creditors have no lien upon the partnership assets, but that they have equities which they may work out through the lien of the partners; that is, that "they have something approaching to a lien, of which, with the assent of the partners entitled to the lien, they may avail themselves, in a court of equity, against the partnership effects." STORY, PARTN. §§ 97, 326, 360. The same author calls the right of the firm creditors "a *quasi* lien upon the partnership effects, as a derivative subordinate right, under and through the lien and equity of the partners." STORY, PARTN. § 361. This right is defined in similar terms in Ewell's Edition of Lindley on Partnership, *655, note 1.

The same rule and doctrine have been applied, without question, more than once in Tennessee. In *Fain v. Jones*, 3 Head, 309, this court, speaking through Judge WRIGHT, said: "The general creditors of a firm have no lien upon the partnership assets if the partners themselves have none. The claim of the creditors must be worked out through the equities of the partners, and, if they have none, neither have the creditors."

In *House v. Thompson*, Judge CARUTHERS, delivering the opinion of the court, used this language: "There is no lien or other equity, in favor of firm creditors, upon the partnership effects. This can only be fixed by judgment, like other creditors. * * * The partners themselves have a right to force the application of the partnership property to the payment of the firm debts, and this right, sometimes called a lien, is paramount to the right of a creditor of any member of the firm to the interest of his individual debtor in the concern. The firm creditors, in this way, have the preference over the individual, to have satisfaction out of the joint property. In this way, and for the benefit of partners alone, a preference is given to the joint creditors; so that any lien or equity the creditor has is worked out through, and is entirely dependent upon, that of the partner." 3 Head, 515. To same effect is *Allen v. Bank*, 6 Lea, 562, 563.

As ordinary creditors of an individual have no lien upon the property, and cannot prevent him from disposing of it as he pleases, if he act in good faith, so the ordinary creditor of a firm has no lien on the property of the firm, so as to be able to prevent a *bona fide* alienation of its property to whomsoever it chooses. LINDL. PARTN. (Ewell's Ed.) 655; 3 Kent, Comm. 66; STORY, PARTN. § 358; *House v. Thompson*, 3 Head, 515.

If the partners have the right to make absolute sale of partnership assets,

it follows that they have the right to pledge or mortgage such assets. Especially is this so when the individual members of the firm are jointly bound and equally bound for the payment of the debts secured as in the case before us. This court has recently held that a mortgage upon partnership real estate, signed by the members of the firm, gave the mortgagee, who was the individual creditor of one member of the firm, a lien upon such real estate prior and superior to any claim of partnership creditors, against the same property as partnership assets. *Anderson v. Norton*, 15 Lea, 32. That was a stronger case for the creditors of the firm than this, for here each member of the firm owes the debt secured, while there only one of them owed it.

The case of *Buck v. Johnson*, 7 Lea 282, is relied upon by counsel to sustain the contention that the trust conveyance here impeached is fraudulent in law. We do not think that case authority for the position. On the contrary, we regard the opinion then delivered by Judge TURNER as in accord with the general doctrine announced in the several cases to which we have referred. There one member retired from the firm, the other partner assuming the payment of all firm liabilities. The retiring member retained "a lien, equal to and like a mortgage" to save him harmless, against the firm debts, and as security for the amount the remaining partner was to "pay over" to him. Subsequently the retiring partner conveyed such interest as he had left in the firm to secure his individual debt. The decision was that this creditor of the retiring partner acquired an interest incumbered with the partnership debts, not because the partnership debts were in the first instance a lien upon the partnership assets, but because the partners had stipulated, at the time of dissolution, that the firm assets should be used in payment of firm liabilities.

No more is *Lasell v. Tucker*, 5 Sneed, 33, an authority for the position assumed by complainant in this case. There *one member* of the firm assumed to pass the partnership assets by an assignment for the benefit of the firm creditors and the individual creditor of that member. The decision was that the firm creditors must be paid first. The power of the partners to sell or convey, in trust, for any *bona fide* purpose they may choose, was not, in terms or by implication, denied in *White v. Dougherty*, Mart. & Y. 308; *Johnson v. King*, 6 Humph. 233; or *Barcroft v. Snodgrass*, 1 Cold. 430. Nor was it decided in any of those cases that firm creditors had any interest in or right to the assets of the firm which they could make available otherwise than through the equity of the partners themselves. The same is true of *Pennington v. Bell*, 4 Sneed, 200; *Insurance Co. v. Partee*, 9 Heisk. 296; and *Richardson v. Richardson*, 1 Leg. Rep. 99.

The beneficiary in the deed of trust is entitled to the payment of his debts out of the proceeds of the sale of the property conveyed. After that, the surplus, if any, will be paid to complainant, who impounded the property by attachment.

The decree of the chancellor is affirmed, and the report of the commission of referees confirmed. Costs of this court will be paid by complainant, and costs below as directed by the chancellor.

BARCHUS and others, Ex'rs, v. PETERS.

(Supreme Court of Tennessee. May 3, 1887.)

INSOLVENCY—ADMINISTRATION—ATTACHMENT.

Where an attachment issues, and is levied against the estate of a deceased non-resident, under subsection 7, § 4192, New Code Tenn., authorizing an attachment "where any person liable for any debt or demand, residing out of the state, dies leaving property in the state," and where, pending the suit, an administrator qualifies, answers, and suggests insolvency, plaintiff must share *pro rata* with other creditors of the deceased, under the statutes governing the administration of insolvent estates: the lien of the attachment, in such case, not being a fixed lien.

Appeal from chancery court, Shelby county.

Smith & Collier, for complainants. *Finlay & Peters* and *Harris & Turley*, for defendant.

SNODGRASS, J. The amended bill in this cause alleged the death of Thomas Peters, a non-resident; that he left property in this state; and sought an attachment, under subsection 7 of section 4192 of the New Code. Attachments issued, and were levied. Pending this suit, George B. Peters qualified as administrator of the estate of Thomas Peters, and answered the bill and amended bill herein. He had suggested the insolvency of the estate of Thomas Peters, and he set up such suggestion and insolvency as a defense, among others not necessary to be mentioned. The chancellor held that the levies fixed liens which were not displaced by the subsequent suggestion of insolvency, and decreed, accordingly, in complainant's favor, and for amount of note sued on, with interest. The administrator of Peters appealed.

The only question in the case is as to the proper construction of the subsection of the Code referred to, authorizing an attachment "where any person liable for any debt or demand, residing out of the state, dies leaving property in the state;" and its application under the facts of this case, where suggestion of insolvency has been made by administrator of the debtor, and such defense properly interposed in the attachment suit. The object of our statutes for the administration of insolvent estates, applying, as they do, alike to estates of residents and non-residents, (*Hubbard v. Epps*, 9 Baxt. 238.) is to secure equality of distribution among creditors of all the assets, real and personal. Hence it is held that the legal effect of the suggestion of insolvency is to appropriate the land (with other property) of the debtor for a *pro rata* distribution among his creditors, after first satisfying such as had fixed or specific liens. *Watson v. Watson*, 1 Baxt. 389. The suggestion of insolvency does not defeat liens acquired and fixed in the life-time of the debtor, whether they be by judgment, execution, attachment, deed or otherwise. Such liens, so fixed in the life-time of the debtor, our insolvency statutes do not, and were not intended to, affect. *Field v. Creditors of Wheatley*, 1 Sneed, 350, 351; *Winton v. Eldridge*, 3 Head, 360; *Bangess v. Partee*, 1 Leg. Rep. 87; *Watson v. Watson*, 1 Baxt. 387; *Boyd v. Roberts*, 10 Heisk. 474. But they were intended to affect, and the suggestion of insolvency does defeat, liens not fixed in the life-time of the debtor, or before suggestion of insolvency. The implied lien of the vendor is defeated. *Watson v. Watson*, 1 Baxt. 387. So is the lien of an unregistered mortgage. *Henderson v. McGhee*, 6 Heisk. 55. These cases established that the object of the statute referred to was to prevent the ripening or fixing of liens after the death of the debtor; and we cannot suppose the legislature intended to defeat such purpose by the subsection in question.

The statute was intended to afford the creditor a simple and speedy remedy for the collection of his debt, where administration was not granted, too expensive, or unnecessary; but was not intended to provide a method by which one creditor might, by diligence, obtain priority. In cases where there are no other creditors, or where none intervened, and no insolvency exists or is suggested, and proper defense interposed before the final appropriation of the property attached, the statute would operate for effectual relief of the attaching creditors alone, but, in cases like the one before us, can give them no priority. The defendant was summoned to answer the original bill, and the debt sued on was established; the statute of limitations being no defense, under the facts, because waived by the debtor by indorsement on note sued on. *Jordan v. Jordan*, 1 Pickle, —, 3 S. W. Rep. 896.

The decree of the chancellor will be so modified as to deny priority of satisfaction to complainants, and permit them to file their decree, and share *pro rata* in the distribution of the assets in the insolvent proceedings. The costs

of this cause in the court below will be paid by the administrator of Peters, out of the assets of the estate, and one-half the costs of this court. The residue of the costs of appeal will be paid by complainants.

LEE v. CHERRY.

(*Supreme Court of Tennessee. May 4, 1887.*)

1. FRAUDS, STATUTE OF—MEMORANDUM—LETTERS.

Letters from a vendor to his agent may constitute the "memorandum or note" of an agreement to convey land which the statute of frauds requires, and if, from such letters, the terms and proposal of sale, the description of the property, and the affirmance of a sale made by the agent can be gathered, the vendee may compel specific performance on the strength of his oral acceptance of the terms offered.¹

2. SPECIFIC PERFORMANCE—AMBIGUITY—MISNOMER.

It is not ground for refusing to compel the specific performance of an agreement to convey land that the vendee, one Lee, is described as "Mr. Lee" only; this being, at most, but a latent ambiguity which may be explained by parol. Nor does the ambiguity exist where it appears that the vendee forwarded a deed for execution in which his name was fully stated.

Appeal from chancery court, Shelby county.

Estes & Warinner, for complainant. *Gantt & Patterson*, for defendant.

LURTON, J. This is a bill for the specific performance of a contract for the sale of a lot in the city of Memphis. The only question necessary to consider is as to whether the sale is sufficiently evidenced by a writing to take it without the statute of frauds. It is not essential that the contract of sale shall be in writing, provided there is produced a writing containing the terms of the oral contract, and authenticated by the signatures of the party to be charged. The language of the fourth section of the statute is: "Unless the agreement upon which such action shall be brought, or *some memorandum or note thereof*, shall be in writing, and signed by the party to be charged therewith, or some person thereunto by him lawfully authorized." The "memorandum or note thereof" relied upon in this case is found in letters passing between the vendor and his agent at Memphis, by which it is clearly shown that the defendant authorized the sale of the lot, by his agent, for \$6,000, one-third cash, balance in one and two years, with interest. After some negotiations between the agent and the complainant, it is shown, by one of the letters of the agent to the defendant, that he had contracted for the sale of the lot to "Mr. Lee" upon the terms demanded by the owner. Some dispute afterwards arose between the vendor and his agent as to the commissions of the latter; the vendor insisting that he must have \$6,000 *net*. The latter concludes a letter to his agent insisting upon \$6,000 *net*, with the agreement: "If you want it at that price, send me deed, and I will sign and return to you." This dispute about commissions was finally settled by the vendor agreeing to pay \$125 in full, and the agreement of the agent to accept this. A deed was drawn up by the vendee, and forwarded by the agent to the defendant, along with an abstract of taxes due on the lot, which were to be paid by the vendor. These taxes proving heavier than anticipated, the vendor peremptorily declined to sign the deed, and withdrew the lot from the market.

The letters passing between Mr. Bacon, the agent, and Mr. Cherry, the vendor, refer to and connect with each other, and contain all the terms of the sale, and a sufficient description of the property. These letters of the

¹ Respecting the sufficiency of a memorandum for the sale of lands within the statute of frauds, see *Elliot v. Barrett*, (Mass.) 10 N. E. Rep. 820, and note; *Higham v. Harris*, (Ind.) 8 N. E. Rep. 256, and note; *Hastings v. Weber*, (Mass.) 7 N. E. Rep. 848, and note; *Camp v. Moreman*, (Ky.) 2 S. W. Rep. 179; *Welch v. Darling*, (Vt.) 7 Atl. Rep. 547, and note; *Love v. Welch*, (N. C.) 2 S. E. Rep. 242; *Alabama Gold Life Ins. Co. v. Oliver*, (Ala.) 2 South. Rep. 445.

vendor to his agent, stating a proposal of sale, and affirming the sale made by his agent on the terms named by himself, are a sufficient memorandum under the statute of frauds. *Browne, St. Frauds, § 354a; Blair v. Snodgrass, 1 Sneed, 26.* The party to be charged therewith under the statute is the vendor; and, if the agreement be signed by him, or there be a sufficient memorandum of an oral agreement signed by him, he will be bound; for an offer or proposal signed by the party proposing to sell will support an action against him for breach of the contract afterwards made by the oral acceptance of the offer by him to whom it was made, the fact of such acceptance being provable by oral evidence. *Browne, St. Frauds, § 345a; Whitby v. Whitby, 4 Sneed, 473; Frazer v. Ford, 2 Head, 464.*

The objection that the sale is reported by the agent in his correspondence as having been made to "Mr. Lee," and that this is not a sufficient description of the vendee, is not tenable. This, at most, is but a latent ambiguity in the writing, and may be removed by parol evidence. *Whart. Ev. §§ 949, 953.* It would be quite as uncertain as to who was the vendee, if the sale had been made to John Smith; for parol evidence as to which John Smith was the purchaser, would be equally necessary. Any doubt on this matter was, however, removed by the forwarding to the vendor before his refusal to execute his agreement of a deed for his signature. This deed is referred to in the letter both of the agent and vendor, and becomes thereby a part of the "memorandum."

The objection that this agreement ought not to be enforced by reason of collusion between the vendee and the agent of the vendor is unsupported by the facts. Mr. Lee was a stranger to the agent until the day of the purchase, and in no way implicated in any breach of duty which might be attributed to Mr. Bacon, the agent. With regard, however, to Mr. Bacon's conduct in this matter, we are unable to discover any delinquency upon his part, towards Mr. Cherry. The suspicion upon the part of Mr. Cherry that he had been induced by his agent to offer this property at a sum much below its value, though evidently entertained sincerely by him, does not seem founded in fact. The sale, by the great weight of proof, was for the full value of the lot at that time, and was as good a price as could have been obtained.

A decree in accordance with prayer of bill will be drawn; the decree of the chancellor reversed; the costs of the cause will be paid by defendant.

SOLINSKY and others v. LINCOLN SAV. BANK and others.

LINCOLN SAV. BANK and others v. SOLINSKY.

(*Supreme Court of Tennessee. 1887.*)

1. FRAUDULENT CONVEYANCE—RECOVERY OF MONEY VALUE.

Where the specific property conveyed, in fraud of creditors, to one participating in the fraud, cannot be recovered, a decree for its value may be rendered; overruling *dictum* in *Tubb v. Williams, 7 Humph. 367.*

2. ATTACHMENT—ASSIGNMENT—PRIORITY.

Where a debtor's previous fraudulent conduct affords ground for an attachment, the attachment is none the less valid because the creditor has reason to believe that a general assignment is in preparation, such assignment not being of record.

3. SAME—LEVY—VALIDITY.

An attachment of goods is not invalid because levied in the night-time, and by forcing an outer door or raising a window of a store-house disconnected with the dwelling-house, and forming no part of the curtilage.

4. ASSIGNMENT FOR BENEFIT OF CREDITORS—VALIDITY—FRAUD.

A general assignment for the benefit of creditors is fraudulent in fact, as against attaching creditors, where it appears that the assignee had previously aided the assignor in fraudulently disposing of property; that a fictitious debt to the assignee was secured to him by the assignment; that the assignment lacked an inventory of notes and accounts due the assignor, and a detailed schedule, and failed to indicate the quantity and value of the property assigned; and that, although *bona fide*

debts were secured by the assignment, yet, the controversy being between the assignor and assignee on the one hand, and the attaching creditors on the other, no creditors intervened to uphold the assignment. Under the circumstances the assignee's acceptance should not be treated as an acceptance by creditors.

5. SAME—RIGHTS OF ASSIGNEE—Costs.

Where, in a contest in equity between attaching creditors and the assignee under a general assignment, the assignment is found to be fraudulent in fact, and the assignee is found to have participated in the fraud, he will be charged with costs, and will not be allowed his disbursements.

6. SAME—APPEAL—REVERSAL.

Where, as between attaching creditors and the assignee under a general assignment, a decree sustaining the assignment is reversed on appeal, the decree of the appellate court sustaining the attachments will be limited to those of the attaching creditors who appealed.

Appeal from chancery court, Lincoln county.

N. Smithson, for Solinsky. *J. H. Holman*, *F. P. Taylor*, and *A. M. Solomon*, for the bank.

LURTON, J. L. Lipman, a merchant, owing debts amounting to about \$15,000, made a deed of assignment of his stock of goods and his book-accounts to H. Solinsky, as trustee. He secures in this deed all of his creditors equally. Certain creditors sued out and levied attachments upon this stock of merchandise, a few hours in advance of the acknowledgment and registration of the deed of trust. A number of others sued out and levied attachments a few hours after the registration of the deed to Solinsky, and after his qualification as trustee. The pleadings make a controversy between Solinsky, as trustee under the deed of assignment, and the attaching creditors. This original bill was filed by Solinsky as trustee, and Lipman, the assigning debtor, against the attaching creditors, and this bill enjoined the prosecution of the attachment suits; and this bill, together with the answer and cross-bill, and an original bill filed by the attaching creditors, presents issues upon which the validity of the deed of assignment depends, and upon which the validity and effect of the several attachments depend.

It will be unnecessary to further state the pleadings. The facts necessary to the determination of the several questions presented by them will appear in the subsequent parts of this opinion. The facts proven abundantly establish the charge that Lipman was, and had been for some time, fraudulently disposing of his property, with the intent to hinder and defeat his creditors.

The deed of assignment secures, among the other claims secured therein, a debt of \$1,200, stated to be due to Solinsky, the trustee. The cross-bill and original attack this debt as colorable. The proof overwhelmingly establishes this charge. Its fictitious character is made manifest. The attaching creditors, in their cross-bill, charge that Solinsky had aided and abetted Lipman in the fraudulent sales, transfers, and concealments made just prior to the general assignment; that Lipman had fraudulently transferred to Solinsky himself considerable amount of property; and a decree is sought against him for such property or its value. The proof shows much complicity upon the part of Solinsky in the fraudulent transaction of Lipman; and it is positively shown that about 14 cases of boots and shoes purchased by Lipman at Nashville were never taken by the latter from the depot at Fayetteville, but were by the clerks of Lipman reshipped to one O'Shisky, at Wales station, Tennessee. This latter individual, instead of claiming or receiving the goods, simply re-marked them at the depot at Wales station to Solinsky at Pulaski, where the latter had a store. These goods are shown to have been received by Solinsky, and their value is shown to be about \$400. It is true that Solinsky claims that these goods were sent to him as a part payment upon a pretended indebtedness due to him by Lipman. The effort to prove such an indebtedness has wholly failed, unless it be as to \$250 security debt claimed to have been paid by Solinsky for Lipman; but the proof as to this is not satis-

factory. But these goods were claimed to have been paid and credited, not upon this security debt, but upon a note for \$700. No note is produced. On the contrary, when Solinsky is called on to produce said note, he claims, after the assignment, to have assigned it to one Bagtoky. The latter has not filed as a claim, and he does not testify in the cause. We are satisfied there was no debt due, either at the time of this mysterious shipment of shoes, or at the time of the making of the deed. These goods have not been attached, and they perhaps could not be identified. It is insisted that no decree can be granted for the proceeds of the sale of the merchandise, or for the value. The statement in case of *Tubb v. Williams*, 7 Humph. 367, is to the effect that, under the statute of frauds, the creditors of fraudulent vendor or donor, could only reach the specific property sold or conveyed, and could not recover its value or proceeds from the fraudulent vendor or donor.

This statement is not the law, and never has been the law. It was *dictum* in the case in which it was used. In the subsequent case of *March v. Powell*, Thomp. Tenn. Cas. —, this language was expressly commented on, and distinctly overruled. Prior to the last case referred to, this language had been limited to actions at law. *Richards v. Ewing*, 11 Humph. 332. When a fraudulent vendor has so converted or disposed of the property, creditors may, in equity, at least, recover the proceeds or value thereof.

The chancellor gave a decree for the value of those goods directly traced to Solinsky, and we affirm his action. The attachments levied before the registration of the deed of assignment were properly sued out, and lawfully levied, and are entitled to priority of payment in the order of their levy. That the creditors suing out these attachments had reason to believe, at the time, that a general assignment was being prepared, will not operate to prevent their levying. They had lawful grounds for attachment in the previous fraudulent conduct of Lipman, regardless as to whether the general assignment he was supposed to be making was or was not a further fraudulent scheme. So long as no valid conveyance by Lipman was of record, his creditors had a right to pursue their legal remedies. The objections that their levies were made in the night-time, and that entrance into the store-houses where the merchandise was stored was obtained by raising a window or forcing an outer door, is not tenable. The maxim, "A man's house is his castle," only extends to his dwelling-house; therefore a store-house or warehouse, or barn or out-house, not connected with the dwelling-house, may be broken open in order to levy an execution or attachment. *Semayne's Case*, 1 Smith, Lead. Cas. side page 118.

SPENCER, C. J., in delivering opinion of the court in case of *Haggerty v. Wilber*, 16 Johns. 288, said: "There can be no doubt that the sheriff had authority to break open the store-house, and seize the goods. The privilege which the law allows to a man's habitation, and which precludes the sheriff from entering unless the outer door be open, either to assist the party, or to take his goods in execution, does not extend to a store or barn disconnected with the dwelling-house, and forming no part of the curtilage."

The chancellor was in error in holding levies invalid because of the breaking into the store-house. We think the attachments levied on the day following the registration of this deed of assignment are entitled to satisfaction in the order of their levy, after first paying those levied before the assignments. The assignment purports to secure all of the creditors of the assignor equally; yet we think it was fraudulent in fact, in view of all the facts of this case. The trustee to whom this deed was made has been guilty of aiding the assignor in his fraudulent disposition of his assets. A considerable lot of the goods of the assignor have been positively traced to his possession. There are strong circumstances in the record strongly indicative of his having fraudulently obtained other goods. A fictitious debt of \$1,200 is secured to him in the assignment. He was the brother-in-law of the debtor. The deed of assign-

ment contains no inventory of the notes and accounts. No detailed schedule is annexed. There is nothing to indicate the quantity or the value of the property assigned. The bond of a trustee of this character would be very slight protection to honest creditors secured by such an indefinite assignment. We are convinced that the purpose of this assignment was fraudulent, for these goods in the hands of Solinsky were, in effect, in the hands of Lipman. Therefore, without regard to the effect which the act of 1881 might have upon such a deed of assignment, we think it was in fact fraudulent and void. That these are *bona fide* debts, secured therein, which have not participated in the fraud of the assignor, or the purposed fraud of the assignee, may be true; but no such creditor has intervened. This has, from the beginning, been a litigation between Solinsky, claiming as trustee and creditor, against the attaching creditors. There is no evidence whatever that any creditor has accepted the benefits of this deed. The presumption of acceptance is not strong enough to justify us in upholding this instrument as valid for any purpose, when there is no one actively seeking relief under the deed but the fraudulent trustee.

The acceptance by such a trustee, under the facts of this case, cannot be treated as an acceptance by the secured creditors; none of them actively seeking relief in this case. There is nothing in the point made in the brief of counsel that the attaching creditors have abandoned this attachment sued out at law. They were enjoined under the bill of Solinsky and Lipman from prosecuting their attachment suits. The very purpose of the bill of Solinsky was to determine the validity of the deed of assignment, as against the attachment. The attachments sued out in this court were to reach assets not subjected by the attachment at law. The validity of these attachments at law is assailed by the original bill upon the ground already discussed, and upon a denial of fraud. Without passing upon the question as to whether the grounds set out in the affidavits for the legal attachments can be controverted by such a bill as this, we are content to determine that fraud has been abundantly proven, and the ground for attachment vindicated. The costs of both the original bills and of this cross-bill will be paid by Solinsky and Lipman, and of this appeal will be paid by H. Solinsky and his sureties. The case will be remanded for the execution of this decree. The claim of Solinsky to be allowed his disbursement for counsel fee incurred in this litigation will of course be disallowed. The burden of paying for this litigation cannot be thrown upon the fund to which the attaching creditors are entitled.

Some of the attaching creditors did not appeal from the decree of the chancellor, maintaining the assignment as against all of the attaching creditors.

The decree to be drawn will of course be limited to the parties now before the court.

WILSON and others v. SIMPSON and others.

(Supreme Court of Texas. May 20, 1887.)

1. PUBLIC LANDS—BOND FOR TITLE—ISSUE OF PATENT.

A title bond executed in 1837, relating to lands to which at the time no patent had been issued, conveys no legal estate, but is a mere executory contract, conferring an equitable interest; and in any proceeding upon it, if not instituted within proper time, the plea of "stale demand" will be applicable.

2. DEED—REGISTRATION—AUTHENTICATION.

A title bond executed in 1837, and proved for record in 1845, is sufficiently authenticated for registration by the affidavit of one witness.

3. COSTS—EXECUTION.

Sections 1420a, 1420b, and 1420c, of Rev. St. Tex., providing for the issuing of costs bills, upon which execution may be levied, do not apply to cases in which suit has terminated and judgment been rendered for costs, and a sale effected under a bill of costs issued in such a case is absolutely void.

4. ACKNOWLEDGMENT—POWER OF ATTORNEY—MARRIED WOMAN.

All conveyances of land, executed under a power of attorney, given by a married woman, and not acknowledged in due form, are void, so far as they purport to transfer her interest.

5. NOTARY PUBLIC—AUTHORITY.

The authority of a notary, who is lawfully such by virtue of his holding some other office, is quite as ample to authenticate conveyances for the purpose of registration as if he were notary by direct appointment.

6. EVIDENCE—ADMISSIONS—DEROGATION OF TITLE.

Admissions in derogation of title to property, made by a former owner, who has parted with his interest, are not competent evidence against third parties.

Appeal from district court, Comanche county.

N. R. Lindsey and Fleming & Moore, for appellants. *Wood & Charlton*, for appellees.

GAINES, J. On the eighth day of October, 1887, Epps D. Payne executed to W. H. Harris a bond in the sum of \$5,000, conditioned as follows: "That if the above-bound Epps D. Payne, his heirs, executors, or administrators or assigns, shall make, or cause to be made, unto the said William H. Harris, his heirs or assigns, a good and sufficient warranty *bona fide* title to the remaining part of my own head-right of land, to which I am entitled as the head of a family, under the constitution and laws of this republic, viz., two-thirds of a league and labor of land, all expense on the same to be paid by the said Payne or his deputy or agent so soon as I myself can obtain one from this government, now, if the above-bound Epps D. Payne shall well and truly perform, fulfill, and accomplish unto the said William H. Harris the titles as above mentioned, then, and in that case, this bond or obligation is to be null and void, or else to be and remain in full force and virtue." On the second day of February, 1888, a certificate for a league and labor of land was issued to Payne, as the head of a family, by the board of land commissioners of Sabine county. This certificate was located on the two-thirds of a league of land in controversy in 1851. The field-notes recite that the location was made for Payne, and the patent, which is dated in 1852, issued in his name. This suit was brought by the heirs of Harris and of his wife to recover of appellants, who were in possession of the premises, claiming under conveyances from the heirs of Payne, the land so located by virtue of the Payne certificate. The issues involved in this appeal will be determined by the effect which is to be given to the title bond from Payne to Harris as an instrument of conveyance.

In *Gainer v. Cotton*, 49 Tex. 119, a bond similar in form to the one before us was held not merely an executory contract for the sale of land, but a conveyance which passed *proprio vigore* the legal title. We do not doubt the correctness of that decision. The laws of Mexico were still in force in Texas when the bond in that case was executed. It is apparent from its face that the parties to it were accustomed to the common-law forms of conveyancing, and that in making it they were acting upon the idea then prevalent that the claimant of land could not convey it by deed before the issue of the final title from the government. The bond shows that its consideration was the executed transfer of a lot from the obligee to the obligor, and clearly manifests the intention of the parties that the obligee was to become immediately entitled to a half interest in the obligor's half of a league of land which is therein described. These embrace all the elements of a sale under the Mexican law, and hence the execution of a deed in the pursuance of such a bond would add nothing to the validity of the title. The court accordingly held, in that case, that the instrument, though in the form of a bond for title, was in itself an effective conveyance of the legal title, and that, therefore, the plea of stale demand could not be set up against one claiming under it. But there is a very broad distinction between that and the case we have before us.

Here, when Payne executed the bond to Harris, he had no land to convey. He had a right to land under the laws of the republic, but as yet had received no certificate as an evidence of that right. The contract seems based upon the idea that the obligor had received a portion of the land, and was entitled to a two-thirds of a league more, and he binds himself to procure a certificate for this amount of land at his own expense, and to make title to it to the obligee. The certificate, however, issued for the whole league and labor. This gave Harris an undivided interest of two-thirds in the certificate. Now, the location having been made, and the patent having issued in the name of Payne, we think it quite apparent that whatever right the heirs of Harris had in the land was an equitable right, and their sole remedy in a court of equity. The claimants under this bond would have no standing whatever in a court of law under a system of jurisprudence where law and equity are administered in separate forums, and they could obtain no relief even in a court of equity without proving that the bond was supported by a valuable consideration. *Short v. Price*, 17 Tex. 397; *Doums v. Porter*, 54 Tex. 59; *Barley v. Sterrett*, 18 Tex. 113.

In several respects the case is wholly unlike that of *Gainer v. Cotton*, *supra*. In that case the consideration clearly appeared on the face of the bond to have been executed. The obligor was at the time the owner of the land which he undertook to convey. Hence it was held a conveyance under the Mexican law, which knew no distinction between the legal and equitable title. But in the case before us the contract is executory. It is to make title to the certificate when issued. In order for the heirs of the obligee to recover the land, it would be necessary for them to prove a consideration, then to establish a trust in the certificate, and through this a trust in the land. This, as we take it, would be an equitable proceeding, and one to which, if not instituted within proper time, the *plea of stale demand* would be applicable. In this view of the law we think we are well sustained by numerous authoritative decisions of our own court. *McFaddin v. Williams*, 58 Tex. 625; *Flemming v. Reed*, 37 Tex. 152; *Yeary v. Cummins*, 28 Tex. 91; *Glasscock v. Nelson*, 26 Tex. 150; *Smith v. Hampton*, 13 Tex. 459; *Johnson v. Newman*, 43 Tex. 628; *Mitchell v. Sheppard*, 13 Tex. 484.

The court below took a different view of the instrument, and charged the jury as follows: "The jury is further charged that the plaintiffs have introduced in evidence a title bond and obligation in writing, dated the eighth day of October, 1837, from Epps D. Payne to W. H. Harris, which was duly recorded in Comanche county — day of —, 1861; also a land certificate issued by the board of land commissioners of Sabine county, Texas, to Epps D. Payne, for a league and labor of land, dated second day of February, 1838; also field-notes of a survey made under said certificate, and made by locator of certificate on — day of —, A. D. —; also the patent from the state of Texas to Epps D. Payne, his heirs or assigns, by virtue of said certificate and location dated — day of —, 1852; that the legal effect of such evidence is to vest title to the land in controversy in the heirs of William H. Harris at the date of the issuance of said patent; and the jury are charged that said title so vested in the William H. Harris heirs in 1852, the date of patent, is a legal title, as contradistinguished from an equitable title; and the jury are instructed that the doctrine of stale demand cannot be urged and pleaded against plaintiffs in this suit."

This charge is assigned as error, and it follows from what we have said that in our opinion the assignment is well taken. The facts stated in the instruction did not invest the appellees with a legal, in contradistinction to an equitable, title, and the plea of stale demand was applicable to the case. It is to be noted here that the certificate having issued to Payne for a league and labor, Harris' claim in it was only that of a two-thirds undivided interest. It is not positively shown by the record who caused the location of the land

in controversy. Harris' heirs had the right to locate their part of the certificate separately, and to hold the location as their interest in severalty, (*Harris v. Gilbert*, 50 Tex. 351;) but it is not shown that they did this. Hence it would seem that, in the absence of some proof that the location was made expressly for them, a two-thirds interest in the land would be the utmost extent of their lawful demand under any circumstances. This point, however, was not made in the court below, both parties seeming to have acted upon the theory that the heirs of Harris were entitled to the entire interest in the land, if they were entitled to any part of it. The record shows that, before the bringing of this suit, the plaintiffs herein had instituted a previous action for the recovery of the same land, in which they took a nonsuit. An execution for the costs issued against them, and was returned satisfied. Subsequently they sued out a writ of error, but did not prosecute it by filing the transcript in the supreme court. After the writ of error was issued, the clerk of the district court placed in the hands of the sheriff a certified copy of a bill of costs, consisting wholly of costs incurred by reason of the proceedings in error, under which the premises in controversy was sold as the property of the plaintiffs. The court below held that this sale passed no title, and we think this ruling correct. The authority for issuing a bill of costs which shall have the effect of an execution is found in articles 1420a, 1420b, and 1420c of the Revised Statutes. Without these enactments the officers of the court had an ample remedy for the collection of their costs at each term in all cases disposed of upon final trial, and when no appeal was taken. The purpose of these provisions was to enable them to obtain their fees, where the cases were continued, or where execution upon the judgment was suspended by an appeal. Article 1420a reads as follows: "It shall be lawful for the clerks of the district and county courts, and justices of the peace, to demand payment of all costs due in each and every case pending in their respective courts, up to the adjournment of each term of the court." This is evidently intended to apply to pending suits only, and not to those in which final judgments should be rendered. Article 1420b gives the remedy for the collection of these fees in case the demand is not complied with; and, in order to prevent the delay which would be caused by an appeal, it further provides that the removal of the cause by appeal shall not prevent the issuing of an execution for costs at the end of the term at which the appeal is taken. The remedy is nowhere extended to any costs which accrue after the end of the term of the court at which the final judgment is rendered. We know of no rule that authorizes us to extend the operation of a summary remedy of this character beyond the clear import of the language of the statute. The bill of costs by virtue of which the sale in question was made was for fees which accrued after the end of the term at which the final judgment was entered, and which were incurred by reason of the suing out of a writ of error. The statute does not give such a bill of costs the force and effect of an execution, and hence the sale was unauthorized by law, and was absolutely void.

The foregoing, as we take it, are the leading questions in the case before us, and for that reason we have discussed them out of the order in which they are presented by the brief of counsel. We will briefly consider such other questions presented by proper assignments as we think likely to arise upon another trial.

The first assignment is that the court erred in admitting in evidence the bond from Payne to Harris, over defendants' objection that it was not properly proved for record. Upon the authority of *Cryell v. Holmes*, 3 Tex. Law J. 481, 58 Tex. 685, we must hold the bond for title sufficiently authenticated for registration, and that the court did not err in admitting it in evidence.

We see no error in the ruling of the court complained of in the second assignment. Caroline Gooch being a married woman, and her power of attorney not being acknowledged as required by law, the court was correct in

excluding the power of attorney, and the deed made under it from the jury, in so far as they were offered in evidence of a conveyance of Mrs. Gooch's interest in the land.

The third assignment of error complains of the exclusion from the jury of the deed of Smith and wife to Stephens and others. The deed appeared to have been acknowledged before an officer in the state of Louisiana, who styled himself "recorder and *ex officio* notary public." It was objected to on the ground that it was not acknowledged before an officer duly authorized by law. The acknowledgment was taken in 1878. The law then in force, (Pasch. Dig. art. 7418,) as now, conferred authority upon notaries public in other states of the Union to authenticate conveyances for the purposes of registration, and it seems to us that the authority of a notary, who is lawfully such by virtue of his holding some other office, is quite as ample as if he were notary by direct appointment. Such is virtually the decision in *Butler v. Dunagan*, 19 Tex. 559, where it was held that an acknowledgment taken before a primary judge was good, by reason of his being *ex officio* a notary public, although the statute did not in terms authorize primary judges to take such acknowledgments, and the officer did not sign as a notary public. We think, therefore, that the court erred in excluding the deed in question.

The admission of the declarations of John P. Payne is complained of in the sixth assignment of error, and we think that that evidence ought to have been excluded. We are of opinion that when he made the declarations he had parted with his interest in the property, and that his admissions in derogation of the title were not competent evidence against third parties. His power of attorney, under which his interest was conveyed, speaks of that interest as derived from his father's estate, and by conveyance from the heirs of Margaret E. Pye; but each interest is spoken of as an undivided one-third interest in the entire tract. This authorized his attorneys to convey two-thirds of the land, which they did, and this being all to which he was entitled as the heir both of his father and of his mother, and as grantee from the heirs of Mrs. Pye, necessarily conveyed his entire estate in the premises in controversy.

Appellants' sixth assignment of error fails to point out wherein the court erred in refusing to give the 15 special charges asked by them, and is therefore not in accordance with the rules, and will not be considered.

For the errors pointed out the judgment will be reversed as to the appellees Mrs. Simpson and Mrs. Hardeman, and remanded for a new trial as to them.

SHIFFLET and others v. MORELLE and others.

(Supreme Court of Texas. May 31, 1887.)

1. TRIAL—VERDICT—FORM.

Where, in an action of trespass to try title, the verdict was in favor of certain defendants, "the jury finding no transfers" of a certain land certificate, *held*, that such verdict was not an uncalled-for special verdict, but was a good general finding in favor of the parties, and also of the facts on which the conclusion was based.

2. EVIDENCE—OPINION—EFFECT OF PAPERS.

The testimony of an administrator that certain papers of his intestate which came into his possession, and were afterwards destroyed by fire, and whose contents he could not remember, in his opinion vested a good title to land in said intestate, *held* inadmissible, as a legal conclusion based on imperfect recollection.

3. SAME—RECORD COPIES—WHAT ENTITLED TO RECORD.

In Texas, certified copies from county records of bonds for title and powers of attorney, relating to an unlocated right to land, such records being made in 1837, were offered in evidence. *Held* that, under the registration laws then in force, being the act of December 20, 1836, §§ 35, 37, 40, (Pasch. Dig. arts. 4973, 4980,) the only instruments entitled to record were those affecting the title to real estate; and that such right to land, before location, being merely personal property, evidence of records affecting it was not admissible.

4. SAME.

In such a case it makes no difference that the certified copy and illegal record were made by the clerk who took the acknowledgment, he and all the parties to the instrument being deceased; although, had he been living, he would have been a competent witness of the contents of the instrument.

5. TRESPASS TO TRY TITLE—INSTRUCTION—PUBLIC LANDS.

An instruction asked, that if the owner of a land certificate sold it, before location, to a person under whom plaintiffs claimed, or to any one else, the verdict should be for plaintiffs, *held* properly refused; an instruction having been given as to a sale to the person mentioned, and a sale to any one else not vesting title in the plaintiffs, but only divesting it from the defendants.

6. SAME—PRESUMPTION.

An instruction asked, that a sale of a land certificate, before location, could be presumed by the jury, if they believed from the evidence that such sale had been made, the court having already charged that a legal sale of such certificate could have been made verbally, *held* properly refused.

7. SAME—EVIDENCE—LAND CERTIFICATE.

A land certificate, before location, is merely an evidence of personal property, and its possession is not evidence of title in the possessor.

8. APPEAL—REVIEW—INSTRUCTIONS.

Where the plea of stale demand was set up by defendants in the trial court, a verdict having been given in their favor on another ground, the appellate court will not review instructions given by the trial judge in reference to such plea.

Appeal from Runnels county.

J. G. Abney, Willingham & Harris, and Hatsook & Patten, for appellants.
Robertson & Williams, Mays & Timmins, and C. A. Dailey, for appellees

GAINES, J. As the pleadings stood in the court below at the time of the trial, this was an action of trespass to try title, brought by Jane C. Shifflet and others, as plaintiffs, against T. L. Odom and C. Morelle and others, as defendants. The plaintiffs claimed the land in controversy under John McCreary, as the alleged assignee of the John Early head-right, by virtue of which the land was patented. Defendant Odom claimed a title to an undivided interest in the land, emanating from the same source. Defendants C. Morelle and others set up title to the entire tract as tenants in common; some of them as heirs of the original grantee of the certificate, and the others as grantees from other of his heirs. There was a verdict and judgment in favor of these latter defendants against plaintiffs, and also against defendant Odom, for the land in controversy, from which the parties cast in this suit have appealed to this court.

The following is the verdict of the jury: "We, the jury, finding no transfers, written or verbal, of the John Early league and labor certificate No. 331, located in Runnels county, Texas, find for C. Morelle, Robertson, and others, defendants, heirs of John Early; and that the locative interest of one-third of the John Early league and labor certificate, claimed by T. L. Odom and others, is barred by lapse of time."

Assuming that this is a special verdict, appellant Odom, in his fourteenth assignment of error, complains that the court erred in not granting a new trial upon the ground the jury found special issues without any instructions from the court to that effect. But we think the assignment is based upon a misconception of the nature of the verdict. A verdict is general which finds in general terms in favor of one party or the other, although special facts may be stated as the grounds of the jury's conclusion. *Lawson v. Hugenberg*, 77 Ind. 221. Our statute defines a special verdict as "one wherein the jury find the facts only on issues made up and submitted to them under the direction of the court." Rev. St. art. 1330. In *Caldwell v. Brown*, 43 Tex. 216, a general verdict awarding damages in favor of the plaintiffs, and showing specifically for what the damages were allowed, was recognized as valid; and the court looked to the special finding, and determined therefrom that

the defendant was not prejudiced by any erroneous charge authorizing the jury to find damages not claimed in the petition, because it appeared from the verdict that only such damages as were claimed had been given. The court, therefore, did not err in refusing to set aside the verdict upon the ground set forth in the motion for a new trial, and urged in the assignment of error under consideration. The verdict must be treated as a good finding, not only in favor of appellees generally, but also of the facts stated as the grounds upon which that finding is based. It is apparent, from the issues made in the case, that, if there was no transfer by John Early of his head-right, neither plaintiffs nor defendant Odom had any title to the land in controversy. It was vested in the heirs of the original grantee who had not conveyed their interests, and the assigns of such of them as had so conveyed. If, therefore, there was no error in the proceedings of the court below, in so far as they affected the question of such transfer, the finding of the jury upon that question is conclusive of the title in favor of appellees, and the judgment must be sustained.

The first and second assignments of error by appellants Shifflet and others, and the first by appellant Odom, complain of the ruling of the court in excluding certain answers of the witness Besser, given in a deposition read upon the trial. The witness was the administrator of John McCreary's estate. It is sufficient, for the determination of the question, to set out the answers together. Having previously testified that certain papers which came to his possession as such administrator had been accidentally burned, he was asked to describe them, and state their contents. He answered: "Can only state the substance from recollection. In investigating the papers left by John McCreary, some of them I deemed insufficient. Those I abandoned. Those which I considered had the evidence of title in him I placed as good; among which so placed were the papers pertaining to the John Early league and labor of land." This was excluded. Testifying concerning the papers before mentioned, in answer to other interrogatories, the witness said: "They were papers to which the names of Steele, also Hood, were affixed; also, I think, one signed by John Early. Of the last I will not be positive." The witness then continued: "They were all of that character of papers in that day by which title to land was passed, and, from a perusal of the same, I considered that they vested a good title to said league and labor in John McCreary." The last part of this answer was also excluded.

There was no error in the exclusion of either answer. It is true, the predicate had been laid for the introduction of secondary evidence to prove the execution of the lost instruments and their contents. Appellants had the right to establish them by any witness who knew the facts to which he was called upon to testify; but this did not open the door for proof of the instruments by the mere opinion of a witness who had given them a cursory examination, and concluded therefrom that they showed title in McCreary. With certain well-defined exceptions, the rule is that witnesses must state facts, and not opinions. Appellants contend that the long lapse of time makes this an exception to the general rule; but they have cited no authority to sustain such a proposition, and we are satisfied that none exists. If the witness had recollected the contents of the papers, he certainly could not have stated his conclusion as to their legal effect. This was the function of the court. For a much stronger reason he should not have been permitted to state his conclusion when, if he had ever known the contents, he failed to recollect them. The evidence was clearly inadmissible. *Rosenthal v. Middlebrook*, 63 Tex. 335; *Purnell v. Gandy*, 46 Tex. 199; *Railroad Co. v. McGehee*, 49 Tex. 489; *Clardy v. Callicote*, 24 Tex. 172.

Appellants offered in evidence certified copies from the record of Washington county of a bond for title from John Early to W. H. Steele for the obligor's right to a league and labor of land; of a power of attorney from Early to Steele and others, authorizing them to locate the land, and to convey it; and a bond for

title from Steele and another to the same right to John McCreary. The records are all made in 1837. The copies were severally excluded, and exceptions taken by appellants. Appellants' third, fourth, and fifth assignments of error are based upon the action of the court in excluding these instruments, respectively. The right to introduce in evidence certified copies of recorded instruments is purely statutory; and the statute applies only to such conveyances as are "permitted or required by law to be recorded." Rev. St. art. 2257. At the time the instruments in question were copied upon the records, the certificate for the John Early head-right had not issued. It was many years before it was located; and, when located, it was placed upon the land in controversy, which is situated in Runnels county. The question, therefore, presents itself, did the law authorize the registration of a conveyance, or of a contract for the conveyance, of the right to receive land from the government, before the certificate was issued, and before the land was located? The law in force at the time the record under consideration was made, was the act of the twentieth of December, 1836. Section 35 makes it the duty of the clerks of the county court to record "all deeds, conveyances, mortgages, and other liens, and all other instruments required by law to be recorded, which are presented to them," provided they are acknowledged or proved in a certain manner; and then provides that "all deeds, conveyances, mortgages, and other liens shall be recorded in the county where the property is situated." Pasch. Dig. art. 4973. By reference to the thirty-seventh section of the same act, we see what instruments are required by law to be recorded. It provides that "any person who owns or claims land of any description, by deed, lien, or other color of title," shall, within a certain time therein specified, have the same proved and recorded. Pasch. Dig. art. 4980. Section 40 reads as follows: "No deed, conveyance, lien, or other instrument of writing shall take effect as regards the interests and rights of third parties until the same shall have been duly proven, and presented to the court, as required by this act for recording land titles." Taking these provisions together, we think the act only authorized the recording of instruments affecting title to land, and that the words, "all other instruments in writing required by law to be recorded," were intended to embrace bonds for title, and other executory contracts for the conveyance of lands. A right to land before the location of the certificate is a mere personal right, and is decided not to be real estate. *Watkins v. Gilkerson*, 10 Tex. 340; *Evans v. Hardeman*, 15 Tex. 480. And hence we think the act in force in 1837 did not authorize the registration of conveyances, or the contracts of conveyances, of such right, until a location was made, and then only in the county where the appropriation was made. The object of the act in question, in providing for the record of conveyances, was to give notice to third parties, (*Crosby v. Huston*, 1 Tex. 203;) and it is not seen how this could be effected as to a mere floating right which might be located upon any part of the unappropriated public domain, unless the law had designated some particular county in which the registration should be made. The act has not done this, and the inference, therefore, is strong that its provisions were not intended to apply to such transfers. When the location is made, antecedent transfers of the certificate, or of the right, being evidence of title to the specific land located, may be lawfully registered in the county where the property is situated.

The decision in *Simpson v. Chapman*, 45 Tex. 560, is in accordance with these views. In the opinion in that case, Judge MOORE, speaking of a certificate, says: "Until its location it has no locality for record, and, being personally merely, a transfer of it is not required." The proposition was involved in the construction of a statute then under consideration, and is not a mere *dictum*. In accord with the same principle, it was held in *Johnson v. Brown*, 25 Tex. (Supp.) 120, that the much more comprehensive act of May 12, 1846, did not embrace the assignment of a judgment. We are of opinion, there-

fore, that the court did not err in excluding the evidence offered merely as certified copies. But it is insisted that the copy of the bond from Early to Steele should have been admitted, because it was proved that both parties, the subscribing witnesses and the clerk who took the acknowledgment, were dead; and that the record was by the same clerk, and was in his handwriting. If the clerk had been living, and had made the record, he could have testified to it as an examined copy, and this would have been competent evidence of the contents of the bond. The mere fact that an officer who took an acknowledgment made an unauthorized record of the instrument upon the book for registration of deeds, etc., gives it no validity. It stands like any other unauthorized copy of an instrument in writing, made by the officer who took the acknowledgment. The proof that the record was in the clerk's handwriting amounted to nothing, because the law would have implied that the paper was transcribed by him, or under his direction, without such proof.

The tenth assignment of error by appellants Shifflet and others, and the eighth by appellant Odom, are the same, and complain of the action of the court in refusing to give an instruction to the effect that if Early sold the certificate by parol to John McCreary, or any one else, before location, the jury should return a verdict for plaintiffs and defendant Odom. This instruction, so far as it relates to a transfer by Early to McCreary, was substantially given in the general charge, and in more than one special instruction, and to that extent need not have been repeated. It would have been erroneous to tell the jury that, if Early transferred to any one else except McCreary, plaintiffs had a right to recover, without instructing them, at the same time, that such third person must also have assigned to McCreary. They were not entitled to a verdict by showing that title was not in defendants. It is true that no charge very distinctly tells the jury that if Early sold the certificate by parol to some third person, and such person sold to McCreary, before the location, they should find for plaintiffs. But no proper charge to that effect was asked. Besides, the omission was unimportant, because the jury found that Early made no transfer of his head-right, either written or verbal.

The proposition of law contained in the charge, the refusal of which is complained of by Odom in his ninth assignment of error, can hardly be deemed correct. But, however that may be, we think, as applicable to the evidence, it was misleading, and was properly refused.

The twelfth assignment of appellants Shifflet and others, and the tenth by Odom, are based upon a refusal to give the following instruction asked by them: "The jury is authorized to presume a sale of the certificate, before its location upon the land in controversy, from John Early to John McCreary, if they believe from the evidence that such a sale was in fact ever made." This charge as a legal proposition is undoubtedly correct; but we cannot see that it differs in effect from a special instruction given at the request of the same parties. In the latter the jury were told that "a legal sale and transfer of the certificate could have been made verbally, without any written contract or conveyance of the same; and if you believe, from the evidence, that such verbal sale of the certificate was made by John Early to John McCreary, then you will find for the plaintiffs." It would have added nothing to this to have instructed the jury that they were authorized to presume a sale, if they believed, from the evidence, a sale had in fact been made.

Appellants Shifflet and others also claim, by their thirteenth assignment, that the court erred in refusing to give the following instruction requested by them: "One having possession of a land certificate before location, claiming to own the same, and dealing with it and treating it as his own, is *prima facie* the owner thereof." As a legal proposition, this is not sound. The possession of personal property is ordinarily *prima facie* evidence of title. The right to appropriate a certain quantity of land from the public domain is personal property; but the certificate is the mere evidence of that right. The

mere possession of a muniment of title is not evidence of title in the possessor. *Smith v. Sublett*, 28 Tex. 163.

The other errors assigned relate to the giving and refusal of charges in reference to the plea of stale demand, set up in the court below by appellees. The jury having found that the certificate was never transferred by Early, appellees were entitled to recover the land, whether appellants' demand was stale or not. We think that it is a case to which the defense was applicable; but we need not discuss whether or not appellants have shown sufficient facts to excuse their long delay in asserting title. See *Wilson v. Simpson*, ante, 839, (decided at present term.)

We find no error in the judgment, and it is affirmed.

SMITH v. CASWELL, Ex'r.

(Supreme Court of Texas. March 26, 1887.)

1. WITNESS—EXAMINATION—CREDIBILITY.

At the trial of an action upon a promissory note, where an expert has been called by the defendant to testify to the genuineness of the signature to the note, it is not error for the court to refuse to allow the plaintiff to ask the witness questions going to his credibility, and not to his competency as an expert, before the latter has answered the questions propounded by the defendant; the witness upon cross-examination being interrogated and answering fully as to the matters concerning which inquiry was made by the plaintiff.

2. EVIDENCE—OPINION—SIGNATURE.

In an action upon a promissory note, the signature to which was denied, the court instructed the jury that, "as no witness has been called by the plaintiff to testify directly to the execution of the note, you will turn your attention and inquiry strictly to the evidence as to whether the signature to this note has been shown to be genuine or not," and also that "the genuineness of a signature may be shown by the testimony of witnesses, who, though they did not see the person sign the instrument in question, may qualify themselves to testify their opinion of its genuineness in two ways: First, by showing that they have seen the person sign his name before, and the witness or witnesses are familiar with his signature, and can swear to the same as being genuine, or by experts," etc. Held, that it was sufficiently clear from the instructions that when the court said a signature could be proved by a witness who swore to its genuineness, it was meant that it might be established by his testimony as to his opinion upon the question, and that, by the clause "can swear to the same as being genuine," the court meant he could swear to his opinion of its genuineness.

3. SAME.

While expert testimony is competent to prove the genuineness of a signature to a promissory note, it is not giving undue prominence to such testimony for the court to instruct the jury that they could look to this evidence in determining the issue before them.

4. SAME.

Where, in an action upon a promissory note, the signature to which is denied, the plaintiff has introduced certain papers, which contain genuine signatures of the alleged maker of the note, and has called witnesses to prove that they are genuine, it is competent for an expert called by the defendant to testify as to whether, in his opinion, the name on the note and that to the other instruments were written by the same person.

5. SAME.

In an action upon a promissory note a witness for the defendant testified that he showed the note in question, together with other papers, to a certain expert, (who was also a witness,) and that the latter picked the note out as a forgery. Counsel for the plaintiff at once objected to this evidence, and it was immediately ruled out by the court, who instructed the jury that they were not to consider it. Held, that the facts were not sufficient to warrant a setting aside of a verdict for the defendant, and the granting of a new trial. Held, also, that it was not error for the court not to instruct the jury in the written charge that they were to disregard the statements of the witness in this connection; the counsel for the plaintiff not having requested such instruction.

6. PROMISSORY NOTE—EXECUTION—INSPECTION OF SIGNATURE.

Where suit has been brought upon a promissory note, it is not error for the court to grant a motion requiring the plaintiff to file the note in court for the inspection of the defendant, who has denied in his answer the signature of the note.

7. EVIDENCE—PRESUMPTION.

At the trial of an action against an executrix upon a promissory note, the court admitted in evidence a judgment rendered against the plaintiff in favor of the defendant in her representative capacity, long after the note in issue was alleged to be due. *Held*, that the fact that the plaintiff, if he had had an existing demand against the defendant while her suit as executrix against him to recover debts alleged to be due her testator was pending, could have pleaded it in offset in that suit, and the fact that he did not do this were circumstances tending to show that no such demand existed, and that the court did not err in admitting evidence of the judgment.

8. JURY—PROVINCE OF COURT.

In an action upon a promissory note, the court, at the request of the defendant's counsel, instructed the jury, in effect, that the language of the plea of *non est factum* to the note in issue was for the construction of the court, and not a matter for them to consider. *Held*, that the court did not err.

9. WITNESS—COMPETENCY—TRANSACTIONS WITH DECEASED.

In an action upon a promissory note the executrix of the alleged maker of the note is not incompetent to testify against the plaintiff, as the other party to the execution of the note, as to the making of the affidavit of the plea of *non est factum*.¹

10. TRIAL—INSTRUCTION—SPECIFIC CHARGE.

The plaintiff in an action upon a promissory note excepted to the verdict on the ground that the court erred in its general charge to the jury in not giving full and complete instructions as to the manner of proving a signature. *Held* that, if the instructions were incomplete, the plaintiff's proper course was to ask special instructions, and, not having done this, he could not complain of the instructions as given.

11. SAME—INSTRUCTIONS—EVIDENCE.

It is not error for the court, at the trial of an action upon a promissory note, in charging the jury, to say that "no witness has been called by plaintiff to testify directly to the execution of the note;" such statement being undeniably true as shown by the record, it being proper for the court to direct the jury to the very issue to be determined, and to instruct them as to what evidence they might look to in coming to a decision upon it.

12. APPEAL—EVIDENCE—REVIEW.

Where an objection is made by the plaintiff in a suit to the action of the court in sustaining the objection of the defendant to a question put by the plaintiff to a witness, it cannot be said that the answer proposed to be drawn out by the question was improperly excluded where its nature does not appear in the bill of exceptions, and where the information sought to be elicited might have been as to some transaction with or statement by defendant's testator.

Appeal from Jefferson county.

GAINES, J. Appellant brought this suit against the appellee as executrix of the will of C. C. Caswell, deceased, to recover judgment upon certain notes alleged to have been made by her testator. To one of the notes (which was for \$4,000) the defendant interposed pleas under oath of *non est factum*, and of failure of consideration. The finding of the jury was in her favor as to this note. The points raised by appellant's brief are mainly questions of practice, and we shall dispose of them in the order in which they are there presented.

Appellant first presents his seventh assignment of error, which is as follows: "The court erred in overruling the objection of plaintiff that the wit-

¹ Respecting the admissibility of testimony concerning transactions with persons since deceased, see *Parcell v. McReynolds*, (Iowa,) 33 N. W. Rep. 139; *Shipp v. Davis*, (Ga.) 2 S. E. Rep. 549; *Butler v. Jones*, (Ala.) 2 South. Rep. 300; *Scherrer v. Ingberman*, (Ind.) 12 N. E. Rep. 304; *Witthaus v. Schack*, (N. Y.) 11 N. E. Rep. 649, and note; *Union Railway & Transit Co. v. Schacklet*, (Ill.) 10 N. E. Rep. 896; *Blohme v. Lynch*, (S. C.) 2 S. E. Rep. 136; *Brown v. Moore*, Id. 9; *Kennemore v. Kennemore*, (S. C.) 1 S. E. Rep. 881, and note; *Booth v. McJilton*, (Va.) Id. 137; *Pennsylvania R. Co. v. Peters*, (Pa.) 9 Atl. Rep. 317; *Hinckley v. Hinckley*, (Me.) 9 Atl. Rep. 897; *Mutual Life Ins. Co. v. Watson*, 30 Fed. Rep. 653.

ness Whitaker, for defendant, could not testify as an expert until he had been cross-examined by plaintiff as to his [witness'] competency as an expert." The ground of the objection to the testimony of the witness is shown by the following extract from the bill of exceptions: "Witness, in answer to questions propounded to him by defendant's counsel, answered: 'My business is that of a lawyer. I have had experience in the comparison of handwritings for more than thirty years. I have been a professional expert for over twenty-five years. I have been called to testify, and have testified, from time to time, in New Orleans and elsewhere, for the past twenty-five years, as an expert in the comparison of handwriting and signatures.' The witness was then asked to examine papers containing signatures of C. C. Caswell admitted to be genuine, when the plaintiff's counsel objected to the witness making any statement about the papers, or examination of them, until plaintiff had cross-examined him as to his qualifications as an expert in the cause, and to know who he was, where he came from, who brought him here, and how much he was paid for coming here. The court overruled the objections of plaintiff, stating that plaintiff should have full latitude when he got the witness on cross-examination, to which ruling of the court plaintiff excepted."

The action of the court was entirely proper. The questions which appellant's counsel proposed to ask the witness went to his credibility as a witness, and not to his competency as an expert, and were properly ruled out at that stage of the examination. Upon cross-examination the witness was interrogated and answered fully as to these matters. The question whether it was competent for the witness to testify his opinion as to the genuineness of the signature of Caswell by a comparison with signatures admitted to be genuine, which has been so elaborately discussed by counsel under this assignment, was not raised by the objection to the testimony, and will not be considered in this place.

The next assignments of error presented in appellant's brief, which are from the first to the fifth, inclusive, complain of the action of the court in giving special charge No. 1 asked by defendant. The first alleges error in the following part of such charge in reference to the manner in which Caswell's signature to the note could be proved: "This may be done in two ways: *First*, by proving, by some one or more who saw him sign the note, that he did sign it; or, *second*, by proving, by a witness or witnesses capable of testifying to the genuineness of C. C. Caswell's signature, that the signature to this note is genuine. And, as no witness has been called by plaintiff to testify directly to the execution of the note, you will turn your attention and inquiry strictly to the evidence as to whether the signature to this note has been shown to be genuine or not." The substance of the objections to the charge is that the rule by which a witness is to qualify himself to testify to a signature is not given; and that it instructs the jury, in effect, that witnesses who know a signature from having seen it written, etc., must testify positively to its genuineness, and not merely to their opinion. Taken by itself, this may be erroneous; but the very next sentence instructs the jury that "the genuineness of a signature may be shown by the testimony of witnesses who, though they did not see the person sign the instrument in question, may qualify themselves to testify their opinion of its genuineness in two ways: *First*, by showing that they have seen the person sign his name before, and the witness or witnesses are familiar with his signature, and can swear to the same as being genuine, or by experts," etc. The rule by which a witness can qualify himself is stated, and we think the meaning of the court sufficiently clear from the context that, when the court said a signature could be proved by a witness who swears to its genuineness, it is meant that it may be established by his testimony as to his opinion upon the question.

The second assignment complains that so much of the extract already quoted from the charge as tells the jury that "no witness had been called

by plaintiff to testify directly to the execution of the note" is upon the weight of the evidence. This statement was undeniably true, as is shown by the record; and, there being no testimony of the character mentioned, it was no error to call the attention of the jury to the fact. It was proper for the court to direct the jury to the very issue to be determined, and to instruct them as to what evidence they might look to in coming to a decision upon it.

What we have already said in regard to the first assignment of error is sufficient to dispose of the third. The context shows that, by the clause "can swear to the same as being genuine," the court meant he could swear to his opinion of its genuineness.

The fourth assignment is that "the court erred in giving to the jury that part of said special charge No. 1 which attempts to define the character of expert testimony, as not being correct in point of law as applicable to this suit, and to the character of proof that was then before the jury, as it gave undue prominence to the witness named Whitaker for defendant, a so-called expert." The name of the witness Whitaker nowhere appears in the charge. It appears from the statement of facts that he did not know Caswell or his handwriting, but was called as an expert in order to testify his opinion, to be derived from an examination of the admitted signatures of Caswell, whether the latter signed the note in question or not. If it was competent for defendant to offer expert testimony of an opinion of the genuineness of the handwriting formed from a comparison of the admitted signature, then it was proper for the court to charge the jury that they could look to this evidence in determining the issue before them. This did not give the evidence undue prominence.

But here we come back to the first question, discussed by counsel for appellant in his brief, was this testimony admissible? The plaintiff had in the first instance called witnesses to prove that certain papers not in the case had the genuine signature of Caswell, and it would seem from the bill of exceptions that there were other signatures to papers not in the record which were admitted to be genuine. Plaintiff interrogated witnesses as to their opinion of the genuineness of the signature as formed from a comparison with the admitted and proved signatures to these outside documents. None of this was objected to by defendant. The witness Whitaker testified his opinion as to whether the name to the note, and that to the other instruments so brought into the case by plaintiff, were written by the same person. It is not necessary for us to go elsewhere for authority upon the competency of this evidence. The point was before this court in the case of *Kennedy v. Upshaw*, 64 Tex. 411; and it was there held that the court did not err "in permitting witnesses who qualified as experts upon examination of papers which were properly in evidence in the case, and of papers which appellant had introduced as being the genuine signature of the testator without objection, and of a paper which on a former trial appellant had introduced and declared to bear the genuine signature of the testator made at the same time as the codicil, to give their opinions as to the genuineness of the signature of the testator to the codicil." The rule laid down in the English courts, and in many of the states of this country, and in our own courts, is that papers bearing the signature of a party whose handwriting is to be proved, if not already in the case, cannot be introduced for the purpose of comparison, or of laying the foundation for the testimony of experts. The grounds, however, upon which they are excluded are—*First*, that such a practice is calculated to raise collateral issues as to the genuineness of the signatures offered; and, *second*, that it affords an opportunity to the party offering them to obtain an advantage by an unfair selection. Neither of these objections applies when the signatures have first been introduced as genuine by the opposite party. The evidence was competent, and the court did not err in charging the jury to consider it.

This disposes of the objections to the special charge No. 1 given at the re-

quest of appellant. These have raised the most serious questions presented in this case. There are isolated passages in that charge from which the jury might have been led to infer that a witness who knew the handwriting of Caswell from seeing him write could not prove his signature by giving his opinion as to its genuineness; but this is corrected in another place, in which they are told that the signature may be proved by the opinion of such witnesses. The mass of the testimony on both sides of the case consisted of this character of evidence, and its competency was nowhere disputed; and it would seem that, if there had been danger of the jury's being misled by the instruction in question, counsel for appellant would have asked a charge upon the exact point, which the court would have given. Since appellant did not do this, he cannot now complain. We conclude that the assignments based upon the charge are not well taken.

The court, at the request of defendant's counsel, instructed the jury, in effect, that the language of the plea of *non est factum* to the note in issue was for the construction of the court, and not a matter for them to consider. This is a correct proposition of law, and it is not seen how plaintiff could have been prejudiced by it, even had nothing appeared during the progress of the trial to call for such instruction. It may have been that counsel for plaintiff in argument to the jury had sought to draw inferences from the language of the plea calculated to bias them against the good faith of the defense. If so, the instruction was entirely proper. In the absence of some showing to the contrary, we must indulge every reasonable intendment in favor of the action of the court, and presume that sufficient cause existed for giving the charge as requested. The charge does not authorize the jury to consider the plea as evidence, as appellant complains in his sixth assignment, and hence did not, as alleged by appellant, make defendant a witness in contravention of the statute. The alleged remark of the judge, in the hearing of the jury, complained of in the statement under the assignment last mentioned, was neither excepted to nor assigned as error, and will not be considered.

The eighth assignment is that "the court erred in sustaining the defendant's objections to the question asked the plaintiff while on the witness stand by his counsel, viz., 'State whether you know where Mr. Caswell got the money to pay for these lumber-yards.'" The answer proposed to be drawn out by the question is not given in the bill of exceptions; and hence this court cannot say that it was improperly excluded. The testimony sought to be elicited may have been "as to some transaction with or statement by" defendant's testator, in which case the action of the court was certainly correct. Rev. St. art. 2248.

It is also complained that "the court erred in granting the motion made in this cause by defendant at a former day of this term of court, viz., May, 1886, requiring the plaintiff, George W. Smith, to file in the court the note dated August 9, 1882, for the sum of \$4,000, for the inspection of the defendant, thereby giving the defendant an opportunity to tamper with the signature to said note, the execution of which had been denied by defendant by a plea of *non est factum* before the plaintiff had offered the note as evidence upon the trial of the cause." We need not inquire into the correctness of the ruling of the court which is here called in question! It does not appear that appellant has been in any manner prejudiced by it. If the note had actually been tampered with, this fact would doubtless have been shown upon the trial, and would probably have had an effect upon the jury most unfavorable to the defendant. But no such proof was attempted. It therefore must be presumed that the note was not in fact tampered with, and we can but conclude that the plaintiff was not injured by the action of the court.

The substance of the tenth assignment is that "the court erred in overruling the objections of plaintiff to the question asked one G. W. Kidd, witness

for defendant, by defendant's counsel, if he [Kidd] had exhibited certain papers containing the signature of C. C. Caswell, and among the number the note for \$4,000 in suit, and what the man named Whitaker said about them;" and the eleventh complains that "the court erred in not instructing the jury in the written charge that they must disregard the statements of Kidd that Whitaker picked out the note of \$4,000 as a forgery." These will be considered together. The bill of exceptions shows that the witness Kidd was permitted to answer over the objections of plaintiff's counsel; but it also appears from the bill that, immediately after these answers were given "to the declarations of Kidd to Whitaker, and by Whitaker to Kidd, the counsel for plaintiff objected, and moved the court to strike the same out, which objection and motion to strike out the court sustained, and then and there stated to the jury that such statements and declarations were not evidence in the case, and that they must not receive them as such." This makes it evident that the testimony was ruled out, except in so far as the witness stated the mere fact that he exhibited certain papers to Whitaker. The relevancy of this evidence is not apparent, unless it be for the purpose of corroborating Whitaker upon a matter about which he had been cross-examined by the counsel for the plaintiff; but, whether relevant or not for this purpose, we cannot see that appellant has been in any way prejudiced by the testimony, because substantially the same fact had been adduced in evidence by his own counsel in the cross-examination to which we have just referred. The question therefore presents itself: Was the admission of the testimony as to the statements and declarations of the witness Kidd and of Whitaker such error as calls for a reversal of the judgment, although they were subsequently excluded, and the jury were told to disregard them?

In the case of *Gulf, C. & S. F. Ry. Co. v. Levy*, 59 Tex. 542, the judgment was reversed because of error of the court in admitting illegal evidence, although it was subsequently withdrawn. But the evidence was not excluded, and the jury not instructed to disregard it, until the day after it was introduced; and in the opinion stress is laid upon the fact that it was the testimony of the plaintiff himself, and was calculated to arouse the sympathy of the jury. There large damages had been awarded, although the pecuniary damages were trivial in amount. In *McCauley v. Long*, 61 Tex. 74, the opinion of the court shows that there was great doubt whether the evidence was ever in fact withdrawn from the consideration of the jury. In *Tucker v. Hamlin*, 60 Tex. 171, the same question is discussed, but in that case improper evidence as to damages was admitted, and was not withdrawn, except inferentially by a charge which gave the jury the correct measure of damages for the injury alleged. The practice of admitting testimony, and then excluding it, is reprobated by this court in the cases cited, and is not to be commended. But whether it requires a reversal or not is a question to be determined by the facts and circumstances of each particular case. A judgment which would otherwise be held good as being supported by a verdict upon conflicting testimony will in such case be set aside if it appear to the appellate court to be against a slight preponderance of evidence, or the damages awarded be so large as to raise a doubt of the fairness of the jury.

In the case before us the testimony was excluded as soon as it was introduced; and, the jury having been then expressly told to disregard it, it is not to be presumed that it made any lasting impression upon their minds. Besides, both parties who made the statement were upon the stand, and were subjected to a rigid cross-examination as to the grounds of their opinion as to the genuineness of the signature in question by the counsel for appellant. In addition to these considerations, the evidence to sustain the verdict was sufficiently ample to remove all doubts of the jury's having been influenced by the temporary admission of the illegal testimony. If appellant considered that a written instruction to the jury to disregard it was necessary, he should have

asked such instruction; and, if asked, it should have been given. That this was not done, evinces to our minds that his counsel did not feel that the jury were likely to be influenced by the excluded testimony. For the reasons stated we think neither the tenth nor eleventh assignments of error are well taken.

The appellant, if he had an existing demand against appellee while her suit as executrix against him to recover debts alleged to be due her testator was pending, could have pleaded it in offset in that suit. The fact that he did not do this is a circumstance tending to show that no such demand existed. We therefore think that, under the peculiar facts of this case, the court did not err in admitting in evidence a judgment rendered against him in her favor in her representative capacity long after the note in issue was alleged to have fallen due.

It is complained in the thirteenth assignment that the court erred in overruling plaintiff's exceptions to the pleas of *non est factum* and failure of consideration "as presented in plaintiff's supplemental petition in exceptions Nos. one and two." Not finding in the supplemental petition any exceptions numbered 1 and 2, we are at a loss to know the specific grounds of exception to the pleas relied upon in this assignment. The proposition under the assignment is that defendant, being the executrix of the alleged maker of the note, "is incompetent to testify against the plaintiff as the other party to the execution of the note, even to the making of the affidavit of the plea of *non est factum*." This is sufficient to show that the assignment is not well taken.

The fourteenth assignment of error is to the effect that the court erred in the general charge to the jury in not giving full and complete instructions as to the manner of proving a signature. If the instructions were incomplete, appellant's remedy was to ask special instructions. Not having done this, he cannot now complain.

It is complained by the fifteenth assignment that "the court erred in the general charge in not using the same language to the jury in regard to finding for the plaintiff as for defendant." We do not see that the jury could have been misled by the difference in the phraseology of which appellant complains. Taking all the instructions together, there is no doubt that the jury well understood it was their duty to find for the plaintiff as to the note, the execution of which was denied, in the event they believed from the evidence that defendant's testator had signed it.

In our opinion, the evidence greatly preponderated in favor of defendant upon the issue presented by her plea of *non est factum*. Therefore the sixteenth assignment is not well taken.

We find no error in the judgment, and it is affirmed.

MYNDERS v. RALSTON and others.

(Supreme Court of Texas. June 14, 1887.)

1. EJECTMENT—ISSUES—EVIDENCE.

When there is no controversy in an action as to the ownership of a certain survey, No. 56, but the real issue is whether such survey does not conflict with another survey, No. 36, under which the defendants claim, it is not error to exclude from evidence a deed of which the only effect is to show title in plaintiff to said survey No. 56.

2. APPEAL—ASSIGNMENT OF ERROR.

An assignment of error that "the court erred in not rendering a judgment for the plaintiff for the land sued for, costs of this suit, the damage proved, and in not ordering a writ of possession to put defendants out of, and put plaintiff in, possession of said land, under the pleadings of the parties filed in this case, and the evidence given on the trial of the case," cannot be considered, because it does not specifically point out the error complained of.

Appeal from district court, Mason county.

A. D. McGinnis, for appellant. *H. M. Holmes and Bridges & Fulton*, for appellees.

WILLIE, C. J. The appellant brought this action of trespass to try title against the appellees to recover survey No. 56 in Mason county, originally granted to John A. Green and N. W. Faison, assignees of Lewis Heitmann. The appellees answered, disclaiming any title to survey No. 56, and denying that they were in possession of any part of said survey; but they further alleged that they were the owners of state section No. 36, surveyed as an alternate section by the Indianola Railroad Company, and that they resided upon this tract, and had placed upon it improvements of great value. They prayed for a survey of the two sections, for the purpose of ascertaining whether or not they conflicted; and, in the event they did not, that the defendants might have judgment, and, if they did conflict in that part upon which the defendants resided, that the defendants might recover the value of their improvements, which they alleged had been made in good faith. An order of survey was issued, and a survey made and returned, and, the cause having been submitted to the court for determination, judgment was rendered for the defendants, for the reason that the plaintiff had failed to establish title in himself to the land sued for. Judgment was entered up for the defendants in the usual form, including a recovery of the costs of suit. A bill of exceptions reserved at the trial shows that, after the testimony on both sides had closed, the plaintiff offered in evidence a deed from John A. Green to J. I. Faison, which was excluded by the court, because it was not in rebuttal of any testimony introduced by the defendants. This action of the court is assigned as error. There are but two other assignments of error, which are as follows:

"Second Assignment of Error. The court erred in rendering judgment for costs for defendants under the pleadings of the parties, and the evidence given in the case.

"Third Assignment of Error. The court erred in not rendering a judgment for the plaintiff for the land sued for, costs of this suit, the damage proved, and in not ordering a writ of possession to put defendants out of, and put plaintiff in, possession of said land, under the pleadings of the parties filed in this case, and the evidence given on the trial of the case."

The last of these is in plain violation of the rules of this court, and cannot be considered. It does not point out in what respect the court committed error in not rendering a judgment for the plaintiff for the land and damages, and not ordering a writ of possession. The error may have been in a matter of law, or in a matter of fact. If there be error, the assignment leaves us to find it out ourselves; and in order to do so we must search the whole record from beginning to end. We see no fundamental error apparent on the face of the record, and, no error of any kind being indicated in the assignment, we cannot look into the statement of facts to see if, under the evidence, the court should not have found for the appellant.

There was no necessity for the introduction of the deed from Green to Faison. If admitted, it would not have benefited the plaintiff's case in the least; hence he was not prejudiced by its exclusion. The only effect of the deed was to show title in the plaintiff to section 56, and this was fully admitted by the pleadings of the defendants. The question before the court was not as to the title to survey 56, but as to whether it covered the land in controversy, *i. e.*, lapped over onto section 36, under which the defendants claimed. This was the only disputed fact in the case, and to this point only should the evidence have been confined. The rejected deed tended neither to prove nor disprove this fact. Under the assignments of error upon which the case comes before this court the judgment must necessarily be affirmed. An affirmation of the judgment against the appellant for the land in controversy

necessarily affirms that portion of it which adjudges the cost against him as the unsuccessful party below. As there is no error in the judgment of which we can take notice, it is affirmed.

KOEPEL and others v. ALLEN and others.

(*Supreme Court of Texas. June 10, 1887.*)

1. BOUNDARIES—CALL FOR NATURAL OBJECT—PROVINCE OF JURY.

When there is involved in a suit the question whether a certain river or a slough is the true boundary of a land grant, and the field-notes of the survey of said grant call for the river, but the courses and distances very nearly correspond to the configuration of the slough, and not to the meanders of the river, and it appears that if the survey were made at a time when the water was high the slough might have been mistaken for the river, and the call for the river might have been the result of a mistake, it is error for the court to withdraw from the jury the question whether said boundary extended to the river or to the slough.¹

2. APPEAL—ASSIGNMENT OF ERROR.

Assignments of error that "the court erred in refusing to give the instructions asked for by defendants and refused by the court," and that "the court erred in not granting a new trial, because the verdict and judgment were contrary to and against the law, and were not supported by the evidence," are too general, and will not be considered, because they do not distinctly specify in what the error consisted.

Appeal from district court, Guadalupe county.

Jas. Greenwood, for appellants. *W. E. Goodrich*, for appellees.

GAINES, J. This suit involves the question of the true location of the Moses Baker league survey; appellees, who were plaintiffs below, contending that its east boundary extends to Guadalupe river, and appellants claiming that it stops at a certain slough or old river bed which lies west of the river as it now runs. The land in controversy lies between the river and slough. The field-notes of the Baker grant call for the river, but the courses and distances do not conform to the meanders of the stream. The evidence shows that the calls very nearly correspond with the configuration of the slough. It also appeared by the testimony that the slough at one time may have been the channel of the river, though such was probably not the case at the time the Baker league was surveyed. A witness also testified that if the survey was made at a time when the waters were high, the slough might have been mistaken for the river. In brief, there was testimony tending to show that the surveyor may have run along the slough supposing it to be the river, and that the call for the river was the result of a mistake. Such being the evidence, the court erred in charging the jury that they should find for plaintiffs if they showed title to the Baker league, unless they found for defendants under their plea of the statute of limitations; and that, if the grant calls for the river, the land would extend to that boundary. A call for a natural object is the call of the highest dignity, because such an object is the most permanent and conspicuous, and the least likely to have given rise to a mistake. But such a call is not absolute. It may be shown to be a mistake, like any other call. There is not that importance or sanctity attached to it to require the courts to depart from the cardinal rule in determining boundaries, that the lines actually run by the surveyor, whenever they can be ascertained by any competent testimony, are always the true limits of the survey. *Jones v. Burgett*, 46 Tex. 285; *Castleman v. Pouton*, 51 Tex. 84; *Booth v. Upshur*, 26 Tex. 64; *Booth v. Strippleman*, Id. 486.

Appellants' third and fourth assignments of error, which complain of the charge in the particulars just considered, are well taken.

¹ Respecting the rule that monuments govern courses and distances, see *McAnninch v. Freeman*, (Tex.) 4 S. W. Rep. 369; *Moore v. Whitcomb*, Id. 373; *Bryant v. Maine Cent. R. Co.*, (Me.) 9 Atl. Rep. 736.

See, also, *Duff v. Moore*, (Tex.) 4 S. W. Rep. 530.

The seventh assignment, that "the court erred in refusing to give the instructions asked for by defendants and refused by the court;" and the first, that "the court erred in not granting a new trial, because the verdict and judgment were contrary to and against the law, and were not supported by the evidence,"—are too general, and will not be considered. The charges refused contained two propositions. The assignments should have distinctly specified in what the error consisted. In view of another trial, however, it may be said that plaintiffs, before they closed their testimony, should have adduced testimony to show that the land in controversy was embraced in the Baker grant. But the subsequent evidence showed that this was a fact if the grant extended to the Guadalupe river. But for the errors in the charge of the court which have been pointed out, the verdict would not be disturbed.

For the error of the court in withdrawing from the jury the question whether the east boundary of the Baker league, as originally run, extended to the river or to the slough, the judgment is reversed, and the cause remanded.

BLUM and others v. LOONEY.

(*Supreme Court of Texas. June 17, 1887.*)

1. PUBLIC LANDS—"HEAD-RIGHT CERTIFICATE."

The Texas special act of April 30, 1873, which granted a head-right certificate to one Lancaster, was unconstitutional and void. The act of March 31, 1883, enacts that such head-right grants, "to which there is no valid legal objection other than that they are supposed to be in conflict with the then existing constitution, are hereby validated and confirmed, and declared to be binding upon the state: * * * provided, that this act shall only apply to soldiers and heirs and actual settlers of Texas, and their vendees, to whom lands have been granted." *Held* that, there being nothing in the constitution in 1883 prohibiting the legislature from passing such an act as that by which a special grant was made to Lancaster, such act might be made valid.

2. SAME.

Held, also, that it was incumbent upon those claiming through Lancaster to show that he was an actual settler within the meaning of the proviso aforesaid, and that this was not shown by the proof that he was an actual settler in 1853, because, as the act of 1873 gave the land as a head-right, it was as such that he must receive it under the law of 1883, and first-class head-right certificates were not granted to settlers of a date later than 1836; and the act of 1873, being void, does not prove that Lancaster fulfilled the requirements which entitled him to the grant in question.

Appeal from district court, Taylor county.

G. A. Kirkland and Scott & Levi, for appellants. Chas. I. Evans, for appellee.

WILLIE, C. J. This case involves the title of the appellants to 5,651,958 square varas of land lying in Taylor county. They claim the land under a head-right certificate granted to J. Lancaster by a special act of the legislature of April 30, 1873, which they say was ratified by a subsequent act of March 31, 1883. A patent for the land located and surveyed under this certificate was granted May 10, 1877, and the appellants are the owners of all the right of the patentee. Appellee claims under the location of a valid certificate made upon the land March 2, 1885, and brought this suit to compel a survey of the land, and a return of the field-notes made under that certificate. The act of March 31, 1883, enacts that "all surveys and patents by virtue of head-right or bounty warrants issued under special laws enacted after March 31, 1873, and prior to April 11, 1876, to which there is no valid legal objection other than that such special laws are supposed to be in conflict with the constitution then in force, are hereby validated and confirmed, and declared to be as binding upon the state as they otherwise would be if such special laws had been permitted by the constitution: * * * provided, this act

shall only apply to soldiers and heirs and actual settlers of Texas, and their vendees, to whom lands have been granted."

The appellee claims that the act of April 30, 1873, was unconstitutional, and that it could not be validated by the act of March 31, 1883. He further claims that, if the act of 1883 could validate the certificate issued under the act of 1873, then it was incumbent upon the appellants, in order to entitle themselves to the benefit of the former act, to show that J. Lancaster came within the meaning of its proviso. On the other hand, the appellants, admitting the unconstitutionality of the act of 1873, contend that the legislature, on the thirty-first of March, 1883, had the power to render it valid; that it was not incumbent upon them to show affirmatively that Lancaster came within the proviso, but that, if he did not, the burden of showing this rested upon the appellee.

They further contend that they proved all that was required by the proviso in showing that Lancaster was an actual settler of Texas from the year 1853 to April 30, 1873; and, further, that the fact that he was an actual settler, entitled to a head-right certificate of the first class, was made to appear by showing that a grant had been made to him as such by the act of April 30, 1873, and by the issuance of a patent and certificates under said special act. The court below held that the act of 1873 was validated by that of 1883; but that it was incumbent upon the appellants to show that Lancaster came within the proviso of the latter act, and that neither the passage of the special act, nor the issuance of the patent and certificate under it, were sufficient evidence of that fact. Judgment was rendered for the appellee, and from that judgment this appeal is taken.

We think the court below was correct in holding that the special act of April 30, 1873, was validated by the general act of March 31, 1883. It is very true that a body not having the power to make a grant has not the power to ratify one already made. But the converse of this proposition is also true, and decides the present question; for, at the time the healing act was passed, there was nothing in our constitution prohibiting the legislature from passing such an act as that by which a special grant of land was made to Lancaster. Having the right to make the grant, it had the power to ratify the one already made without authority. The right of the legislature to validate such grants by the act of 1883 was recognized by this court in the case of *Bates v. Bacon*, 1 S. W. Rep. 256, and the question is too clear to require further discussion.

We think, too, that the court was correct in holding that it was incumbent on the appellants to show that Lancaster was an actual settler, within the meaning of the proviso of the healing statute. The rule of pleading as to penal and criminal statutes is to the effect that an exception contained in such statutes must be negatived in pleading, but a proviso need not; which rule seems to rest upon the ground that an exception is matter of defense, and must be shown by the party prosecuted. *Spieres v. Parker*, 1 Term R. 141. If that rule be applicable to civil statutes, it would seem that, when one claims a benefit under such an act, he should bring himself fully within the terms and conditions upon which the benefit is to be granted. He occupies a like position to that of him who claims to be exempted from the unfavorable provisions of a statute.

But it is unnecessary to resort to analogies drawn from penal statutes to ascertain what construction should be given to the statute under decision. The intent and meaning of the act are apparent upon its face, and from the circumstances which brought about its enactment. The legislature had passed several acts granting to individuals bounty and head-right certificates at a time when it had no power to do so. These grants were utterly void. They could not be enforced against the government. Every certificate or warrant issued under these acts was so much blank paper, and the land upon

which it had been located was, so far as these were concerned, unappropriated public domain. But the state was not unwilling that certain meritorious parties, such as soldiers and their heirs, and actual settlers, and the assigns of either, to whom such grants had been made, should have the lands granted to them. Hence, when it regained the power to make the grants, the state exercised it in favor of these parties by confirming such grants as had already been made to them. This confirmation was a mere act of bounty upon the part of the government, and by every rule of interpretation must be confined to the classes of persons in favor of whom it was intended to operate. It cannot be claimed that any other persons except such as are named in the proviso are entitled to the benefit of the confirming act. The whole object of the act is to benefit them, and the fact that a claimant of land belongs to one of these classes of persons is in the nature of a condition precedent to his right to the land granted. Had the certificates never been issued under the former acts, and the healing statute had validated these acts with a proviso like that under consideration, it is very clear that the commissioner of the general land-office would have no right to issue the certificates without proof that the applicant possessed the qualifications therein prescribed. It would be unreasonable to contend that, because the applicant was named in the act, he was to receive the certificate unless the commissioner could show that he did not possess the proper qualifications. In the cases provided for in the act, the certificates, and perhaps the patents, had already issued, but they were null and void. The new act called them into life upon certain conditions. Compliance with these conditions was as necessary to impart vigor to the surveys and patents as it would have been originally to call into existence the warrants and certificates upon which they were based. In fact, the statute must be read as if it in terms validated and confirmed only such surveys and patents by virtue of head-right or bounty warrants as had been issued under the special acts named for the benefit of soldiers and heirs and actual settlers, and their vendees. The statute evidently intended to make the condition of being an actual settler a condition precedent to the right to the land under a head-right certificate previously granted; and, when the right is claimed, compliance with such a condition must of course be proved. Evidence of this fact is affirmative, and lies more particularly within the knowledge and reach of the grantee. To require the state, or a subsequent claimant under the state, to show the negative, would be to render the proviso of no force whatever.

It was not sufficient proof of this condition to show that Lancaster was an actual settler of Texas in 1853 and for any number of years thereafter. The special act of 1873 granted this certificate as a head-right, and at the same time granted him 640 acres as bounty. The certificate was of the first class, issued only to single men residing in Texas, March 2, 1836. The bounty was for six months' service in the army of the republic. The clear intention of the statute was to give to Lancaster the amounts of land to which the legislature thought him entitled for such residence and such services. Upon what evidence, as to his merits, the legislature acted, is unimportant. Its act was void, and all the proceedings which brought it about were of no effect for any purpose whatever. The act of March 31, 1883, made the previous act valid, but only upon condition that the beneficiary should show that he was a soldier or an actual settler, accordingly as he claimed the one grant or the other. As bounties were granted only to soldiers of the republic of Texas, no proof that the claimant was a soldier in any other capacity would have satisfied the condition; and we think it equally clear that the settlement necessary for Lancaster to obtain a head-right certificate must have dated as far back as the second of March, 1836, for first-class head-right certificates were not granted to settlers of a later date. If this be not so, then we must conclude that the legislature, under the guise of rewarding a soldier of the Texas revolution, and

a settler of Texas in its darkest days, has granted land to one having no merit not possessed by thousands of citizens to whom such bounty is denied. Such special acts expressly state or necessarily imply the reasons for their passage. The reasons for this act are apparent upon its face, and we have no right to refer its passage to other causes.

Nor do we think that the mere fact that the legislature passed a special act granting a head-right certificate to Lancaster was proof that he was an actual settler of Texas on the second of March, 1836. If this were so, why insert the proviso in the confirmatory act? It became of no force whatever. It required that, in order to entitle Lancaster to the one-third league of land previously granted him, it should appear that he was an actual settler of Texas at the proper time, and yet the simple fact that he had obtained the land would be full evidence that he had settled at such time. In other words, the legislature demanded evidence that a party had a right to enjoy a grant of land, and intended at the same time that the fact that he did enjoy it should be full evidence of that right. The requirement as to the evidence in such case would be a useless thing. For the same reason the issuance of the patent by the commissioner of the general land-office was not proof of the grantee's qualifications. The case is very different from that where a grant has been made by an officer having full authority over the subject-matter. The law there presumes, as to third persons, that the grant was made in a proper case. But here the grant was made by a body having no authority so to do. None of the ordinary presumptions of law can then be indulged in its favor. Had it been unconditionally confirmed, these presumptions might arise; but, as it was validated only upon condition that a fact which would ordinarily be presumed should be actually proved, as to this fact there can be no presumption in favor of the grantee.

We think the court below correctly decided all the issues submitted to it, and the judgment is affirmed.

PRESIDIO MIN. CO. v. BULLIS and others.

(Supreme Court of Texas. June 25, 1887.)

1. HUSBAND AND WIFE—COMMUNITY PROPERTY.

In an action in which the plaintiff, a married woman, sued the defendants for partition of mining land, in which she claimed an undivided one-fourth interest, it appeared that she, with three other parties, had bonded the land for one year to one Cook, upon certain conditions; Cook agreeing within that period to develop its mineral resources. Defendants succeeded to Cook's rights, but did not carry out the terms of the agreement until nearly six months after its expiration, and, alleging that plaintiff's husband had agreed to waive the condition as to time, went on working the minerals. In a suit by the wife for an injunction and an account, she alleged that the land was her separate property, and not held in common, and that her husband had no authority to extend the time for completion of the contract. The agreement with Cook, although signed, was not acknowledged by her. She recovered a verdict. *Held*, on appeal, that the evidence led to the conclusion that the land was purchased in her name with community money, and was therefore, *prima facie*, community land; and as the judge had wrongly instructed the jury, so as to lead them to the conclusion that the land was separate estate, the judgment must be reversed, and a new trial ordered.

2. CONTRACT—TIME OF THE ESSENCE—MINING.

Held, also, that the contract, being unacknowledged, was unilateral; that the use of the land for mining unfitted it for any other purpose; that the longer the defendants worked it the more injury would result, and meantime the plaintiffs were deprived of the use of the land; and that therefore time must be held to be of the essence of the contract.

3. ESTOPPEL—TIME OF THE ESSENCE OF CONTRACT—WAIVER.

But *held*, that if the property was found to be community property, and plaintiff's husband had represented to defendants that he would extend the time, and, on the faith of such representation, defendants went on to expend moneys, and carry out their part of the contract, plaintiff was bound by such waiver.

Appeal from district court, Presidio county.

Wm. S. Wood, Saunie Robertson, Flournoy, Whoon & Flournoy, and B. H. Davis, for appellants. Geo. Paschal and A. J. Evans, for appellees.

WILLIE, C. J. The appellee Alice Bullis, joined by her husband, John Bullis, sued the appellants for partition of section 8, block 8, in Presidio county, she claiming an undivided one-fourth interest in said section of land, and alleging that the remainder belonged to the Presidio Mining Company. She alleged that, on the eighth of June, 1882, William Shafter, Louis Wilhelm, John A. Spencer, and herself, then owners of said section, made a contract with one Daniel Cook substantially as follows: The owners of the land bonded and leased it, and another section known as section 6, block 8, to Cook for one year, for the purpose of developing the mineral resources of these lands; he to incur all the costs of the experiment. At the end of the year, or sooner if demanded by Cook, they were to make a deed to him for the land, on condition that he formed two separate mining companies, embracing each of the above sections; each company to have a capital stock of not less than \$100,000, and give to said owners the one-fifth of said stock, free of all assessments till all the necessary machinery was erected and paid for, and the mine placed upon a paying basis. He was also to pay the owners \$10 per acre in addition for the land. Should Cook conclude, after having thoroughly prospected the property, not to complete the purchase, he was to surrender possession to the said owners, with all the improvements placed on the same, free of expense to them. She further alleged that the terms of this instrument had not been complied with on the part of Cook, or the appellants, who had succeeded to his rights under it, within the year from its date, but that the latter held possession of the land against the plaintiffs. She alleged that the tract contained valuable minerals, and that the appellants had obtained large quantities of ore, and were still working mines upon the land for their own benefit. She prayed for a partition and an account, etc., and an injunction to stay further taking of ore from the property. A temporary injunction was granted.

The appellants denied all these allegations; set up that the interest claimed by plaintiff was not her separate property, but the community property of herself and husband; and averred that they had fully complied with all the conditions of said instrument except such as had been expressly waived by the plaintiffs. They further claimed that the time in which the contract was to be performed on their part had been in effect extended by the plaintiffs, and the appellants had made the tender of the money and stock, agreed to be given to the plaintiffs, within the time to which performance had been extended.

A trial was had before the court and jury, and a verdict returned for the plaintiffs. Judgment was rendered directing a sale of the land for the purpose of a partition. The injunction was perpetuated, and the plaintiffs required to pay one-fourth the costs of partition up to the first term of the court, and the defendants to pay all other costs. From this judgment the defendants appealed to this court.

The first issue before the jury was as to whether the one-fourth interest claimed by Mrs. Bullis was her separate property, or the community estate of herself and husband. If it was her separate property at the time the contract with Cook was made, this contract could not be enforced against her; for it seems from the record that she had never acknowledged it in the manner prescribed by our statutes for the execution of contracts by married women, and, if properly executed, she certainly would not be bound by any agreement that the husband might make for its extension; for this would be to obligate her to the performance of a different contract from that to which she had consented. Hence the issue as to the *status* of the land sued for, so far as title was concerned, involved a question of the utmost importance.

The evidence relied on to show that the land was the separate property of

Mrs. Bullis may be briefly stated as follows: The appellee, John Bullis, William Shafter, and Louis Wilhelm agreed among themselves to purchase several sections of land in the Chenati mountains, supposed to contain mineral ore. These were school lands, and the parties, in pursuance of their agreement, applied for nine sections, as follows: Shafter applied for two in his own name, and two in the name of his wife; Wilhelm applied for three; and Bullis applied for two in the name of his wife. It was agreed that the three should be interested in the lands to be applied for and purchased, and the understanding then was that no one else was to be interested. The lands to be purchased were to be held in common by these three parties. Afterwards they agreed to take in one Spencer on account of his being a known prospector of mines, and the other three were to pay Spencer's *pro rata* of the cost of the land. The applications were filed in the surveyor's office November 5, 1880.

The effect of this testimony is to prove that the lands acquired were to be held in common by these four persons. Their object, as shown by the evidence, was to engage in a mining adventure; and, to increase their chances of finding precious minerals, they proposed to acquire as large an area of land as possible. They could not acquire enough in their own names, and hence used the names of their wives to secure additional sections. Bullis applied for two sections in the name of his wife, one of which includes the land in controversy, and stated, at the time, that he made the application in her name because he had already applied for three sections, and could acquire no more in his own name. He seems to have been the one who made the suggestion as to acquiring additional lands in the names of the wives of the parties interested. Bullis testified that he intended section 8 for his wife at the time of applying for it, but did not testify that he made any statement to that effect at the time. Other witnesses prove positively that he made no such declaration. In pursuance of the agreement, deeds afterwards passed between Shafter, Wilhelm, Spencer, and Mrs. Bullis, which apparently put the title as the parties contemplated.

The land in dispute was therefore presumably bought with community funds, and the title taken in the name of the wife. This made it *prima facie* community estate, and the burden of showing to the contrary rested upon the plaintiffs. If it was a fact that the husband did actually intend, at the time of making the application, that the land should belong to his wife, it doubtless became her property as to him and his heirs, and those claiming under him with notice. The intention of the husband, whether to give the land to his wife, or that it shall become part of the community estate, is the subject-matter of proof, like any other fact. Surrounding circumstances and contemporaneous statements of the husband may be taken into consideration, and must have more or less weight in determining his intention. It has been held by this court that a declaration of the husband, made at the time the title is taken in the wife's name, that he intends it for her separate benefit, will make it her separate property as to him and his heirs. *Higgins v. Johnson*, 20 Tex. 389. It must be also true that, if the declarations are such as show that it was intended to be community estate, it would assume that character. It results that much force is given to declarations made at the time as evidence of the real intention of the husband, and they are entitled to great weight in corroborating or disproving any evidence as to a secret intent different from that which was contemporaneously expressed. So, too, as to facts and circumstances, occurring at the time, which tend to show the true intent of the husband in having the deed made to his wife. A declaration at the time, however, is not necessary to establish his intention one way or the other, and it may be proved by accompanying circumstances.

There was no proof that Bullis stated, at the time of making the application, that he was buying the land for his wife, though he intended it for her benefit; but his object in applying for the land in her name was plainly

shown by his own declarations, and the circumstances attending the transaction. He had acquired all the land he could from the state in his own name; and, wishing to procure as much as possible to put into the mining partnership, he had to resort to this means of purchasing an additional quantity. His distinct understanding with his associates, however, was that he and they were to share equally in the ownership of all the lands acquired, no matter in whose names the titles were issued. The titles taken in the names of the parties to the agreement made the lands community property, and those taken in the names of their wives had presumably the same effect; and the fact that either of them had already obtained all he could from the state in his own name would not of itself make those applied for in the name of his wife community property.

Titles acquired from the state are subject to the same rules, in this respect, as those taken from individuals; and the fact that the title in this case was applied for in the name of Mrs. Bullis because her husband had already acquired three sections in his own name, was not without other proof sufficient to divest it of its community character. Upon this state of facts, the court charged the jury upon the question of separate property as follows:

"If you are satisfied, by a preponderance of proof, that on the twelfth day of October, 1881, John L. Bullis signed the name of Alice Bullis to the application of Alice Bullis to purchase the land in controversy from the state of Texas, and declared at the time that he wished to purchase the said land from the state of Texas for his wife, said Alice Bullis, to be her separate property; and that after that time the said Alice Bullis, with the consent of said John L. Bullis, executed and delivered a note for the balance of the purchase money for said land, after making the first payment on said land; that it was the intent of said John L. Bullis, at the time of making said application, that said land was to be the separate property of said Alice Bullis; and that it was the intent of said Alice Bullis and John L. Bullis, at the time of executing and delivering said note to the state of Texas for the unpaid balance of the purchase money for said land, that the land was to be the separate property of the said Alice Bullis; and that said John L. Bullis had, at said time of signing the application for said land, already purchased three sections of school land from the state of Texas, which was all the law permitted him to purchase for himself; and that said land in controversy was at said time a section of school land; and that said land was paid for by said John L. Bullis; and that the patent for said land was issued to said Alice Bullis,—then said property would be the separate property of the said Alice Bullis."

Whether this charge was abstract law or not, it did not properly present the issue as made by the evidence. In the first place, there was no evidence tending to show that Bullis declared, at the time of making the application, that he wished to purchase the land for his wife, and make it her separate property. The charge tended to mislead the jury, and make them believe, not only that such a statement of Bullis was an important fact in the case, but that the court supposed there was evidence upon which they were authorized to find that it had been made. It doubtless led them to think that Bullis' declaration as to the reason why he applied for the land in the name of his wife was equivalent to a statement that he intended it as her separate property. This more especially as the court laid before them the hypothesis as to whether or not Bullis had acquired all the land he was entitled to; a matter about which there was no proof further than was contained in his declarations made at the time of the application. The charge made the question of separate property or not depend upon whether there was an intention to give the property to Mrs. Bullis, coupled with a declaration to that effect; when the question was, did the facts and circumstances surrounding the application and purchase prove or disprove the alleged secret intent of Bullis to give the land to his wife? All question as to his declaration of an intent to make

it her separate property should have been left out, and the jury should have been left free to consider the facts really in evidence tending to show the intention of Bullis at the time of making the application. In the charge as given, the intent of Bullis, as testified to by him, was to be tested solely by a fact not in evidence before the jury. When the court came to lay before the jury the hypothesis upon which they were to find that the property was not the separate estate of Mrs. Bullis, this is made to depend alone upon the absence of the supposed declaration. If this hypothesis was correct, it is clear, from what we have said, that the verdict on this issue should have been for the defendant; and, if the jury concluded that it was the separate estate of Mrs. Bullis, they were evidently misled by the charge into believing that the supposed declaration had actually been made. It would have been better, too, that the court should not have made the finding of the jury to depend at all upon the question as to whether Mr. or Mrs. Bullis paid for the land, for the payment in either case was presumably made from community funds. We think the charge was misleading in the matters to which we have alluded, and for this reason the judgment must be reversed.

As the cause will have to be remanded for a new trial, it may be proper to give some directions to be observed in case the jury should, upon another trial, find the land in dispute to be the community property of Bullis and wife. The rights of the parties will depend upon two questions: (1) Whether time was of the essence of the contract of June 8, 1882; (2) if so, had the time within which it was to be performed been waived or extended by the parties?

We think that, upon the face of the contract, it was essential that Cook should perform his obligations by the end of one year from its date. He was placed in the possession of the land, for the purposes of developing its mining resources. In order to do this he was bound to injure it more or less for other purposes, and the longer he worked the more injury would result. It was therefore to the interest of the owners that he should complete his investigations by the time stated or sooner. While he was in possession they received no compensation for the use of the premises. The value of the land was liable to fluctuate; and the same may be said of the stock he was to give in return for it. The pay they were to receive from him was not to increase with the increased length of time he should occupy the land. Moreover, the contract was unilateral. It was left entirely at the option of Cook whether he would take the land at the end of the year or not; and in such cases it is the general rule, to which this case is no exception, that time is of the essence of the contract. Pom. Spec. Perf. 384, 385, 387; *Edwards v. Atkinson*, 14 Tex. 373. It was, however, within the power of the owners to waive its performance within the period specified. All of them except Bullis signed a paper in which they agreed to its extension. The law governing the alleged waiver as to him was correctly charged by the judge below, and need not be discussed.

As to the matter of costs, we think that, should the judgment be rendered in favor of the plaintiffs upon another trial, they should recover all the costs incurred by them in establishing their right to the land; and those subsequently incurred in partitioning it, or selling it for partition, should be so divided as to require the plaintiffs to pay one-fourth and the defendants the other three-fourths. Should the judgment be rendered in favor of the defendants, they will of course recover all the costs of the suit.

For the errors pointed out, the judgment will be reversed, and the cause remanded for further proceedings in accordance with this opinion.

DAY LAND & CATTLE CO. v. STATE.

(Supreme Court of Texas. June 21, 1887.)

1. PUBLIC LANDS—QUO WARRANTO—SUIT BY ATTORNEY GENERAL.

In an action to establish the right of the state of Texas to certain lands in Greer county, and to cancel adverse patents relating thereto, which action was brought by the state through the attorney general and the district attorney of the judicial district in which the lands in question were embraced, the district court held that the presence of the attorney general with the district attorney, both representing the state, afforded a guaranty of the presence in that court of the state as a litigant, under the constitution and laws, and the authority of those officers would not be inquired into or disputed by the court. *Held*, on appeal, that, the legislature having subsequently recognized the power of its officers to institute such a suit, the proceedings were ratified and must stand, as though the attorney general and district attorney had express power to institute and maintain it.

2. TRESPASS TO TRY TITLE—NOTICE—REV. ST. TEX. ART. 4787.

In an action of trespass to try title, the failure of the plaintiff to indorse his petition with notice that it is a suit in trespass to try title, under Rev. St. Tex. art. 4787, cannot be raised by a general demurrer, and, when presented before the supreme court for the first time, on appeal, cannot be considered.

3. SAME—WHO MAY MAINTAIN—REV. ST. TEX. ART. 4790.

Under Rev. St. Tex. art. 4790, an action of trespass to try title may be maintained against a defendant who never has occupied the premises, if he claims title thereto; and it is not necessary to aver and prove that the owner ever was in actual possession, or that the defendant was in possession as a trespasser, unless some relief is sought based on these facts.

4. QUIETING TITLE—POSSESSION OF PLAINTIFF.

In Texas, in a suit to remove cloud from title, it is not necessary, as it would be in states having separate legal and equitable jurisdictions, to aver that plaintiff is in actual possession of the lands; the courts of this state being not only authorized, but required to give such relief, either legal or equitable, or both, as the facts presented may authorize or require.

5. SAME—VOID DEED.

A defendant who asserts a claim, even under an instrument void upon the face of it, cannot be heard to say that it has not such a semblance of validity as to create a cloud upon the title to property which it professes to convey, which will prejudice the right of the real owner if it be not removed, and in such a case the court has power, which it must exercise, not only to declare the instrument void, but to cancel it.

6. PUBLIC LANDS—STATE TITLE—UNITED STATES TITLE.

Lands within Greer county, Texas, were claimed both by the state and by the United States, and it was contended by the defendant, in a suit brought by the state to quiet title, that the state must fail, not having shown an undisputed paramount legal title. *Held*, that the fact of the legislature having extended its laws over Greer county precluded the defendant from setting up the claim of the United States to that territory, either as holding the outstanding title, or as unsettling the title of the state of Texas as plaintiff, or as lacking the title paramount.

7. SAME—RESERVED DOMAIN—SURVEYS.

An action to try title to land claimed to be reserved public domain can be maintained notwithstanding that the lands sued for have not been surveyed, if the petition sufficiently identifies the boundary of the reservation, and shows that the land to which the suit relates is comprised within it.

8. SAME—LEGISLATIVE POWER—CANCELLATION OF PATENTS.

The legislature of Texas alone has power to determine what part of the public domain shall be applied to specific purposes, and, if either the governor or the commissioner of the general land-office disregard the will of the legislature, their action will be reviewed by the courts and the patents issued by them cancelled.

9. CONSTITUTIONAL LAW—TITLES OF LAW—SCOPE OF LAW.

The act of February 25, 1879, (Gen. Laws Tex.,) setting aside lands for educational purposes and the payment of the public debt, is not in conflict with section 35, art. 3, Const. Tex., providing that no bill shall contain more than one subject, which shall be expressed in its title. The subject of the former act is essentially single, although the ends intended to be reached are various.

10. STATUTES—IMMEDIATE ENACTMENT.

Under art. 3, § 32, Const. Tex., providing for the immediate passing of an act where an emergency or public necessity demands it, the legislature itself is the sole judge whether facts exist to authorize the immediate passage of a bill, and its decision is final, and cannot be questioned in any court.

11. SAME—ENACTMENT—REFERENCE TO COMMITTEE.

Article 3, § 37, Const. Tex., providing that a bill shall be referred to and reported on by a committee before being passed by the legislature, is sufficiently complied with if a bill is presented to and reported on by a committee of either house.

12. SAME—REVENUE BILLS—CONST. TEX. ART. 3, § 33.

Article 3, § 33, Const. Tex., providing that revenue bills shall originate in the house of representatives, only applies to bills to levy taxes, in the strict sense of the word, and not to bills for other purposes, which may incidentally raise revenue.

13. PUBLIC LANDS—RESERVATION FOR SCHOOLS.

It was claimed that the state legislature (Texas) had no power to reserve the public lands in Greer county, as it did by the act of February 25, 1879, (Gen. Laws Tex.,) for educational purposes and the payment of the public debt, inasmuch as the constitution had already made certain reservations, which were all it was intended should be made. The constitution, however, contains no express prohibition of further reservations. *Held*, that the legislature was entitled to exercise any power not expressly denied to it by the constitution of the United States, or its own, and therefore such further reservations were valid.

14. SAME—HEAD-RIGHT CERTIFICATES—"VETERANS."

The act of March 15, 1881, (Gen. Laws Tex.,) granting the veteran certificates for 1,280 acres, which may be located, as "head-right" certificates, "upon any of the public domain," must be construed to mean, "upon any of the *unappropriated* public domain."

15. SAME—"CONFEDERATE CERTIFICATES."

The act of April 9, 1881, (Gen. Laws Tex.,) known as the "Confederate" act, granting certificates, but requiring the locator to set aside an equal amount of land for the benefit of the public school fund, and expressing in terms that said location "shall be made on any of the public domain of Texas not reserved by law from location," did not enlarge the privileges to veteran certificates, nor evidence any intent on the part of the legislature to open the reservations to the veteran certificate holders.

16. SAME—CERTIFICATES—VALIDITY.

When the original location of certificates is contrary to law, the subsequent issuance of patents will not legalize the locations, and both locations and patents are void.

17. SAME—PUBLIC DOMAIN—NOTICE OF APPROPRIATION.

Section 2, art. 14, Const. Tex., providing for notice of appropriation of the public domain, does not apply to lands owned by the state, which, but for their appropriation for specific purposes, would be a part of its public domain, subject to appropriation by private individuals.

18. SAME—ACTION TO SET ASIDE PATENT—ESTOPPEL.

The fact that executive officers of the state had issued patents in excess of their authority, or that they took no steps to advise or warn the patentees of the invalidity of the patents, or that the legislature had not at an earlier day passed a law requiring suits to be brought to vacate the patents, cannot estop the state from maintaining a suit to recover the lands patented.

Appeal from district court, Travis county.

Anderson & Flint, and Walton, Hill & Walton, and West & McGown, for appellant. *John D. Templeton and J. S. Hogg*, Atty. Gen., for appellee.

STAYTON, J. This action was brought by the state of Texas, through the attorney general and the district attorney of the judicial district in which Greer county is embraced. The purpose of the suit is to establish the right of the state to 144,640 acres of land, situated in Greer county, and to cancel the patents under which the appellant asserts title to the land. The land was located and patented by virtue of land certificates issued under the act of March 15, 1881, (Gen. Laws, 35,) which provided for the issuance of land certificates in favor of the surviving soldiers of the Texas revolution and others. It is claimed by the state that the several grants under which the appellant claims are invalid because all the land within the limits of Greer

county was appropriated by the act of February 25, 1879, (Gen. Laws, 16,) to other purposes, and was therefore not subject to location by virtue of the certificates under which the appellant claims or any other. There are many questions raised in the case, and, without considering each separate assignment, these will be considered in the groups in which they are presented in the brief of counsel for appellant.

1. It is claimed that neither the attorney general nor the district attorney, in the absence of direction so to do from the legislature or the executive of the state, had power to institute and maintain this action. Their right and power to maintain the suit was denied by a sworn plea, as well as by a motion asking that those officers be required to show by what authority they acted. The motion was overruled, and the plea stricken out. Neither the constitution nor the general laws defining the powers and prescribing the duties of the attorney general, and of district attorneys, in terms empower either of those officers to institute and maintain a suit of this character; nor do we find any law, in force at the time this suit was brought, which directed them, or either of them, to institute it. Finding no express law which authorized either of those officers to institute and maintain the suit, it would be difficult to hold that either of them had the implied power resulting from the general grants of power or imposition of duties.

It may be that, in the exercise of the general powers conferred upon the governor of the state, as its chief executive officer, he would have the power to require the attorney general to institute, or to cause to be instituted, a suit of this character, when in his judgment the welfare of the state required it, even though the legislature had not so directed; but, in a government in which the duties of all officers, as well as their powers, are defined by written law, no power ought to be exercised for which warrant is not there found. The plea shows that a bill introduced in the senate during the sitting of the nineteenth legislature, which required the attorney general to institute such suits, was passed by that body; but that, upon reference to the judiciary committee of the house of representatives, an adverse report was made upon the bill by that committee, and from this the inference is sought to be drawn that the legislature did not intend that the attorney general, directly or through a district attorney, should have power to institute and maintain such a suit. There is force in this proposition; but the failure of the legislature to pass the bill may have resulted from the fact that the members of that body were of the opinion that, under the general grants of power to the attorney general, he might institute such suits without legislation expressly requiring him to do so.

As the law now stands, we deem it unnecessary to determine whether the attorney general or district attorney had power to institute this suit at the time it was brought; for, be that as it may, by recent legislation such power is not only conferred on that officer, but its exercise in the past has been ratified, and his power to maintain this suit recognized.

The act of April 1, 1887, (Gen. Laws, 101,) after providing for the cancellation of patents issued for lands situated in Greer county, located by virtue of "veteran" certificates, and for the issuance of certificates to the holders of such patents, declares "that nothing in this act shall be construed as requiring or authorizing the attorney general to dismiss any suit now pending for the cancellation of said patents, nor to prevent him from bringing other suits for such purposes." There we have a clear recognition by the legislature of the power of the attorney general to institute and maintain, in the name and on behalf of the state, this and like suits, and to institute others for the same purpose.

The state doubtless has the right, by suit, to protect any property right vested in it as fully as has any person; and this suit was brought in its name, and on its behalf, by persons claiming to act as its officers or agents. The act to which we have referred bears conclusive evidence that the legislature

knew that this suit or similar suits were pending, and it must have been cognizant of all the facts attending the institution of such suits. This being true, if it be conceded that neither the attorney general nor the district attorney was empowered to institute the suit at the time this was done, nevertheless the state has ratified their act, and will be bound by the result as fully as though they had the power which they assumed to exercise. This ratification is retroactive, and the suit must stand as though the attorney general and district attorney had express authority to institute and maintain it. Story, Ag. 244-260; Whart. Ag. 77; *Ancona v. Marks*, 7 Hurl. & N. 686.

2. It is urged that the general and special demurrers to the petition should have been sustained, and that the petition does not state a cause of action. The main objections raised by the assignments relating to this matter are that the petition does not allege that the state was in possession of the land, and ousted by the defendant, nor that the state is entitled to the possession of the land, and the defendant a trespasser, and that the petition is not indorsed as the statute requires a petition in trespass to try title to be. There was no exception based on the fact that the petition was not indorsed as the statute requires petitions to be in actions of trespass to try title; and the answer of the defendant presents defenses applicable to that character of action, thus evidencing that the defendant was not misled as to the character of the action by the want of such an indorsement. Such an objection cannot be raised by a general demurrer, and, when presented here for the first time, cannot be considered. *Bona v. Walters*, 14 Tex. 567; *Shannon v. Taylor*, 16 Tex. 423; *Wade v. Converse*, 18 Tex. 234.

The petitioner alleges that the lands belong to the state; that they are claimed by the defendant, and gives the origin and nature of the claim thus asserted. It prays for general relief, and that the patents under which the defendant claims be canceled, and the cloud thereby placed on the state's title it asks to have removed. The first, second, and third requirements in a petition in trespass to try title are fully complied with. The petition states facts which, if the grants through which the defendant claims are invalid, entitles the state to the possession, and that there was not an averment in terms that the state was so entitled is a matter of no importance. The petition does not state that the defendant unlawfully entered upon and dispossessed the state of the premises, and that the defendant withholds the possession; but there is no exception which questions the sufficiency of the petition on the ground that no such averments are made. The eighth and ninth exceptions reach no such question. While the statute seems to contemplate that in an action of trespass to try title such averments must be made, it is certainly true that it is not necessary to allege any fact which it is not necessary to prove. It is not necessary to prove that the owner of land ever was in actual possession of it, or that the defendant was in possession, in order to sustain even an action of trespass to try title; and it is therefore unnecessary to allege these things unless some relief be sought against the defendant based on the fact that he has been in possession. Under the former law it was held that a plaintiff in an action of trespass to try title must show that the defendant was in possession; but under the present law the action may be maintained against a defendant who never has occupied the premises, if he claims title thereto. Rev. St. art. 4790.

Whether, as the petition in this case was framed, the action is to be deemed technically an action of trespass to try title, in which the respective parties would be entitled to all the statutory rights to which parties to such actions are entitled, we need not determine, for it is too clear that the petition states facts which empowered the court to inquire and determine whether the state was the owner of the land as it claimed to be.

It is urged, if this be treated as a suit to remove cloud, that the petition is not sufficient, in that there is no averment that the state was in possession of

the lands. The rule here invoked has doubtless been recognized by many courts exercising only an equitable jurisdiction; but it may be doubted if it can be said ever to have been a rule well established even in such tribunals. When recognized, it was upon the ground that a court of equity would refuse to act when the party seeking equitable relief had a full and adequate remedy at law. Whatever the rule may be elsewhere, the rule invoked can have no application in the courts of this state, which are not only empowered, but required, in every case, to give such relief as the facts presented may authorize or require, without reference to whether the relief be such as a court of equity or a court of law may give. In the same case legal and equitable relief may be given. *Allen v. Stephanus*, 18 Tex. 659; *Magee v. Chadoin*, 44 Tex. 488; *Grimes v. Hobson*, 46 Tex. 416; *Dangerfield v. Paschal*, 20 Tex. 537; *State v. Snyder*, 66 Tex. —; *Thompson v. Locke*, Id. —, 1 S. W. Rep. 112.

It is also urged that if the patents are void there is no necessity for relief; and that, as a court will not do a useless thing, therefore it will not cancel the patents. As said by a distinguished author, this rule "leads to the strange scene, almost daily, in the courts, of defendants urging that the instruments under which they claim are void, and therefore that they ought to be permitted to stand unmolested; and of judges deciding that the court cannot interfere because the deed or other instrument is void; while, from a business point of view, every intelligent person knows that the instrument is a serious injury to the plaintiff's title, greatly depreciating its market value; and the judge himself, who repeats the rule, would neither buy the property while thus affected, nor loan a dollar upon its security. This doctrine is, in truth, based upon mere verbal logic, rather than upon considerations of justice or expediency." 8 Pom. Eq. 1399.

The rule insisted upon proceeds not upon the theory that the court has not power to remove cloud from title by the cancellation of an instrument which evidences the adverse claim, even though it be void; but upon the theory that the court refuses to exercise the power it has, when it clearly appears that its exercise can accomplish no useful purpose, and that by its refusal to act the person who calls upon it to exercise its power will suffer no injury by its refusal to do so. If such a rule as is insisted upon can have just application in any case, it would seem to be only in a case in which, from the face of the paper which is the basis of the claim asserted to be a cloud upon title, no man of ordinary intelligence would, in acting in relation to the subject-matter of controversy, be influenced by the claim asserted to be void; for it is only in such case that injury would not result from even a void claim.

The rule, thus limited, would, however, be too uncertain to furnish the basis for judicial action in granting or refusing relief; and we are of the opinion that the better rule is that, notwithstanding an instrument may be void upon its face, a court has power, which it must exercise, not only to declare the instrument void, but to cancel it, when a defendant asserts claim under it. A defendant who asserts claim, even under an instrument void on its face, cannot be heard to say that it has not such semblance of validity as to create a cloud upon the title to property which it professes to convey, that will prejudice the right of the real owner if it be not removed. He cannot be heard to say that others will not attach to it the same degree of faith and credit, as a title-bearing instrument, which he in good faith gives to it; and that, to the extent of the doubt or cloud thus cast upon the real title, its holder is injured, or is likely to be injured.

The answers of the defendant were filed before the exceptions were acted upon, and must be considered in connection with the petition in determining whether the exceptions were properly sustained. The petition alleges that the lands belong to the state, and that the defendant claims them through patents issued by the governor of the state and the commissioner of the general land-

office, and it sets out the authority under which these officers claimed the power to pass title from the state to the patentees, and assumes that, from the facts stated, those officers had no power to issue the patents which are alleged to be void for this reason. The defendant does not disclaim. On the contrary, relying upon the same things alleged by the state as the basis of the power which the governor and commissioner assumed to exercise, it claims that these conferred the power, and that the patents are valid; and in support of their propositions they file in this court an elaborate brief, marked for careful preparation and learning. Thus standing the case, the court had the power to declare the law arising upon these facts. Such power existing, it would not be exercised for the sole purpose of declaring what the law of the case abstractly was; for this is not the purpose for which courts are created. It then became the duty of the court to determine and adjudicate the rights of the parties, and to give such relief to the party in whose favor the adjudication was as would protect from the injuries which it was the purpose of the suit to avoid. The statute declares that "the judgment of the court shall conform to the pleadings, the nature of the case proved, and the verdict, if any, and shall be so framed as to give the party all the relief to which he may be entitled, either in law or equity." Rev. St. art. 1335.

8. Another ground of exception was that the lands embraced within the limits of Greer county were claimed by the United States as well as the state of Texas, and that legislation looking to the settlement of the disputed question between the two governments recognized the fact that the title of the state was doubtful, and that hence the title of the state must be deemed doubtful, and the averment of ownership insufficient. The state, through its legislature, has, in effect, declared that Greer county is a part of the state. It has made it one of the legal subdivisions of the state, caused courts to be there held, and the laws of Texas to be there administered. It levies taxes upon property there situated, and, at least, has attempted to appropriate every foot of land within its limits to which private ownership had not attached before the twenty-fifth February, 1879, to specified purposes. So far as the courts of this state are concerned, they are bound to recognize the boundaries of the state as fixed by the legislature, and to regard all lands within those boundaries as the property of the state, unless it be shown that the state, or some former government having sovereignty within those boundaries, in some way parted with the title. In no event could one claiming under the state question its originally paramount title, so long as the proper departments of the United States and state governments do not determine that Greer county is not within the proper boundaries of the state of Texas.

4. It was further urged, by way of demurrer, that the state could not maintain this suit until the lands in Greer county "had been surveyed or allotted for the public school fund, or for the payment of the public debt." The boundaries of Greer county are defined by law, and if the act of February 25, 1879, be valid, and not repealed, all lands within its boundaries, unappropriated at the time that act was passed, were by it appropriated to specific purposes; and those claimed by the defendant must be held to have been embraced within the lands so declared appropriated; for the petition alleges, and the answer claims, that the lands in controversy were a part of the public domain of Texas at and subsequent to March 15, 1881; the question between them being whether these parts of public domain were unappropriated at the time those persons under whom the defendant claims located veteran certificates on them. Under these facts we see no reason why the state may not maintain this suit before, by surveys, the particular parts of Greer county are designated which shall be applied to the one or the other of the purposes named in the act of February 25, 1879. If that act be valid and unrepealed, the land in controversy was appropriated,—vested in the state; and it is a matter of no importance to the defendant whether the state holds the lands to be used

to procure a fund for one or the other or for both of the purposes named in the act. There is no objection made on the ground that the petition does not sufficiently describe the land.

5. It is urged that the action of the governor and commissioner of the general land-office in issuing the patents under which the defendant claims is conclusive of its right, and not revisable by any other co-ordinate branch of the state government. The acts of these officers are entitled to the highest consideration; and, if the powers which they have assumed to exercise are conferred upon them by the constitution and laws made in accordance therewith, then their action cannot be reviewed and set aside by any other department of the government, in so far, at least, as they may have exercised a power discretionary in character. If, however, they assumed to exercise a power not conferred upon them by law, then their acts are subject to review by the judiciary, whenever this becomes necessary to the decision of a question arising in a case of which the judiciary are given jurisdiction by the constitution. The power to determine what part of the public domain shall be appropriated to specific purposes, and thus be withdrawn from appropriation by individuals, except as this may be limited by the constitution, rests with the legislature; and neither the governor nor the commissioner of the general land-office have any power to determine whether such discretionary power has been wisely exercised, nor to disregard the legislative will manifested by a law passed in the manner prescribed by the constitution, and, in defiance of it, to issue patents for land thus withdrawn from individual appropriation. That the judiciary have power to inquire whether the executive department, charged with the duty of issuing patents to land, has exceeded the power conferred upon its branches, and to declare patents void when found to have been issued without lawful power, cannot be considered an open question in this court; and it matters not whether the question arises in an action in which the state or an individual calls in question the validity of a patent.

The case of *State v. Delesdenier*, 7 Tex. 76, was one in which the state called in question the validity of a patent, on the ground that the executive officers who issued it had no power to do so, the land covered by it having been appropriated to a specific purpose. In that case it was held that the state was entitled to relief, and that the patent was void for want of power in the officers who issued it.

In *Sherwood v. Fleming*, 25 Tex. (Supp.) 408, it appeared that an individual had obtained a patent on land within a reservation, and in an action between adverse claimants the court determined the question of invalidity of the patent; and after referring to the former case of *Kimmell v. Wheeler*, 22 Tex. 77, which involved the validity of a location made within a reservation, on which, however, no patent had issued, the court thus gave the grounds on which its action was based: "Does a patent issued for lands within the reservation at that time stand upon any higher ground? It would seem, upon principle, that it does not, for the plain reason that the officer had no authority to issue patents to lands thus reserved and set apart from the mass of the public lands, and the act of issuing the patent, being contrary to law, was void. It has accordingly been held, in numerous divisions of this and other courts, that a patent which has been issued contrary to law is void. *Mason v. Russell*, 1 Tex. 721; *State v. Delesdenier*, 7 Tex. 76; *Stoddard v. Chambers*, 2 How. 284; *Mills v. Stoddard*, 8 How. 345; [*Marsh v. Brooks*,] Id. 223; [*Polk v. Wendal*,] 9 Cranch, 99; [*Minter v. Crommelin*,] 18 How. 87. It is too firmly settled by the whole current of judicial decisions on the point to be now questioned that the issuing of a patent is a ministerial act, and must be performed according to law. If it is issued against law it is void. Such is the character of the defendant's title. His location was made upon land which had been reserved from location, and which was not liable to be thus appropriated; and this was the case when the patent issued. It was therefore issued contrary to

law, and is consequently void. It is an elementary principle, not to be touched, that an act, in order to be valid, must be legal. An act which is done contrary to law must be held void." The following cases are to the same effect: *Cowan v. Hardeman*, 26 Tex. 219; *Todd v. Fisher*, Id. 239; *Bacon v. Russell*, 57 Tex. 409; *Gammage v. Powell*, 61 Tex. 629.

All power that any officer of this state has, is given by a written law, directly or indirectly, and any act which any officer, from the chief executive of the state to the lowest officer in it, may assume to do in excess of the power thus given, is void; and it matters not whether the want of power results from the absence of a law confirming it under any circumstances, or from a law which forbids the exercise of the power in a given case, while the exercise of a like power in other cases would be lawful. If the act of February 25, 1879, by which the public lands situated in Greer county were set apart for educational purposes, and for the payment of the public debt, was subject to no constitutional objection, either as to the manner of its passage or the purpose intended to be accomplished by it, then it must be held that the lands in controversy were not subject to location and patent at the time those through whom the defendant claims thus attempted to appropriate them, unless it be true, as claimed by the defendant, that the act of March 15, 1881, repealed the act of February 25, 1879, or opened the public lands in Greer county to location by veteran certificates.

6. It is claimed that the act of February 25, 1879, is invalid, in that it contains more than one subject, and is so titled as to express that fact. Former constitutions of this state used the word "object" in the same connection in which the word "subject" is used in section 35, art. 3, of the constitution now in force; but the latter word perhaps expresses more accurately the meaning and intent of the constitutional provision. As used in the constitution, the word "subject" is that which is to be dominated or controlled by the particular law. Thus considered, there can be no doubt that the subject of the act was single, and consisted of all the public land in Greer county unappropriated at the time the act was passed; and that this subject may have been appropriated to more than one purpose or end does not affect the question.

As said in *Tadlock v. Eccles*, 20 Tex. 793: "The intention doubtless was to prevent embracing in an act having an ostensible object, provisions having no relevancy to that object, but really designed to effectuate other and wholly different objects, and thus to conceal and disguise the real object proposed by the provisions of an act under a false or deceptive title." A title or act essentially single in subject, which does not thus conceal or disguise the real purpose, is not subject to constitutional objection, although the ends intended to be reached through the one subject may be many. The decisions made under former constitutions, in which the word "object," which in its ordinary signification means more nearly the same as "end" or "purpose" than does the word "subject," was used, are conclusive of this question. *Giddings v. San Antonio*, 47 Tex. 553; *Breen v. Railroad Co.*, 44 Tex. 302; *Stone v. Brown*, 54 Tex. 331; *State v. McCracken*, 42 Tex. 384; *Railroad Co. v. Odum*, 53 Tex. 344; *Railroad Co. v. Smith Co.*, 54 Tex. 1.

7. It is urged that the act of February 25, 1879, is invalid for want of compliance with sections 32, 39, art. 3, of the constitution. It is not claimed that four-fifths of the members of each branch of the legislature did not concur, through a vote taken as prescribed in the constitution, in suspending the rule which requires a bill to be read on three several days in each house before it can become a law, nor that they did not so concur in declaring that an imperative public necessity existed for the suspension of the rule. But it is claimed that this necessity is not sufficiently stated in the preamble or in the body of the bill. The third section of the act declares "that an emergency and imperative public necessity exists for the immediate passage of this act; that its object may not be defeated by delay, the same shall take effect and be in force

from and after its passage." This section clearly states that an imperative public necessity for the immediate passage of the act existed, and the fact on which it determined that this was so it declares was that delay would defeat the purpose intended to be accomplished by the act. This was declared by the legislature to create a necessity which authorized the suspension of the rules prescribed by section 32, art. 3, of the constitution. The constitution declares that the "necessity shall be stated in a preamble or in the body of the bill." If this means that the legislature shall do more than to state that the imperative public necessity exists, and requires the facts or reasons which give rise to such necessity to be stated, of which there may be doubt, then it rests with the legislature to determine what facts do create it, and its determination and declaration of their sufficiency must, in the nature of things, be conclusive. If the legislature states facts or reasons which in its judgment authorize the suspension of the rule and the immediate passage of a bill, the courts certainly have no power to re-examine that question, and to declare that the legislature came to an erroneous conclusion.

The legislature ascertains in its own way the facts on which it bases its action, and it is made the sole judge whether facts exist to authorize the immediate passage of a bill; and whatever facts or reasons it may give for such action must be held sufficient.

8. It is not claimed that two-thirds of all the members elected to each branch of the legislature did not vote, in the manner prescribed by the constitution, to give the act effect and force as a law from and after its passage; but it is claimed that the emergency which made this necessary is not sufficiently stated. We think the third section of the act is a substantial compliance with the requirements of section 39, art. 3, of the constitution; for the same fact is stated to have created the emergency which required the act to have the force of law from the date of its passage that made it necessary to pass the bill without reading it on three several days in each house. If, however, this were not so, and this court had power to review the action of the legislature in this respect, the question would be unimportant in this case; for in any event the act would take effect 90 days after the adjournment of the legislature, and there is no pretense that the defendant, or those through whom it claims, acquired any right to the lands in controversy until long after that period had elapsed.

9. The answer of the defendant alleged that the act of February 25, 1879, was never legally passed, in that the bill was not referred to a committee of each house before it was acted upon. The answer shows that the bill was referred to a committee by the senate, who reported upon it favorably before the senate acted upon it, but that it was not referred to a committee by the house of representatives before that body acted upon it. The constitution provides that "no bill shall be considered, unless it has been first referred to a committee, and reported thereon." Const. art. 3, § 37. This does not in terms require a bill to be referred to a committee by each house before it can become a law. The requirement is that a bill shall be "referred to a committee, and reported thereon," before it shall be considered. This, from the averments of the answer, was done, and we cannot, under the wording of the constitution, say that more than this was necessary. If, however, the constitution required a bill to be referred to a committee of each house, and to be reported on before the house making the reference acted on it, it would be conclusively presumed that the legislature complied with the requirements.

10. It is further urged that the act of February 25, 1879, is invalid, because it originated in a bill introduced in the senate, which it is claimed was a bill to raise revenue. The constitution provides that "all bills for raising revenue shall originate in the house of representatives." Const. art. 3, § 33. The purpose of the act was to set apart one-half of the unappropriated public domain, situated in Greer county, for the benefit of public free schools, and

the other for the payment of the state debt; but it did not undertake even to bring into the state treasury the proceeds of those lands. It merely withdrew that land from the body of unappropriated lands, and reserved it for specific uses, leaving it to some future legislature to determine when and how the proceeds of those lands should be brought into the state treasury. To hold that such a bill was one for raising revenue would require the placing on the language of the constitution a construction which such language has never received,—a strained construction, which should never be placed on language contained in a constitution or a statute. Similar language is found in the constitution of the United States, and, as said by Judge Story, "The history of the origin of the power already suggested abundantly proves that it has been confined to bills to levy taxes in the strict sense of the words, and has not been understood to extend to bills for other purposes, which may incidentally create revenue." Story, Const. § 880. The true construction of the language used in the constitution is given in the case of *U. S. v. James*, 13 Blatchf. 208, and any other would lead to results never contemplated.

11. It is claimed that the legislature had no power to reserve the public lands in Greer county for the purposes stated in the act of February 25, 1879. This proposition is based on two others: (1) That the constitution made all the reservations which it was intended should be made; (2) that the constitution made reservations and provided for the issuance of land certificates. The general rule is that the legislature may exercise any power not denied to it by the constitution of the United States or the constitution of the state. The constitution appropriated one-half of the public domain, unappropriated at the time it was adopted, for the support of public schools, and in addition to this made other appropriations for the same purpose. Article 7, § 2. In so far as the act in question appropriated one-half of the unappropriated land in Greer county to this purpose, it only carries into effect, in the particular territory, the mandate of the constitution. The constitution also appropriated, for the endowment and support of the university of Texas, lands in addition to those before that time appropriated for the same purpose, as did it appropriate lands for the purpose of erecting a state capitol. Article 7, § 15; article 16, § 57. But these, or like appropriations or reservations, but evidence the intention of the people thus to appropriate so much of the public domain absolutely, and without reference to the will of any legislature thereafter to assemble; and cannot be held to evidence an intention to withhold from the legislature the power to make other appropriations or reservations for public purposes.

The fact that the constitution contemplated that land certificates might be issued after its adoption, and that some were outstanding, cannot be made to operate as a limitation on the power of the legislature to appropriate or reserve lands for public purposes or uses. When it is intended to withhold a power from the legislature, this is done by some provision of the constitution clearly expressing such intention. Many provisions of this character are found in the constitution of this state; and that one which relates to the power of the legislature to make grants of land to railway companies illustrates the view entertained by the framers of the constitution, and by the people, in regard to the general powers of the legislature to appropriate lands to specific purposes, or to make reservations. The first subdivision of section 3, art. 14, Const., provides "that there shall never be granted to any such corporation more than 16 sections to the mile, and no reservation of any part of the public domain for the purpose of satisfying such grant shall ever be made." There we have a clear recognition of the power of the legislature generally to appropriate lands for public purposes, and that this power should not be exercised in the particular cases it was deemed necessary to forbid it. The denial of the right to exercise the power in one case recognizes the existence of the power except as expressly restrained.

12. There are several assignments of error which assert the proposition

that the act of March 15, 1881, under which the certificates were issued by virtue of which the lands in controversy were located and patented, repealed the act of February 25, 1879, which set apart the then unappropriated lands situated in Greer county for the purposes named in it. That the act of February 25, 1879, appropriated the land to the purposes named in it, is too clear for controversy. After providing for the issuance of certificates to the meritorious class of persons for whose benefit it was passed, the act of March 15, 1881, provides that the certificates "may be located as head-right certificates upon any of the public domain, and patented as in other cases." It is claimed that the words, "*upon any of the public domain*," evidence an intention to permit the certificates to be issued under the act to be located on any public lands, although appropriated to some other purpose by laws then existing. The words "public domain" evidently were not used in their most general sense; for, if thus used, they would embrace lands owned or held by the state for public purposes, notwithstanding the constitution had expressly appropriated some of the lands so held to specific purposes. "Domain," in its broadest sense, when used in connection with property, means "ownership," and "public domain" means, when used in such a connection, "public ownership." The words were not used in this sense in the act; for it was never contemplated that the certificates might be located on any lands which the state might own and hold, or have the right to sell.

The land on which the capitol is now in course of erection is, in a general sense, a part of the public domain, as are all the alternate sections of land heretofore located by railway companies, and appropriated to public-school purposes; but it would not be contended that it was intended that any of these lands could be appropriated under certificates issued under the act of March 15, 1881. We are of the opinion that the words, "any of the public domain," as used in the act, mean the same as "unappropriated public domain." Such is the sense in which these words are used in the constitution and laws, although in some instances the words "unappropriated" or "vacant" are used in connection with them, as will be seen by a reference to their use.

Section 2, art. 7, of the constitution, after declaring that "all the alternate sections of land reserved by the state out of grants heretofore made, or that may hereafter be made, to railroads or other corporations of any nature whatsoever, * * *" shall constitute a perpetual school fund, provides that "one-half of the public domain of the state," among the other funds named, "* * *" shall constitute a perpetual school fund." The alternate sections set apart to that fund were, in a general sense, public domain; but it was not thought that those lands would be embraced under the general terms "public domain," however they were specifically appropriated, as they had been by former laws, and an additional grant was made to the fund of "one-half of the public domain of the state." The words "public domain," as here used, meant simply that one-half of the public domain then unappropriated to some use by the constitution, or some precedent obligation, should be so appropriated. It makes that which, in a general sense, was public domain, and that which was unappropriated public domain to the named extent, with other things named, the aggregated perpetual school fund formed from funds all of which were in a general sense public domain; some, however, already appropriated, and others unappropriated, until this was done by the express declaration that "one-half of the public domain of the state * * *" shall constitute a perpetual school fund." Section 8, art. 11, authorizes the legislature to aid counties and cities on the Gulf coast to construct sea walls, by making donations "of such portion of the public domain as may be deemed proper." Section 57, art. 16, of the constitution, appropriated 3,000,000 acres "of the public domain" for the purpose of erecting a state capitol; while section 15, art. 7, of the constitution, appropriates "one million acres of unappropriated public domain of the state" for the endowment and maintenance of the uni-

versity of Texas. Can there be any reasonable doubt that, by the terms used in each of these sections, the same meaning was intended to be conveyed? There is nothing in the matter to which they severally relate to evidence an intention to give a higher or different right in the one case than in the other, or to evidence an intention that the power of the legislature, in selecting the land to be applied to these distinct purposes, should be restricted in the one case more than in the other.

In section 6, art. 14, of the constitution, which provides for homestead donations, the term "public land" is used in the same sense as "public domain;" and the preceding section, which provides for the forfeiture of lands granted to railway companies in case of their failure to alienate as required by law, uses the terms "vacant lands" and "vacant public domain;" but this is done to show that after forfeiture such lands, though once severed from the public domain, should become subject to "pre-emption, location, and survey," just as though such lands had never ceased to be a part of the public domain. Without this provision there would have been doubt upon this question which it was the intention clearly to settle. *Hughes v. State*, 41 Tex. 10. Section 3, art. 14, of the constitution, prohibiting reservations for railways, uses the terms, "any part of the public domain;" evidently intending the same thing as would be expressed by the words "unappropriated public domain." A reservation of a thing, in favor of or for the benefit of a corporation or person not its owner, necessarily implies that the thing to be reserved has not been appropriated, and is subject to be withdrawn from general appropriation for the benefit of the person or corporation in whose favor the reservation is made. The second section of the same article provides that land certificates "shall be located, surveyed, or patented only upon vacant and unappropriated public domain, and not upon land titled or equitably owned under color of title from the sovereignty of the state." This provision doubtless had two purposes,—one was to forbid the location of land certificates on other than vacant and unappropriated public domain; and the other was to declare what, within the meaning of the section, should not be considered vacant and unappropriated public domain.

Without this constitutional provision, in the nature of things, persons, through certificates, could not legally appropriate lands, unless they were vacant, *i. e.*, not legally appropriated by some other person, or not reserved or set apart for some public use. Prior to the adoption of the constitution, however, except as it was forbidden by a few statutes applicable only to colonies named, it was lawful to locate certificates on lands which had been formally titled under such circumstances as made the grants void, and it was the purpose of the constitution to declare that, within the meaning of the section, such lands should not be deemed a part of the vacant and unappropriated public domain, subject to private appropriation, by location, survey, and patent, by virtue of certificates, notwithstanding the state may have the right to disregard, or have declared invalid, all such grants. Such lands, within the meaning of this section of the constitution, are understood to be titled lands. *Summers v. Davis*, 49 Tex. 554; *Truehart v. Babcock*, 51 Tex. 169. The section further, in effect, declares that lands located and surveyed by virtue of valid land claims, or to which inchoate titles have been acquired, shall not be deemed vacant and unappropriated public domain, on account of any mere informality attending the acquisition which does not affect its legality. Such lands are understood to be equitably owned before they are patented. This section of the constitution does not undertake to legalize claims which are essentially invalid on account of a violation of law on which they are founded; but it will have the effect, in some instances, to deny the right of individuals to locate, have surveyed, and patented, lands to which the state may have both the legal and equitable title. There is nothing in this section of the constitution which favors the idea that the words "public domain," as used in the constitution in connec-

tion with words giving the right to individuals to acquire public lands, mean more or less than the words "unappropriated public domain."

The act of April 26, 1879, granting to indigent veterans certificates for 640 acres of land, provided, as does the act of May 15, 1881, that such certificates "may be located as head-rights upon any of the public domain, and patented as in other cases. It certainly was not intended by that act to repeal the act of February 25, 1879, or the act of February 20, 1879, which set apart the unappropriated public lands in counties named in the act for the purpose of erecting a new state capitol, for all three acts were passed at the same session. If the language did not have that effect, then why should that effect be given to its use in a subsequent statute relating to the same matter? By the act of July 14, 1879, all the vacant and unappropriated lands in a large number of counties, as well as all the unappropriated part of the Pacific reservation, and all unappropriated public lands in organized counties, which as separate tracts contained not more than 640 acres, were set apart to be sold, and the proceeds applied to the same purposes to which the lands in Greer county were to be applied under the act of February 25, 1879. The act of July 14, 1879, was amended by the act of March 11, 1881, but the amendment simply added the land within a county not embraced in the amended act. The act, as thus amended, was practically repealed, in so far as it authorized the sale of the lands, by the act of January 22, 1883, but the later act recognized the fact that the original act severed the land from the unappropriated public domain, and appropriated it to the designated purposes, and declared that nothing "contained in it should be construed to return the land reserved * * * to the mass of the public domain, but shall be construed to be reserved for the purposes for which said land was originally set apart and designated by said act, until the legislature shall otherwise provide." The words "public domain," as here used, evidently mean the same as the words "unappropriated public domain." We have here, in effect, a legislative declaration that the act of July 14, 1879, and the amendment thereto, were not repealed by the act of March 15, 1881. The only difference between the act of July 14, 1879, and the act of February 25th, of the same session, except that they affected different lands, was that the first-named of those acts put the lands appropriated by it upon the market for a time, while the lands appropriated by the other never were; and so, most probably, because the legislature deemed it due to the adverse claimant of the land not to permit its appropriation by individuals until the conflicting claims between the two governments were adjusted. The constitution of this state and the laws may be searched in vain for an instance in which the words "public domain" have been used in a law bestowing a right on individuals to appropriate land by the location of certificates in which the context evidences an intention to confer a right to appropriate other than then unappropriated lands.

It is urged that the act of April 9, 1881, granting certificates to persons who were disabled in the military service of the state or Confederate states, evidences an intention by the legislature to give to the words, "any public domain" a right broader than would be given to the words "unappropriated public domain." The original bill, which became, after amendment, the act of April 9, 1881, provided that the certificates to be issued under it "may be located as head-right certificates upon any of the public domain;" but, as passed, the bill provided that "the certificates granted under the provisions of this act shall be located as follows: The locator shall also locate a like amount of land for the benefit of the permanent school fund before either shall be patented, and such location shall be made on any of the public domain of Texas not reserved by law from location." The amendment shows clearly that the legislature was unwilling to permit the certificates, provided for by this act, to be located as head-right certificates, *i. e.*, singly, and without locating a like quantity of land for the benefit of the school fund; while the act under

which the defendant claims did grant such a right to persons who took certificates under it. Head-right certificates were not any more entitled to be located on appropriated lands than were other classes of certificates. The fact that the act of April 9, 1881, provided that certificates issued under it should be located on public domain not reserved by law from location, does not affect the question; for this would be the true construction of the act had permission been given to locate on "any of the public domain," in the absence of a clear expression of an intention to permit them to be located on lands then appropriated to other purposes. The act appropriating the public domain in Greer county, and the act through which the defendant claims, are not inconsistent. Hence the later act does not repeal the former by implication, nor can the clause in it repealing all laws in conflict with it, have such effect. The rule is that when the legislature once appropriates land to a specific purpose it ceases to be "public domain," in the sense in which these words are used in laws subsequently passed authorizing individuals to appropriate public lands, although within the more general meaning of the word the land so appropriated may continue to be "public domain," so long as the title to it is in the government, unless the subsequent law clearly expresses a contrary intention.

As said in *State v. Delesdenier*, 7 Tex. 108: "Appropriation of land by the government is nothing more nor less than setting it apart for some particular use; and whenever a tract of land shall have been legally appropriated to any purpose, from that moment the land thus appropriated becomes severed from the mass of public domain, and no subsequent law or proclamation or sale would be construed to embrace it, or to operate upon it, although no other reservation were made of it. The island of Galveston, having been reserved from location and sale unless special authority for that purpose was given by congress, was, from that moment, severed from the public domain. No general repealing clause contained in subsequent laws can be held to apply to the act appropriating it to a particular purpose. Having lost the character of 'public lands,' it could not regain that character except by direct and express terms." This rule has been asserted by other courts. *Railroad v. U. S.*, 92 U. S. 745; *Spaulding v. Martin*, 11 Wis. 286; *Newhall v. Sanger*, 92 U. S. 762.

13. It is urged that the state is estopped, and cannot now assert title to the lands. This proposition is based on two others: (1) That those through whom the appellant claims had not notice that the lands were appropriated, given as provided by section 2, art. 14, of the constitution. This section can have no application to the case; for it does not apply to lands owned by the state which, but for their appropriation for specific purposes, would be a part of its public domain, subject to appropriation by persons holding valid claims for land. The right of the state to such lands is not evidenced by records of the general land-office, records of a county, or by an occupation. The purpose of its adoption was not to confer rights on holders of land certificates, but to give protection to individuals who hold titled lands, or lands equitably owned under color of title, from the sovereignty of the soil, by forbidding the location of certificates on lands so held; and the want of notice acquired in the manner pointed out in this section would not protect a locator who might have notice, acquired in some other manner, that another was legally or equitably the owner of the land. There can be no question of notice in the case; for the law affects every person with notice that the state is the owner of all the land within its boundaries which has not been appropriated to individuals. Besides, the laws prescribe the boundaries of Greer county, and the act of February 25, 1879, appropriates all lands within its boundaries to specific purposes, which but for that act might have been appropriated under certificates. If there was a question of notice in the case, neither the defendant nor those under whom it claims, can claim to have been ignorant of these

laws. (2) The other ground of estoppel claimed is that, as the officers of the government who have power to issue patents in proper cases, issued the patents under which the appellant claims, and construed the law as authorizing them so to do, this construction is conclusive upon the state after the land has gone into the hands of a purchaser for value. The state cannot be estopped by the acts of any of its officers, done in the exercise of a power not conferred upon them, any more than it can be bound by contracts made by its officers which they were not empowered to make. The powers of all officers are defined and conferred by law, and of these all persons who deal with them must take notice. Acts done in excess of the powers conferred are not official acts. The fact that executive officers of the state, in excess of their authority, had issued patents to other persons for lands similarly situated, or that they took no steps to advise or warn the appellant of the invalidity of the patents, or that the legislature had not passed a law requiring suits to be brought to vacate the patents at an earlier day, cannot affect the right of the state to maintain this suit. No one can be misled for the want of notice who has notice; and the failure of the state earlier to take steps to have the patents declared void, which the appellant must be held to have known were invalid, cannot affect its right to do so at any time. That since the locations were made, under which the appellant claims, the lands which were subject to location under the certificates have been exhausted in legal methods, furnishes no reason why the appellant should be permitted to hold lands which it does not own, or why the state shall be precluded from enforcing its right to what belongs to it.

There is no error in the judgment of the district court, and it will be affirmed.

ROBERTS v. STATE.¹

(*Court of Appeals of Texas.* February 26, 1887.)

HOMICIDE—ASSAULT WITH INTENT TO MURDER.

See the opinion of this court for a summary of the evidence upon which a conviction for assault to murder was had, and which should have elicited instructions upon certain phases of the law of aggravated assault, manslaughter, and self-defense.

Appeal from district court, Johnson county.

This conviction was for assault with intent to murder, and the penalty assessed was a term of three years in the penitentiary. The material facts are clearly, though concisely, stated in the opinion of the court.

C. W. Jordan, for appellant. *Asst. Atty. Gen. Burts*, for the State.

WHITE, P. J. From the evidence as it appears in the record it seems that one Stewart, a constable, had a warrant for the arrest of the appellant and his brother upon a charge of unlawfully carrying a pistol. Stewart summoned one J. H. Keith and Tom Keith, his brother, to assist him in making the arrest. These parties reached the house of Mrs. Roberts, the mother of the appellant, where he and his brother resided, after dark. The two Robertses were out in the yard, preparing to ride around the field to look after stock that had been breaking into their crop, and were in the act of saddling their horses, when Stewart and the two Keiths came up; Jim Keith stopping at the fence in front of the house, and Stewart and Tom Keith going around behind the house.

There is a conflict in the testimony as to the action of the parties just preceding the difficulty; Mrs. Roberts testifying that the first thing done and said was by Jim Keith, who was seen at the fence some 10 feet in front of

¹Reported by Messrs. Jackson & Jackson, official reporters of the Texas court of appeals.

defendant, and with his gun (a double-barreled shotgun) lying across the fence, and pointing at defendant; Keith saying "Throw up your hands, or, God d—n you, I'll kill you," and that defendant and his brother Charley both threw up their hands. Jim Keith himself testified "he saw the boys in the yard, and they immediately drew their pistols, and he leveled his gun on defendant, with one barrel cocked, and ordered them to throw down their pistols and surrender." He says he then went through a gap in the fence, and walked towards defendant, "telling him we had warrants for them, and wanted to arrest them;" that, just as he got to defendant, and reached to take defendant's pistol, defendant raised his pistol to shoot witness, and witness struck defendant over the head with his gun. This difficulty occurred on the night of June 15th. It is in evidence that on the tenth of June, five days before the difficulty, defendant and one Mrs. Miller, who was the mother-in-law of Jim Keith, had a wordy altercation in which Mrs. Miller told defendant that she would make Jim Keith kill him. These are the facts in so far as they are necessary in order to illustrate our view of one or more phases of the law of the case which the court failed to give in charge to the jury, and which omission was, in our opinion, a fundamental error necessitating a reversal of the judgment.

Mrs. Miller had threatened to make Jim Keith, her son-in-law, kill defendant. When defendant first sees Keith after this, Keith is in 10 feet of him, with his double-barreled shotgun cocked and presented at him, accompanied by the command to throw up his hands or he would kill him. Now, under these circumstances, the previous threat of Mrs. Miller, the acts and words of Keith at the time, if defendant was so aroused by anger, rage, or terror as that he determined to kill Keith, and drew his pistol with that purpose, and did kill him, would his offense have been of a higher degree than manslaughter? And, failing to kill him, could his attempt to shoot, under the circumstances, have been of a higher grade of offense than aggravated assault?

Again, suppose it be conceded that Keith, in attempting to make the arrest, did not use more force than is allowed by law, (Code Crim. Proc. art. 255,) and that he made known the authority under which he proposed to arrest him, (Code Crim. Proc. art. 257,) still might not his conduct at the time, coupled with the previous threats of Mrs. Miller, have been such as that defendant, judging of the matter from his own stand-point, could well have concluded that the claim that he had a warrant for his arrest was but a pretext in order to enable him (Keith) to get defendant at a disadvantage by making him throw down his pistol and throw up his hands, in order that he might the better carry out his purposes of serious bodily injury towards him. And if, acting under such reasonable apprehension, defendant had killed Keith, would not the killing have been justifiable as in his necessary self-defense?

These were phases of the law of this case which the facts demanded should have been submitted to the jury. They were not presented in the charge given by the court. Because the charge did not embrace these material issues of law applicable to the facts the judgment is reversed, and the cause remanded.

STEHER v. STATE.¹

(Court of Appeals of Texas. March 9, 1887.)

1. PERJURY—FALSE SWEARING—MARRIAGE LICENSES.

County clerks have authority to take affidavits of the consent of parents to the marriage of their daughter, and such an affidavit, if false, may be assigned as "false swearing," though not as perjury. Rev. St. art. 1149.

¹ Reported by Messrs. Jackson & Jackson, official reporters of the Texas court of appeals.

2. MARRIAGE—LICENSE—FALSE SWEARING—EVIDENCE.

It was in proof that, when the marriage license was obtained upon appellant's affidavit that the bride's mother consented to the marriage, the said mother had been dead two years, and thereupon one G., who stood *in loco parentis* to the bride, was permitted to testify that he did not consent to the marriage. *Held*, that the testimony of G. was wholly irrelevant, and should have been excluded.

3. PERJURY—FALSE SWEARING—INSTRUCTIONS.

Article 196 of the Penal Code, in defining the offense of "false swearing," requires that it be done "deliberately" and "willfully." Though in this case the court properly defined "deliberately," it omitted to define "willfully," which omission, in view of the facts, was reversible error. See the opinion *in extenso*.

Appeal from district court, Rusk county.

This conviction was for false swearing, and a term of two years in the penitentiary was the penalty awarded. The material facts are sufficiently disclosed in the opinion.

J. H. Wood, for appellant. *Asst. Atty. Gen. Davidson*, for the State.

WHITE, P. J. This appeal is from a judgment of conviction for "false swearing," and the false swearing was assigned upon a statement or declaration made by appellant in an affidavit before the county clerk for the purpose of obtaining a marriage license for one Jesse Wells and one Savannah Stovall to marry; the false matter assigned consisting in a statement contained in said affidavit "that Savannah Stovall's mother was willing for Savannah to marry Jesse Wells;" said Savannah being at the time only 15 years of age.

Many of the questions raised in the assignment of errors and brief of counsel have already been decided by this court in the analogous case of *Davidson v. State*, 22 Tex. App. 376, 3 S. W. Rep. 662. In that case it was held that such an affidavit, and for such a purpose, taken by a county clerk, was legal and valid under the general authority conferred by statute upon county clerks to take affidavits, (Rev. St. art. 1149,) and that such an affidavit, while not assignable as perjury, being extrajudicial, was assignable and would support a prosecution for "false swearing" under our statute defining that offense. Pen. Code, art. 196. It was not error to admit in evidence the purported affidavit made before the county clerk. Said affidavit was not variant to nor contradictory of any allegation in the indictment, but, on the contrary, tended directly and pertinently to support said allegations.

It is urgently insisted that the court erred in permitting the witness Andy Givens to testify that he did not give his consent that Savannah Stovall should marry Jesse Wells. It is established by the evidence that Savannah Stovall's mother had been dead some two years when the marriage license was obtained. After her mother's death, Savannah had lived in the family, and at the house of Givens. With reference to the girl, Givens in fact occupied the relation of one standing *in loco parentis*. Now, while it is true that, from an equitable standpoint, had such evidence been offered by defendant, his consent to the marriage would and should have tended strongly to have obviated the operation of law as to the illegality of the license, (Rev. St. art. 2841,) yet his consent or non-consent could throw no light upon the issue assigned for false swearing, to-wit, the consent or non-consent of Savannah Stovall's mother; and to prove his want of consent had a tendency, and, we think, a strong one under the circumstances, to prejudice the rights of defendant by immaterial and irrelevant matter. We are of opinion the evidence was inadmissible.

We are also of opinion that the charge of the court, under the peculiar facts of this case, should have defined to the jury the meaning of the word "willful," which is one of the statutory words used to characterize this offense. The language of the statute is, "If any person shall deliberately and willfully," etc. Pen. Code, art. 196. The jury were, as to the word "deliberately," properly charged that a false statement made through inadvertence,

or under agitation or by mistake, (Pen. Code, art. 189,) would not support a conviction, but they were not charged as to the meaning of the word "willfully," which was equally as essential to be understood as the word "deliberately," since the statute makes them both conjointly essential to the crime. "Willful," in legal parlance, signifies with evil intent or legal malice, or without legal ground to believe the act to be lawful; and a trial court, in charging a jury upon a case involving this question, should, as an essential part of the law of the case, instruct the jury as to the legal meaning of the word "willful." *Trice v. State*, 17 Tex. App. 43; *Owens v. State*, 19 Tex. App. 243; *Loyd v. State*, Id. 321; 21 Tex. App. 264.

Had the court given a proper explanation of the word "willful," the jury might perchance have concluded that the alleged false statement was not made with "evil intent or legal malice, or without legal ground to believe the act to be lawful." Appellant had not lived in the neighborhood of Savannah Stovall, does not appear to have known her, did not know her mother, certainly did not know the latter was dead. Two parties most deeply interested, it seems, in procuring marriage license for themselves,—friends of his, in whose honesty and integrity, as well as truthfulness, doubtless, he trustingly reposed with childish simplicity and faith,—exactd of him the friendly office of procuring for them the legal sanction which would alone enable them to wed the objects of their affection, and thereby secure their supposed lasting happiness. No wonder that friendship, put to so mild a test, should have readily become an easy victim to premeditated purposes for circumventing the law. Moreover, the evidence tends to show that appellant was a man of rather weak intellect, one susceptible to influences and easily imposed upon by designing persons, who, in the character of confiding friends, would exact of him a duty which the fear of the penitentiary would prevent them performing for themselves. If defendant really believed their statements, and relied upon them, then, however much we may blame his discretion and condemn the soundness of his judgment in the matter, we can but doubt, nevertheless, the existence of an "evil intent," when it appears to be based alone upon misplaced confidence and disinterested friendship in a matter pertaining exclusively to the happiness of others.

For the errors pointed out, the judgment is reversed, and the cause is remanded.

HUNNICUTT v. STATE.¹

(Court of Appeals of Texas. March 9, 1887.)

1. INSTRUCTIONS—CONSTRUCTION AS A WHOLE.

A charge of the court is to be construed as a whole; and if, when so construed, it is found correct, it meets all the requirements of the law.

2. LARCENY—EVIDENCE.

See the statement of the case for evidence held, though conflicting upon the issues of ownership of the alleged stolen property, sufficient to support a conviction for cattle theft.

Appeal from district court, Blanco county.

Indictment for larceny of a cow.

The conviction was for the theft of a cow, and the penalty imposed was a term of two years in the penitentiary. The state found, in substance, that the defendant claimed the cow as his property prior to the alleged theft; that he killed the animal at his house, and preserved the hide; that the alleged owner and two others went to defendant's house, examined and identified the hide, which was of a brown color, with a reddish stripe down the back, branded with a peculiar character. When told that the animal killed belonged to the

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witness, the defendant said that he would pay for it. When the witness first reached defendant's house, he asked defendant if he had seen his (witness) cow. Defendant replied that he had not; and, when told by witness that he (witness) had heard that he (defendant) claimed her, he denied it. The defense introduced testimony to prove that the animal killed by defendant belonged to him, and that he took the animal openly, claiming it as his. Upon this conflict of evidence, the jury found a verdict for the State.

R. H. Ward, for appellant. *Asst. Atty. Gen. Davidson*, for the State.

WILLSON, J. When considered as a whole, we are of opinion that the charge of the court is not erroneous, but that it correctly presents the whole law of the case. There is other evidence besides the brand upon the animal which tends to prove the ownership of said animal as alleged in the indictment, such as the color of the hide, and the conduct and declarations of defendant when said hide was found and examined at his house. Notwithstanding the evidence as to the ownership of the animal, and the intent of the defendant in killing it, is conflicting, the evidence on the part of the prosecution is, we think, sufficient to sustain the conviction. Such being the case, and there being no error committed upon the trial, we must affirm the judgment.

GORDON v. STATE.¹

(Court of Appeals of Texas. March 16, 1887.)

HOMICIDE—ASSAULT TO MURDER—INDICTMENT.

Indictment for assault to murder charged that the accused "did then and there make an assault upon Frank Stoker, with the intent to murder him, the said Frank Stoker." Held sufficient by a majority of the court. But note the animadversions of *HURT, J.*, upon the ruling, and upon the precedents and reasoning upon which it is maintained.

Appeal from district court, Rusk county.

This conviction was for an assault upon Frank Stoker, with intent to murder him, and the punishment affixed by the verdict was a term of two years in the penitentiary. There is no occasion for a statement of the evidence.

No appearance for appellant. *Asst. Atty. Gen. Davidson*, for the State.

HURT, J. Appellant was convicted of an assault with intent to murder under an indictment, the charging part of which is that he "did then and there make an assault upon Frank Stoker, with the intent to murder him, the said Frank Stoker." A motion to quash was presented, based upon the ground that a conclusion of law is charged, and not the facts constituting the elements of the offense. The motion was overruled, and exception taken. This court has held that such an indictment is sufficient; following the opinion in *Martin v. State*, 40 Tex. 19, and another case decided by our supreme court. In *Mills v. State*, 18 Tex. App. 491, the opinion was written by the present writer, and in that I simply say: "This precise question was discussed at length by Judge GRAY in *Martin v. State*, * * * and it was there held that the omission to allege that the assault was made with *malice aforethought* was not fatal to the indictment." The question being settled in that case by the supreme court in an elaborate argument, I was willing to rest it there. But, holding the views I do, I deem it due to myself to here declare that, in my humble judgment, the reasoning of Judge GRAY, though coming

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from a jurist of the first ability, is not sound; and, if carried to its logical results, would hold to be sufficient other indictments declared by this and the supreme court to be fatally defective.

Let us examine the position of the learned judge in the *Martin Case*. After citing several provisions of the Code, he proceeds: "In accordance with these provisions, one of the requisites of an indictment is declared to be that the offense must be defined in 'plain language,' and also that the law defining it 'shall be construed according to the plain import of the language in which it is written,' etc. Applying these rules to the definition of the offense for which appellant was indicted, there seems to us no difficulty in understanding it. It is declared, 'if any person shall assault another with intent to murder,' he shall be punished. An assault and murder are defined in other articles by stating what acts and purposes constitute those offenses. Their meaning is definite and well understood. To constitute murder the killing must have been done with malice aforethought; and, in an indictment for murder, that intent must doubtless be alleged, for the simple reason that it is so defined in plain language in the Code. The charge of an assault with intent to murder clearly conveys to the mind that the party charged did make an attack on the party assaulted under circumstances constituting the offense of an assault, and that he did so under the circumstances constituting the offense of murder; that is, the intent to kill with malice aforethought. If the language of the Code in defining this offense is in plain language enough to be clearly understood, then it would seem to follow that an indictment charging a party in that language must be deemed to be in plain and intelligible words, and a sufficient compliance with the law."

From this citation it evidently appears that in any and all cases, owing to the peculiar provisions of our Code bearing upon this subject, the indictment will be sufficient if it contains or follows the language of the statute defining the offense. The argument of the learned judge has for its object this conclusion and none other. To restate the proposition: The offense being defined, to-wit, "if any person shall assault another with intent to murder, he shall be punished," etc., therefore an indictment which alleges that the accused did assault A., with intent to murder him, is sufficient, because, the offense being defined in plain language, the indictment, if in the language of the offense, is set forth in "plain and intelligible words."

If this rule be sound in this case, the same reasoning through which this conclusion is reached forces upon us the inexorable conclusion that in each and all offenses the indictment will be sufficient if it employs the language used in defining the offense. To this no one can give assent. To test the rule: "If any person shall assault a woman with intent to commit the offense of rape, he shall be punished," etc. The indictment alleges that A. did assault C., a woman, with intent her, the said C., to rape, and is good because it follows the language of the offense. Again: "If any person shall assault another with intent to commit the offense of robbery, he shall be punished," etc. The indictment alleges that A. did assault B. with intent to commit the offense of robbery; and this is to be held good for the same reason. Again: "The offense of burglary is constituted by entering a house by force, threats, or fraud at night, * * * with intent, in either case, of committing felony, or the crime of theft." The indictment alleges that A. did by force enter the house of B., with the intent of committing felony or theft, as the case may be. Applying the reasoning in the *Martin Case*, all felonies are "defined in plain language;" and theft, whether felony or misdemeanor, is also "defined in plain language," as clearly and as specifically as is murder. The analogy is perfect, and the conclusion must be the same, to-wit, (quoting the language of Judge GRAY:) "If the language of the Code in defining this offense is in plain language enough to be clearly understood, then it would seem to follow that an indictment charging a party in that language must be * * * a suffi-

cient compliance with the law." It is hardly necessary to state that an indictment for an assault to rob, to rape, or for burglary, which merely follows the language used in the supposed definition of these offenses is wholly insufficient.

The plain fact is that it was not the purpose of articles 499, 500, 503, 504, and 505 to define offenses at all. An assault is defined in article 484. Murder, maiming, rape, robbery, and burglary are clearly defined in other articles. Burglary is composed of certain acts specifically named, done with intent to commit offenses elsewhere defined; and the pleader is to look, not alone to the articles which simply declare the punishment for assaults with intent to commit other offenses, but also to the definition of the offenses intended to be committed by the assault or the attempt. This is obviously correct; for article 506 provides that "an assault with intent to commit any other offense is constituted by the existence of the facts which bring the offense within the definition of an assault, coupled with an intention to commit such other offense, as of maiming, murder, rape, or robbery.

The opinion in the *Martin Case* seems to proceed upon the idea that our Code defines an assault with intent to murder, and that the definition is different from that given to the same offense at common law. The fact is the offense is defined in substantially the same words, because an assault and murder are very nearly defined in our Code as at common law. Common-law indictments for assault and for murder have always in this state been held sufficient; and this, too, where we have murder of the first and second degrees. This being the case, we should look to the common-law precedents for indictments. Looking to the common law, we shall certainly find no authority for holding the indictment sufficient. Neither Archbold, Russell, nor Bishop sanction such pleading. They all hold that it must be alleged that the assault was made with malice aforethought. Bishop says that it must be alleged that the accused "did make an assault * * * with intent then and there feloniously, willfully, and of his *malice aforethought* to kill and murder," etc. 2 Crim. Proc. 77.

Being a felony, "feloniously" was absolutely essential at common law, but not so with us. Now, this form of indictment, without "feloniously and unlawfully," contains every element of the offense of murder, except the death of the party. Here we have charged the assault, instigated by malice aforethought and with the intent to kill and murder; and under the authorities, as well as upon principle, this is sufficient. We could explain the reason of the distinction in forms of indictment between assaults to murder and assaults to rape, rob, and attempts at burglary, made by the authorities, and especially by this court, if time permitted. The student, by a critical comparison of these offenses, (those intended by the assault,) will have no difficulty in discovering the reason for this difference in the form of the indictments.

In the *Mills Case*, 13 Tex. App. 491, I wrote the opinion sanctioning the conviction under an indictment in like form with this, not because I then believed the indictment good, but, in deference to the opinions and superior abilities of the learned bench by whom this question was decided, I believed I would be justified in yielding my convictions to such more profound wisdom of others. But, after more critical investigation of my duty to the citizen, and to the obligations resting upon me to uphold the constitution of my state, I feel impelled to give my views upon such a vital question as that presented by this appeal. I close my observations upon this subject of the binding effect of the decisions of courts upon other courts with a citation from Mr. Bishop: "The prosecuting state does not seek a continued violation of its own fundamental laws, but rather a correction of whatever has been amiss; and, above all other reasons, the error is one which no number of repetitions and no piling of adjudication upon adjudication can make right, or place beyond future review." 2 Crim. Proc. 587.

I am of opinion that this conviction was had upon a bad indictment, and that the judgment should, for that reason, be reversed, and the prosecution thereunder dismissed. A majority of the court, however, hold that the authorities in this state, emanating from the supreme court as well as from this court, amply support the sufficiency of the indictment; and, this being the only question of moment, the judgment is affirmed.

PER CURIAM. A majority of the court are of the opinion that the indictment in question, being a valid indictment at the time of the adoption of our constitution, is not subject to the objections made to it by Judge HURT. We can see no sufficient reason, and no practical good at this late day, in disturbing or even questioning the previous decisions upon this subject.

KELLER v. STATE.¹

(Court of Appeals of Texas. April 9, 1887.)

INTOXICATING LIQUORS—SUNDAY SALE—EVIDENCE.

See the statement of the case for evidence held insufficient to support a conviction for selling intoxicating liquor on Sunday; the statutory inhibition not extending to the *gift* of intoxicating liquors on Sunday.

Appeal from county court, Dallas county.

The conviction was for selling whisky on Sunday, and the penalty assessed was a fine of \$20. The single witness who testified on the trial said that he took several drinks of whisky, served by defendant, in his saloon, on the Sunday, but did not know whether the drinks were sold or given to him, or whether or not he paid for them. Witness was very drunk.

No appearance for appellant. *Asst. Atty. Gen. Davidson*, for the State.

HURT, J. This was a conviction for selling a glass of whisky to one F. Meyer on Sunday. There is no law prohibiting the giving away of whisky on Sunday; it is the sale or barter that is prohibited. To sustain this conviction there must be proof that the appellant *sold*—bartering not being alleged—the whisky. Looking to the statement of facts, we find that there is not sufficient proof upon this point. For this the judgment must be and is reversed, and the cause remanded.

GILES v. STATE.¹

(Court of Appeals of Texas. April 13, 1887.)

HOMICIDE—MURDER IN THE FIRST DEGREE—EVIDENCE—INSTRUCTIONS.

See the statement of the case for evidence held sufficient to support a conviction for murder of the first degree, founded upon the defendant's plea of guilty; and also for a charge of the trial court held to be correct,—the evidence proving that the homicide was committed in the perpetration of robbery, which the Penal Code, art. 606, makes murder in the first degree, *per se*.

Appeal from district court, Henderson county.

The appellant in this case, upon his plea of guilty, was convicted in the first degree of the murder of Albert Williams. The death penalty was assessed by the jury. In addition to the defendant's plea of guilty, it was conclusively shown by the state that he killed the deceased by fracturing his skull with an axe, while the two were engaged in the woods cutting timber. The motive was shown to be robbery, and certain property belonging to the deceased was discovered in the possession of the defendant shortly after the murder. Certain apparel shown to have been worn by defendant on the day

¹ Reported by Messrs. Jackson & Jackson, official reporters of the Texas court of appeals.

of the murder, covered with blood, and his bloody axe, were found secreted in his house, immediately after the discovery of the murder.

The correctness of the charge of the trial court was impeached on this appeal. After instructing the jury upon murder upon implied and express malice, and that, defendant having pleaded guilty, it devolved upon them to find the "degree of his guilt, and fix the penalty," the charge proceeds as follows: "Therefore, if the evidence shall show, beyond a reasonable doubt, that defendant, when he killed Albert Williams, did so in the perpetration of robbery, or in the attempt at the perpetration of robbery, or that he killed deceased in pursuance of a design to kill him, formed when his mind was cool, calm, and undisturbed by passion, sufficiently to admit of cool reflection upon the nature and character of the act he contemplated, then he would be guilty of murder in the first degree. But unless it does appear, beyond a reasonable doubt, that the killing was done either with express malice, or in the perpetration, or in the attempt at the perpetration, of robbery, he would be guilty only of murder of the second degree. Robbery is when one, by assault or by violence, fraudulently takes from the person or possession of another any property, with intent to appropriate the same to his own use. If you find defendant guilty of murder in the first degree, say by your verdict: 'We, the jury, find defendant, Robert Giles, guilty of murder in the first degree, and assess his punishment at ———;' and add such penalty as you may assess, which will be either death or confinement in the penitentiary for life, as you may determine. If you find his offense to be murder in the second degree, your verdict will be in the following form: 'We, the jury, find the defendant, Robert Giles, to be guilty of murder in the second degree, and assess his punishment at ———;' and add the penalty you assess, which will be confinement in the penitentiary for any term of years not less than five. Let your verdict be signed by your foreman, whom you will select. Your verdict will be based upon the evidence which has been introduced before you, in finding the degree of the offense, and in fixing the penalty."

No appearance for appellant. *Atty. Gen. Davidson*, for the State.

WHITE, P. J. This is an appeal from a judgment of conviction of murder in the first degree, the punishment being assessed at death. The case is a novel one in the jurisprudence of our state. Appellant, when first arraigned upon the indictment against him in the lower court, pleaded guilty to the charge, whereupon the court duly admonished him of the consequences of said plea; and the judgment recites that, before the court would receive and allow the plea to be entered, it was made plainly to appear to the court, as provided by statute, (Code Crim. Proc. art. 518,) that the defendant was sane, and was uninfluenced by any consideration of fear, or by any persuasion or delusive hope of pardon prompting him to confess his guilt. As shown by the record the plea was sufficient and good under the statute, and decisions of this court. *Saunders v. State*, 10 Tex. App. 886; *Wallace v. State*, Id. 407; *Sanders v. State*, 18 Tex. App. 872.

After this trial and conviction in the first degree, with the death penalty assessed against him, which was on February 21, 1887, appellant's counsel moved for a new trial, and said motion was sustained by the court, the verdict and judgment set aside, and the case set for trial again on February 24, 1887. When the case was called for trial on the appointed day, and the defendant was called upon again to plead anew to said indictment, he again persisted in pleading guilty, notwithstanding his previous conviction and the death penalty, and notwithstanding that, in receiving and permitting his new plea to be entered, all the requisites of the statute (article 518, *supra*) were observed, and again complied with.

Being a second time convicted, his counsel made a motion for a new trial, based upon two grounds, to-wit: "(1) Because the evidence introduced upon

the trial of said cause was not sufficient to show that defendant was guilty of murder in the first degree, as required by law; (2) because the court erred in the charge to the jury, wherein the jury are instructed that, 'your duty is to determine of what degree of murder he is guilty, and to assess the proper penalty;' it being also the duty of the jury to find if the evidence showed the defendant to be guilty of the offense, outside of his plea of guilty."

In so far as the first ground of the motion is concerned, we deem it only necessary to say that in our opinion the evidence adduced was amply sufficient to establish a case of murder in the first degree,—a homicide in the perpetration of robbery, which is *per se* murder in the first degree. Pen. Code, art. 606.

In so far as the second ground of the motion is concerned, the charge of the court fully, fairly submitted the law applicable to the facts to the jury, and also proper instructions as to their duty under the law. *Sanders v. State*, 18 Tex. App. 372.

No reason has been made to appear why the extreme penalty of the law should not be carried out, as has been prescribed by the judgment of the court below, and said judgment is therefore in all things affirmed.

KOBLENSCHLAG v. STATE.¹

(Court of Appeals of Texas. April 13, 1887.)

1. INTOXICATING LIQUORS—SALE TO MINOR—EVIDENCE.

The issue being the defendant's knowledge of the minority of the purchaser of the intoxicating liquor, the state, over objection, was permitted to ask a witness if, at the time of the offense, the purchaser, by reason of his physical appearance, would be taken by a person of ordinary observation to be a minor; and the witness was permitted to answer in the affirmative. *Held error.*²

Appeal from county court, Montague county.

The opinion states the nature of the case. The fine imposed was in the sum of \$25. The age of the purchaser, at the time of the purchase, was shown to be 15 years, but there was no proof that his minority was known to defendant.

No appearance for appellant. *Asst. Atty. Gen. Davidson*, for the State.

HURT, J. This was a conviction for selling liquor to a minor. Upon the trial the state's counsel propounded to a witness the following question: "From physical appearance in last August, was W. C. Strong a minor, or did he appear to be so to a man of ordinary observation?" To which the witness answered: "At that time a person of ordinary observation and intelligence would have taken him to be a minor from his physical appearance." Counsel for appellant objected to both the question and the answer. Both were improper, and in permitting both or either there was error. The age, appearance, etc., of the minor might very properly be shown; but it was not permissible for the witness to give his opinion as to how others would be impressed by these physical marks of age. It was the province of the jury to determine whether from these the defendant knew that the party was in fact a minor.

For this error the judgment must be and is reversed, and the cause remanded.

¹ Reported by Messrs. Jackson & Jackson, official reporters of the Texas court of appeals.

² Respecting the sale of intoxicating liquor to minors, see *State v. Lowrance*, (N. C.) 2 S. E. Rep. 337, and note; *Masowits v. State*, (Ark.) 4 S. W. Rep. 666.

PORTER v. STATE.¹*(Court of Appeals of Texas. April 16, 1887.)***LARCENY—FALSE PRETEXTS—INSTRUCTIONS.**

In order to sustain a prosecution for theft when the taking was originally lawful, (Pen Code, art. 727,) the proof must show either that the taker obtained the lawful possession of the property by some false pretext which induced or deceived the owner to surrender the possession of the property to him, or that, at the time he obtained the possession of the property with the consent of the owner, he intended to deprive the owner of the value of the same, and to appropriate it to his own use. See the opinion for a charge of the court on the subject held correct; and see the statement of the case for evidence held sufficient to support a conviction for theft of money obtained from the owner by false pretext.

Appeal from district court, Collin county. Indictment for theft.

Under an indictment impleading himself and three others, the appellant was convicted of the theft of \$95 in money, the property of M. A. Tolar, and was awarded a term of three years in the penitentiary. In substance, the state proved that, by persistent importunity, the defendant induced the prosecuting witness to enter a gambling-room with him, where they found the parties afterwards jointly indicted with defendant engaged in playing a game with cards. The defendant joined the game, and, upon promise, iterated by his co-defendants, to return the money at the conclusion of the game, induced the prosecuting witness to lend him, at various periods of the game, sums of money aggregating \$95. Upon the conclusion of the game the conspirators extinguished the lights in the gaming-room. To the prosecuting witness' demand for his money he retorted that he had none, and kept the money. It was testified by the co-defendants of the accused, who had been tried and acquitted, that, as a matter of fact, the prosecuting witness participated in the game, and lost the money in wagers. This testimony was corroborated by a non-participant in the game, but the state, in rebuttal, adduced evidence showing that the said witness was at another place than the gambling-room at the time of the alleged theft.

Mr. Craig and Garnett & Muse, for appellant. Asst. Atty. Gen. Davidson, for the State.

WHITE, P. J. In explaining the meaning and comprehensiveness of the word "taking," as used in our statutory definition of theft, article 727 of the Penal Code provides, among other things, that "if the taking, though originally lawful, was obtained by any false pretext, or with any intent to deprive the owner of the value thereof, and appropriate the property to the use and benefit of the person taking, and the same is so appropriated, the offense of theft is complete." This is when the possession of the property has been acquired lawfully by the taker; that is, when the owner consents to part with the possession of his property, and the taker obtains possession by virtue of such consent. In such cases the taker may be guilty of theft, notwithstanding such lawful possession, by one or the other of the two modes mentioned in the statute; that is, (1) by his having obtained such possession by any false pretext which induced or deceived the owner into surrendering the possession to him; or (2) when he has obtained possession from the owner, and at the time intends to deprive him of the value thereof, and appropriate the same to his own use and benefit. Either one of these modes of acquisition of property will separately constitute theft under our Code. *Hornbeck v. State*, 10 Tex. App. 408.

Now, in the case before us, the main, and indeed only material, question is whether the facts shown in this record constitute theft. It is in proof that

¹ Reported by Messrs. Jackson & Jackson, official reporters of the Texas court of appeals.

all the money alleged to have been stolen was loaned by the prosecutor, Tolan, to the accused, upon his promise that he would return it or give it back to him when he had finished the game of cards which he and others were playing at the time the money was so loaned.

The court instructed the jury that "if they believed from the evidence that defendant and the three other parties jointly indicted with him entered into a conspiracy to fraudulently obtain from M. A. Tolan the possession of his money, with the intent, when such possession should be obtained, to deprive said Tolan of the value thereof, and appropriate the same to their own use and benefit, and that acting together, in pursuance of a common design to carry out such conspiracy, the said Porter, Wilson, Redding, and Bagley, or either of them, represented to said Tolan that they desired his money for temporary use in a game in which they were then engaged, or about to engage, and that they would return him the same money they might receive from him when such game was ended, and that, upon such representation and promise, the said Tolan delivered to said parties, or either of them, the money described in the indictment for such temporary use in such game, and not intending to part with his title to the same, but understanding that he was to receive the same money back when such game should be ended, and that, when such representations and promise were made by said Porter, Wilson, Redding, and Bagley, and when they so received said money from said Tolan, they did not intend to comply therewith, but made the same for the purpose of getting possession of said money, with the fraudulent intent at that time, when such possession should be so obtained, to deprive the said Tolan of the value thereof, and appropriate the same to their own use and benefit, and that the money so received by the said Porter, Wilson, Redding, and Bagley was the same money described in the indictment, [e. g., describing it as it was described in the indictment,] and that the said money was the corporal personal property of said M. A. Tolan, and was over the value of \$20, and that, after the possession of said money was so obtained by said Porter, Wilson, Redding, and Bagley from said Tolan, the same was appropriated by them to their own use and benefit, without the consent of said Tolan, and with intent to deprive him of the value thereof, you will find the defendant William Porter guilty of theft of property over the value of \$20, as charged in the indictment, and assess his punishment," etc. We are of opinion this instruction presented fully and accurately the law of the case in conformity with the spirit and intent of the statute. Pen. Code, art. 727; *Dignowitty v. State*, 17 Tex. 521. In the special instructions which were given, taken in connection with the main charge, the rights of appellant were carefully guarded as to every phase of the defense made by the evidence. Nor was it error to refuse the special instructions which the court declined to give.

This is a novel case of theft, but in my opinion a case of theft nevertheless, clearly made out under the law and the evidence, as was found by the verdict and the judgment of the lower court. We have found no reversible error in the record on this appeal, and the judgment is affirmed.

HUFF v. STATE.¹

(Court of Appeals of Texas. April 16, 1887.)

1. CRIMINAL PRACTICE—INFORMATION—VARIANCE.

Variance as to the date of the alleged offense between the affidavit or complaint, and the information based upon it, is fatal, and a motion to quash the information should prevail.

¹Reported by Messrs. Jackson & Jackson, official reporters of the Texas court of appeals.

2. SAME—VARIANCE—AMENDMENT OF INFORMATION.

The date of the offense, as alleged in either the complaint or information, is matter of substance, and not form merely, and cannot be amended either upon motion or by order of court.

3. INFORMATION—MUTILATION—SUBSTITUTION.

The only remedy in a case of mutilation of the complaint or information, by the fraudulent alteration of the date of the offense alleged in either, is by substitution of the complaint and information, as provided by article 434, Code Crim. Proc.

4. EVIDENCE—BEST AND SECONDARY.

Oral proof of the contents of a written document cannot be received if the original document is accessible. The original document in this case being in the courtroom upon the trial, the court erred in admitting oral proof of its contents.

Appeal from county court, Wichita county.

This conviction was for illegal traffic in county scrip, the appellant being alleged to occupy the office of county attorney at the time of the traffic. The verdict assessed the defendant's "punishment the lowest given in the statute." It was in proof that defendant bought the county scrip, but no proof was adduced that he occupied the office of county attorney.

W. W. Flood, for appellant. *Asst. Atty. Gen. Davidson*, for the State.

WHITE, P. J. This prosecution is for a violation of article 248, Pen. Code, which prohibits any county officer from trading for claims drawn on the treasurer of any county, city, or town. Omitting formal allegations, the information charges that "R. E. Huff, on or about the first day of April, 1884, was then and there county attorney in and for Wichita county, Texas, duly elected and qualified, and acting as such; that on the said day and date aforesaid, he did then and there, in said county of Wichita, contract and buy one certain piece of jury scrip, issued by W. E. Brothem, county clerk of said Wichita county, Texas, on the twenty-fourth day of March, 1884, to G. W. Humphreys, for the sum of eight dollars, and drawn on the treasurer of Wichita county, Texas; contrary," etc. The affidavit upon which this information was based alleged the offense to have been committed on the twenty-first day of April, 1884, or 20 days subsequent to the date of its commission as laid in the information. Defendant filed exceptions to the information, upon the ground that this variance between the information and complaint or affidavit, as to the date of the commission of the offense, was fatal to the information. It is well settled that, inasmuch as the information is based upon the affidavit, (Code Crim. Proc. art. 431,) there must be a correspondence between the two as to the date of the commission of the offense charged. *Hoerr v. State*, 4 Tex. App. 75; *Collins v. State*, 5 Tex. App. 87; *Brewer v. State*, Id. 248; *Williamson v. State*, Id. 485; *Smith v. State*, 9 Tex. App. 475; *Cole v. State*, 11 Tex. App. 67; *Hafner v. State*, 16 Tex. App. 578.

In answer to the defendant's exception and motion to quash, the county attorney filed his affidavit, stating that said complaint had been changed and altered by some one, since the filing of the information, by the insertion of the figure 2 before the figure 1, so as to make the same read "21st" instead of "1st," as originally written by him, and he moved the court to allow him to correct the date in the complaint accordingly; which, after hearing the evidence upon the matter, was ordered to be done by the court, and the trial proceeded, though the amendment was not in fact made in conformity to the order. We know of no statute or authority of law under which this proceeding can be validated. Time as to date of the offense, both in the complaint and information, is matter of substance, and not of form, and it cannot be corrected or amended simply upon motion, and by an order of the court. Code Crim. Proc. art. 550; *Sanders v. State*, 26 Tex. 119; *Drummond v. State*, 4 Tex. App. 150; *Sharp v. State*, 6 Tex. App. 650; *Goddard v. State*, 14 Tex. App. 566. Matters of substance, essential to an indictment or information, cannot be amended. *Brown v. State*, 11 Tex. App. 451.

If the facts stated by the county attorney in his affidavit and motion were true, then the original complaint or affidavit upon which the information was based had been fraudulently tampered with and *mutilated*, and, the complaint being made by statute an essential part or basis of the information, its mutilation was a mutilation of the information also. To mutilate is defined by Webster to be "to cut off a limb or essential part; to destroy or remove any material part, so as to render the thing imperfect." This was clearly done, if, by altering the date, the information was deprived of the support of the complaint, and thereby rendered imperfect and invalid. Such being the case, the proper practice, and the only remedy, as we are advised, is that pointed out in article 434 of the Code of Criminal Procedure for the substitution of indictments or informations; which provides that "when an indictment or information has been lost, mislaid, mutilated, or obliterated, the district or county attorney may suggest the fact to the court, and the same shall be entered upon the minutes of the court; and in such case another indictment or information may be substituted, upon the written statement of the district or county attorney that it is substantially the same as that which has been lost, mislaid, mutilated, or obliterated; or another indictment may be presented, as in the first instance, and in such case the period for the commencement of the prosecution shall be dated from the time of making such entry. *Perez v. State*, 10 Tex. App. 327. Such a substitution should have been made in this case if, upon hearing of a motion for that purpose, the court was satisfied that the complaint had been fraudulently tampered with, and that thereby the information became mutilated because not supported by it. As shown by the record, the ruling of the court in permitting the county attorney to amend the complaint as to the date of the offense was manifestly erroneous.

Several other errors are complained of on this appeal, one or more of which are well taken. It was error to permit the witness Barwise to testify as to the date and contents of the jury scrip,—the paper,—the jury scrip itself being in court, and in the possession of the prosecution, and being the best evidence of what it contained as to date of issuance and other matters embraced in it. "Whenever an original document can be brought into court, secondary evidence of its contents as a rule is inadmissible." "The writing must be produced whenever it is necessary to prove the particular act which the writing embodies." 1 Whart. Ev. (2d Ed.) § 60 *et seq.*; *Sager v. State*, 11 Tex. App. 110; *Wyers v. State*, 13 Tex. App. 57; *Miller v. State*, 18 Tex. App. 84. The jury scrip should itself have been produced in evidence, or its loss or non-production been accounted for, before proof of its contents was admissible.

But upon the main point necessary to be established by the evidence in this case, to warrant a conviction, to-wit, that appellant, at the time he purchased the jury scrip, was county attorney of Wichita county, we think the proof is by no means conclusive or sufficient, and upon this ground alone, if none other had been presented, the conviction would have been set aside by us.

For the reasons discussed the judgment is reversed, and the cause remanded.

CASTLE v. STATE.¹

(Court of Appeals of Texas. April 16, 1887.)

THREATS AND THREATENING LETTERS—INDICTMENT.

The offense defined by article 813 of the Texas Penal Code is the "*knowingly* sending or delivering of a threatening letter," etc., and the appellant in this case was prosecuted under that article. *Held*, that the information charging that appellant "*knowingly* did threaten to take the life of Arizona C. Benton, by sending her a

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threatening letter," etc., it does not charge the offense defined by the statute under which the prosecution was had, wherefore the conviction cannot stand. It is not knowingly threatening, but knowingly sending or delivering a threatening letter, which constitutes the offense defined in said article.

Appeal from county court, Archer county.

Information for sending a threatening letter.

The opinion states the case. The penalty assessed was a fine of \$100.

F. E. Dycus, for appellant. *Asst. Atty. Gen. Davidson*, for the State.

WILLSON, J. This conviction was obtained under a complaint and information which charge that defendant "did knowingly, unlawfully, feloniously, and seriously threaten to take the life of Arizona C. Benton, by sending her a threatening letter through the United States mail, in words and figures as follows, to-wit, threatening to kill her, the said Arizona C. Benton, viz.;" and then follows the letter referred to, set forth *in hæc verba*. It is apparent from the record that the county attorney and the trial court regarded the prosecution as brought under article 813 of the Penal Code. In his charge the judge instructed the jury with reference to that article, and the penalty denounced by it, and there can be no doubt from the record that the defendant has been tried and convicted under that article. This being the case, we are of opinion that the conviction is erroneous because the information is not a good one under said article 813. It does not allege that the defendant "knowingly," etc., did threaten, etc., by sending, etc. It is the *sending or delivering* of a threatening letter *knowingly* that constitutes this offense,—not *knowingly threatening*. A person might *knowingly* write a threatening letter, and such letter might reach the person to whom it was addressed, and yet it might not have been *knowingly sent or delivered* by the writer. In such case the offense denounced by article 813 would not have been committed. *Tynes v. State*, 17 Tex. App. 123; *Willson, Crim. Forms*, No. 527. If this conviction had been had under article 809 of the Penal Code, we would not, perhaps, disturb it, although the information is not in strict accordance with approved precedents. *Willson, Crim. Forms*, No. 525, and note.

Because the defendant has been convicted of an offense with which he is not charged the judgment is reversed, and the cause remanded.

PHILLIPS v. STATE.¹

(Court of Appeals of Texas. April 20, 1887.)

INTOXICATING LIQUORS—LOCAL OPTION—ESTABLISHMENT.

Local option law, when adopted by the vote of the electors, does not become operative until the order of court declaring the result of the election has been published for four successive weeks, and the sale of intoxicating liquors in the community to be affected is not, prior to such publication, a violation of the local option law. The order in this case was published in the four successive issues of the newspaper of July 4th, 11th, 18th, and 25th, and the trial court charged, in substance, that the law became operative on the last-named date. *Held* erroneous. The law contemplates that the order shall be published for four full consecutive weeks, or twenty-eight days, from the day of its first publication, and in refusing a special charge to that effect the trial court further erred.

Appeal from county court, Denton county.

This was a conviction for a violation of the local option law, and the penalty imposed was a fine of \$200. The disposition of the case does not necessitate a statement of the facts proved on the trial.

Smith & Battorf, for appellant. *Asst. Atty. Gen. Davidson*, for the State.

¹ Reported by Messrs. Jackson & Jackson, official reporters of the Texas court of appeals.

WILLSON, J. It is not a violation of the local option law to sell intoxicating liquors until after the order of the commissioners' court declaring the result of the election adopting said law has been published for four successive weeks in the newspaper having the largest circulation in the county. Pen. Code, art. 378; Rev. St. arts. 3234-3239. In this case the said order was published in four successive issues of a newspaper, the dates of said issues being July 4, 11, 18, and 25, 1885. The trial judge in effect instructed the jury that the publication of said order was completed July 25, 1885, the date of the last issue of the newspaper in which it was inserted, and that the law took effect and became operative on that day. This was error.

The law contemplates the publication of such order for four successive weeks, or twenty-eight days, dating from the day of its first publication. Such has been the construction placed upon analogous statutes, and such is, we think, the plain intention of this statute. *Hill v. Faison*, 27 Tex. 428; *Stephenson v. Railroad Co.*, 42 Tex. 162. The local option law did not, therefore, become operative in Denton county until August 2, 1885. Not only was this erroneous charge of the court excepted to by defendant, but he requested a special instruction presenting the law upon the subject correctly, which was refused by the court, and to which action of the court the defendant also excepted.

Because of these errors the judgment is reversed, and the cause is remanded.

Ex parte SUBLETT.¹

(Court of Appeals of Texas. April 23, 1887.)

1. INTOXICATING LIQUORS—LOCAL OPTION—ELECTION.

The statute requiring the order for election under the local option law to be issued at the term of court succeeding the filing of the petition therefor is mandatory, and an election held under an order issued at any other term of court is absolutely void.

2. SAME.

Under the local option law as it existed in November, 1876, an election under its provisions could be ordered at a special session of the commissioners' court, if such was the first session after the filing of the petition.

Appeal from county court, Rockwall county.

Appellant was held under a *capias* charging him with a violation of the local option law. He sought his release by writ of *habeas corpus*, but, being remanded to custody, prosecuted this appeal. The opinion sufficiently discloses the case.

E. W. Terhune and *W. C. Jones*, for relator. *Asst. Atty. Gen. Davidson* and *J. Cox*, for the State.

HURT, J. A petition for election on local option was filed with the county clerk of Rockwall county on November 7, 1876. On the same day, but at an hour subsequent to the filing of the petition, the commissioners' court convened in called session, and ordered the election. The election, appellant's counsel insists, was void because ordered at a called or special session of the court. To this it is answered that the then existing law provided that the court, at its first session after the filing of the petition, should order the election, and we think the court, whether at a called or regular session, had authority to make the order. This order designated December 26th thereafter as the date for holding the election. No election was held under this order, but the commissioners' court, at a called session held on December 7th, acting upon the petition theretofore filed, ordered an election to be held January 6, 1877. The election so ordered was held, resulting in favor of local option.

¹Reported by Messrs. Jackson & Jackson, official reporters of the Texas court of appeals.

Appellant, through his counsel, presents these propositions: (1) That the statute makes it the duty of the court to order the election at its first session after the filing of the petition. The correctness of this is beyond question. Section 2, c. 33, Acts 1876, p. 26. (2) That, if not ordered at the first session after the petition is filed, the election is void. This is equally true. *Stallworth v. State*, 18 Tex. App. 378. (3) "If it means regular session, the election is void, because ordered at a called session. If it means called session, there was a session on November 28, 1876, after the petition was filed, and the election was ordered at the second session."

Having decided that the court, as the law then stood, had authority to order the election at a called or special session, and that the order must be made at its first session after petition is filed, the only and decisive question remaining is whether the petition was filed in time to constitute the session of November 28, 1876, the first session after the filing of the petition. This precise question was presented in *Lipari's Case*, 19 Tex. App. 433. Lipari's counsel insisted that the election was void because the petition was filed on the first day of the term at which the election was ordered. This court held that notwithstanding this, since the petition was filed before the session was opened, the filing was in time to constitute that session the first session after petition filed, and hence that the statute was complied with in so far as this matter was concerned.

The law requiring the election to be ordered at the first session after the petition is filed, the question arises, is this provision of the statute directory merely, or is it mandatory? The language of the act is, it *shall* be the duty of the court, at its first session after the filing of such petition with the clerk thereof, to order an election to be held at the regular voting place or places, within the proposed limits, upon a day not exceeding 30 days nor less than 15 days from the date of said order, and said order *shall* express the object of said election. Act June 24, 1876.

It is seen that the legislature declares it *shall* be the duty of the court to order the election at its first session after petition filed, and that the day designated for holding the election shall not exceed 30 days, and shall not be less than 15 days from the date of the order. Now, if the provision requiring the election to be ordered at the first session after petition filed is to be construed to be directory, the purpose of the provision requiring that the election shall be upon a day not exceeding 30 nor less than 15 days from the date of the order might be rendered, to a great extent, nugatory; for, if the court may continue or postpone the making of the order from one term to another, it may do so for months or years; so that the power to thus postpone might be the means, in the hands of an unscrupulous court, of defeating the popular will, by deferring the issuance of the election order to a time when the existing condition of public sentiment with regard to the matter to be voted upon appeared to indicate a result favorable to the views entertained by the court.

The law clothes the acts of public officers with every presumption of verity and fairness. This presumption, however, is in no wise disturbed by holding, as we do, that the act under which this election was authorized did not contemplate that the power to defeat the popular will, or to postpone to an indefinite future its expression, should be deposited with the court to which was confided the ordering of the means through which it was to be rendered operative. The provision requiring the election to be ordered at the first session of the court after the filing of the petition therefor, we consequently hold to be mandatory, from which it follows that an election held under an order issued upon the same petition at a subsequent term of the court is void.

The record does not support the proposition that the relator procured or connived at his arrest. Other persons having an interest in testing the legality of local option in the county may have instituted the prosecution; but

this does not affect the relator's right, unless a party in some way, to his remedy by *habens corpus*.

The judgment is accordingly reversed, and it is ordered that the relator be discharged from custody.

WADE *alias* BANKS v. STATE.¹

(Court of Appeals of Texas. April 23, 1887.)

1. HOMICIDE—MURDER—INDICTMENT.

Indictment for murder, if it alleges the name of the person killed, need not allege that he was a "reasonable creature in being," which fact is a matter of proof, and not pleading. That the alleged name of the deceased is an unprecedented one is immaterial.

2. APPEAL—PRESUMPTION.

Charge of the court, in the absence of a statement of facts, can be considered on appeal only with reference to fundamental errors. If it conforms to the indictment, it must be presumed that it responded to the evidence.

Appeal from district court, Walker county.

The death penalty was assessed against the appellant upon his conviction in the first degree for the murder of "Smutty, My Darling," in Walker county, Texas, on the fifteenth day of November, 1886. The transcript brings up no statement of facts.

W. A. Leigh and Benton Randolph, for appellant. Asst. Atty. Gen. Davidson, for the State.

WILLSON, J. It was not error to overrule the exception to the indictment, and the motion in arrest of judgment, both based upon the supposed insufficiency of the indictment, in that "it does not appear from the face of the indictment whether the defendant killed a man or a beast or some inanimate object." It is alleged in the indictment that the defendant killed "Smutty, My Darling." It has been repeatedly held by this court that in an indictment for murder it is sufficient to allege the name of the deceased, without further alleging that said deceased was a "reasonable creature in being." *Bean v. State*, 17 Tex. App. 60, and cases cited. Whether or not the deceased was a "reasonable creature in being," and therefore the subject of unlawful homicide, is a question not of pleading, but of proof. If the name of the deceased, as alleged in the indictment, was the name of a human being, and it was this identical human being that was killed, it can make no difference that the name is an unusual one,—a name perhaps never before applied to a person. The singularity of the name would serve the more certainly to identify the deceased. In all respects the indictment is in accordance with long-approved precedents, and is sufficient.

Several objections to the charge of the court are presented in a motion for a new trial, in an assignment of errors, and in the brief of counsel for defendant. As there is no statement of facts in the record, we can only consider the charge with reference to fundamental errors,—such errors as would, under any state of facts, be fatal to the conviction. We find no such error in the charge before us. It conforms to the indictment, and we must presume that it conformed to, and was warranted by, the evidence. It was not excepted to at the time of the trial, nor were any additional instructions requested. While in some of the respects complained of the charge may not be critically correct, these are no such errors as can be considered fatal to the conviction in the absence of a statement of facts.

There is no such error shown by the record as would authorize the conviction to be set aside, and the judgment is affirmed.

¹Reported by Messrs. Jackson & Jackson, official reporters of the Texas court of appeals.

ROSSON v. STEHR.¹

(Court of Appeals of Texas. April 16, 1887.)

1. PARDON—REVOCATION.

The delivery and acceptance of a pardon are complete when the grantor has parted with his entire control or dominion over the instrument, with the intention that it shall pass to the grantee, and the latter assents to it either by himself or agent. In this case, the agent having accepted the pardon on behalf of the grantee, the pardon took effect immediately upon its delivery.

2. SAME.

The pardoning power cannot revoke a pardon once delivered, and accepted by the grantee or agent.

3. SAME—CASE STATED.

The pardon in this case was issued and delivered to the grantee's agent on August 25, 1886. On August 30th, it was filed with the superintendent at the penitentiary in which grantee was confined. On the same day, but before the pardon was entered on the books of the penitentiary, or delivered to the grantee, the superintendent received a telegram from the governor to hold the said pardon for further orders. By subsequent telegram the governor notified the superintendent that the pardon had been revoked, and ordered its return. It was returned to the governor, who indorsed upon it instructions to the secretary of state to issue an order revoking the same, as it was granted upon misinformation. Thereafter proceedings by *habeas corpus* were instituted in the district court of Travis county; and, to support his application for release under the pardon, the appellant produced in evidence the charter of pardon bearing the said indorsement. *Held*, (1) a pardon procured by fraud upon the pardoning power, whether by suppression of truth, or suggestion of falsehood, or by other imposition, is absolutely void; (2) having relied upon the pardon with its indorsement, the appellant established against himself *prima facie* the procurement of the pardon by fraud, and assumed the *onus* of proving no fraud, failing to do which, or to controvert the *prima facie* case established by himself, the trial court did not err in remanding him to the custody of the penitentiary.

Appeal from district court, Travis county.

The case fully disclosed in the opinion of the court.

J. D. McMahan and Makemson & Price, for appellant. Asst. Atty. Gen. Davidson, for the State.

WILLSON, J. At the July term, 1885, of the district court of Williamson county, the appellant was convicted of theft of horses in seven different prosecutions, the penalties aggregating 45 years confinement in the penitentiary, and he was duly sentenced, and was placed in the penitentiary to undergo said punishment. On August 25, 1886, the governor of the state, upon application made to him therefor, granted and issued a full pardon for appellant, embracing each and all of said offenses. This pardon was delivered by the governor, on the day of its issuance, to the agent and attorney of appellant, who had applied to the governor for it. On the thirtieth day of August, 1886, it was delivered to a clerk in the office of the superintendent of the penitentiary at Huntsville, the place of appellant's confinement. On the same day, and before the pardon had been actually delivered to appellant, and before any entry had been made of the same in the prison records, the superintendent received a telegram from the governor to hold said pardon until further orders, and thereafter, on the same day, the governor, by telegram, notified said superintendent that said pardon had been revoked, and ordered him to return the same to the executive office; and it was so returned, and the superintendent refused to discharge appellant from confinement. On February 18, 1887, appellant applied to Hon. A. S. WALKER, judge of the Twenty-sixth judicial district, for the writ of *habeas corpus*, setting forth the facts of the issuance of said pardon, and of the refusal of the superintendent to discharge him by virtue thereof, and claiming that he is being illegally restrained of his liberty.

¹ Reported by Messrs. Jackson & Jackson, official reporters of the Texas court of appeals.

The writ was granted, and, upon a hearing thereof, appellant was remanded to the custody of the superintendent, and from that judgment he prosecutes this appeal.

Delivery and acceptance of a pardon are essential to render it effectual. The same rules which govern the delivery and acceptance of deeds govern in the case of a pardon. Delivery and acceptance are complete when the grantor has parted with his entire control or dominion over the instrument, with the intention that it shall pass to the grantee, and the latter assents to it, either by himself or by agent. *Hunnicut v. State*, 18 Tex. App. 498; 6 Crim. Law Mag. 478; 8 Washb. Real Prop. (5th Ed.) p. 316, § 38, and note. In the case before us the pardon was delivered by the governor to appellant's agent, and became at once effectual. It results, therefore, that, if the pardon is not otherwise invalid, appellant is entitled, by virtue thereof, to be discharged from imprisonment.

It is claimed by the assistant attorney general that the pardon was revoked by the governor, and thereby rendered of no effect. It is well settled that, after a pardon has been delivered and accepted, it cannot be revoked by the authority which granted it. 1 Bish. Crim. Law, § 907; 6 Crim. Law Mag. 480, and authorities cited. We must hold, therefore, that, under the facts of this case, the revocation of the pardon by the governor was without authority, and void.

But it is further contended by the state that the pardon is invalid and void because it was obtained by fraud, or granted by mistake, and that the record shows that such was the case. It is unquestionably true that a pardon procured by fraud upon the pardoning power is void. Any suppression of truth, or suggestion of falsehood, in obtaining a pardon, will vitiate it. 1 Bish. Crim. Law, §§ 905, 906; 6 Crim. Law Mag. 473, 474. And from the pardon itself it may be inferred that the pardoning power has been imposed upon. *State v. Leak*, 5 Ind. 359; *State v. McIntire*, 1 Jones, (N. C.) 1.

In this case the appellant claims the right to be discharged from imprisonment by virtue of a pardon which he produces before the court, and which he contends is in all respects a valid pardon. Upon that pardon is the following indorsement made by the governor who granted it: "Issue an order canceling this as having been issued on misinformation." This order was to the secretary of state, with whom the pardon, with said indorsement upon it, was deposited by the governor. This being all that is shown by the record bearing upon the question of fraud, is it sufficient to invalidate the pardon? We are of opinion that it is. Appellant relies upon the pardon; claims to be discharged by virtue of it; presents the issue that it is a valid pardon; as such produces it in court, bearing upon it the indorsement above noted. He does not controvert the truth of that indorsement. He virtually admits that the pardon was issued on misinformation. He has in fact proved that it was so issued by the production of the pardon itself. It being proved, and not controverted, that the pardon had been issued on misinformation, it was *prima facie* procured by fraud, and was void. If, in fact, no fraud was practiced upon the governor in obtaining it, it devolved upon appellant to explain and rebut the *prima facie* proof of such fraud made by said indorsement. This he did not do, nor attempt to do.

We are of opinion that the facts do not show that appellant is illegally restrained of his liberty, and the judgment appealed from is affirmed.

ROSENBERG and others v. WEEKES, Tax Collector.

(Supreme Court of Texas. March 28, 1887.)

1. TAXATION—NATIONAL BANKS—REALTY.

Under Rev. St. Tex. 1879, the real estate of national banks is not subject to taxation.

2. SAME—NATIONAL BANK SHARES—TAXATION OF.

A bill in equity cannot be maintained by a shareholder in a national bank to enjoin the collection of a tax assessed, in accordance with the provisions of a state statute, upon national bank shares, on the ground that the tax is at a greater rate than upon other moneyed capital, contrary to the act of congress, where it appears that the statute provides that the shares shall be assessed according to their actual value; and in arriving at that value the liabilities of the bank are deducted from its credits, and the shareholders thus given the benefit of the reduction, the value of the shares being decreased to an extent proportionate to the debts and liabilities of the banking institution; and, if the claim of the plaintiff in such bill is that his individual debts should be taken from the value of the shares held by him, he should show that he owes such debts; otherwise the law is valid as to him.

3. SAME—ASSESSMENT OF ILLEGAL TAX—REMEDY OF PROPERTY HOLDER.

Where an officer transcends the bounds of his duty, and assesses an illegal tax against a person, such person is not freed from taxation upon other property; and, if he is entitled to a reduction upon other taxes by reason of such unlawful assessment, it is his duty to demand the reduction, and pay the tax legally due, before coming into a court of equity to enjoin the collection of an entire tax, part of which it is his duty to pay.

Appeal from Galveston county.

Trezevant & Franklin, for appellants.

WILLIE, C. J. The appellants sued out an injunction restraining the appellee, as tax collector of Galveston county, from selling certain of their real estate in satisfaction of taxes claimed to be due to the state of Texas, and to the county of Galveston, upon their shares of stock in the First National Bank of Galveston. Upon final hearing, the court below dissolved the injunction, and dismissed the bill; and, further, upon a plea in reconvention of the appellee, containing a prayer to that effect, adjudged that the appellee in his official capacity of tax collector, and for the benefit of the said state and county, recover the amount of taxes due thereon respectively from each of the defendants, the collection of which this suit was brought to restrain, together with interest and costs of suit. From that judgment this appeal was taken. The appellants insist that the tax levied upon their shares in said national bank is illegal, and in support of their objection to the tax present the following issues: (1) The state of Texas has not prescribed any system for the assessment of shares of stock in national banking associations, as by the acts of congress it is required to do as a condition precedent to the right of the state to tax said shares, and the system of assessment in force in this state is not in conformity with the conditions imposed by the acts of congress. (2) No valid assessment against plaintiffs, upon the shares of stock owned by them, has been made by the assessor of Galveston county. (3) Plaintiffs' shares of stock are, under the laws of this state, taxed at a greater rate than is other moneyed capital in the hands of individual citizens of this state, and that the taxes sought to be collected of appellants are levied and assessed in violation of the act of congress, by which the state is permitted to tax such shares.

Under the first of these issues they make these propositions: *First*. No provision is made by the tax law of this state, as required by the act of congress to be made, for deducting, in the process of assessment, the value of real estate and other taxable property of national banks from the aggregate value of the shares of stock in such associations. *Second*. No provision is made by the tax law of this state, as is required by the act of congress to be made, for taxing in the city or county where the bank is located, and not elsewhere, the shares of stock owned by non-residents of this state. *Third*. There is no dec-

laration in the tax laws of this state, as is required by the act of congress to be made, that the state tax upon national bank shares shall not be at a greater rate than upon other moneyed capital in the hands of individual citizens of this state.

It is a sufficient answer to all these propositions to say that the act of congress does not require that the restrictions set forth in the act should be embodied in the state law of taxation. It is sufficient that, upon a fair construction of the statute law, none of the provisions of the act of congress are violated. This was held in the case of *Harrison v. Vines*, 46 Tex. 22, under the act of 1864, and there is nothing in the act of 1868 which requires that it shall receive a different interpretation. Whether a proper construction of the acts of our legislature shows that they tax shares in national banks at a greater rate than other moneyed capital in the hands of individual citizens is the principal question in this case. We do not regard the points made as to the deduction of the value of the bank's real estate from the tax value of its shares as amounting to anything. Our statutes do not contemplate that real estate belonging to banks shall be taxed at all. All the provisions of these statutes which levy a tax upon any property whatever, except shares in national banks, are wholly inapplicable to these institutions. They apply only to other corporations and individuals. To hold them applicable to national banks would make the statutes violate, not only the act of congress, but our state constitution; for it would subject national shares to double taxation. Such a construction would be in plain conflict with the whole spirit and intent of the law, if not of its letter; and it is against all rules of construction to so interpret a law as to make it unconstitutional or otherwise void, when no such interpretation is demanded by its language. *St. Louis Nat. Bank v. Paptn*, 4 Dill. C. C. 29; *Commissioners v. Bank*, 23 Minn. 280.

We hold, then, that, under our Revised Statutes of 1879, the real estate of national banks could not be taxed, and any attempt of an assessor so to do was unauthorized. But because an officer transcends the bounds of his duty, and assesses an illegal tax against a person, such a person is not freed from taxation upon other property. And, even if he be entitled to a reduction upon other taxes by reason of such unlawful assessment, it is his duty to demand the reduction and pay the tax legally due from him before coming into a court of equity to enjoin the collection of an entire tax, a part of which it is his duty to pay. *National Bank v. Kimball*, 103 U.S. 752; *Pelton v. Bank*, 101 U.S. 143. So far from the appellants having done so in the present case, they have neither paid nor offered to pay anything upon the tax imposed upon their bank shares; and the record does not show that the bank has even paid the tax assessed against its real estate. Nor do we think that national bank shares are assessed at a greater rate than other moneyed capital in the hands of individual citizens. In the assessment of state banks, brokers, etc., deductions are allowed for deposits made with them and debts due by them. But the same privilege is in effect allowed to shareholders in national banks. The value of a bank share depends upon the value of its franchise, capital, and property of all kinds, less the amount of its debts. All such property in the hands of individuals and corporations, other than national banks, is taxed under our Revised Statutes. We tax bank shares according to their actual value. In arriving at that value, we must necessarily deduct liabilities from credits, and in this way the shareholder obtains the benefit of the reduction. The value of his shares is decreased to an extent proportionate to the debts and liabilities of the banking institution. Not to allow to banks and individuals a deduction for the property of others held by them, such as depositors, and to tax these against the owner of the deposits, would be to impose a double tax upon the same property. If the claim of the appellants is that their individual debts should be taken from the value of their shares, then it should be made to appear that they owed such debts,

or else the law is valid as to them. This was in effect held in the case of *Supervisors v. Stanley*, 105 U. S. 315, where it is said: "When the shareholder has no debts to deduct, the law provides a mode of assessment for him which is not in conflict with the act of congress, and the law in that case can be held valid." For aught that appears, these appellants owed no debts; and if they did, they may have been already deducted from debts which were due to them in making a general assessment of their property. *Pelton v. National Bank*, 101 U. S. 148.

An individual has no right, under our laws, to have his debts deducted from the assessment made against his property generally, but only from the indebtedness due him. A bank share is not a debt due its owner; and, if these appellants had debts due themselves and also owed debts, these latter should have been deducted from their credits, and not from their shares. As the assessor was presumptively informed as to the credits, we must further presume that he took from their assessment made against them the whole amount of their indebtedness. That the legal-tender notes and United States bonds belonging to corporations or individuals are not taxed by our laws is not their fault, but is due to the positive requirements of the acts of congress.

In the case of *People v. Commissioners*, 4 Wall. 244, assessments against insurance companies and individuals were subject to a deduction on account of investments in securities of the United States, which deduction was not made as to assessments against shares in national banks. The law was sustained by the supreme court of the United States, and the decision is cited with approval in *People v. Weaver*, 100 U. S. 546. We think this case decisive of the question. The exceptions allowed by our laws are very few, and such as are called for by an enlightened public policy. It has been held by the United States supreme court that the allowance of such exemption does not show an unfriendly discrimination against national banks by the taxing power. Case of *Boyer v. Boyer*, 113 U. S. 689, 5 Sup. Ct. Rep. 706, has no application to our laws, as then the exemption was of a large portion of the moneyed capital of the state, while our laws reach every article of the kind, with trifling exceptions, which the state is allowed to tax.

That some corporations escaped taxation for a large part of their property, by reason of having on hand legal-tender notes, cannot affect this case. This does not occur by any fault of the law, or of its officers; but under any system of laws it will frequently happen that persons or corporations will escape taxation by various shifts and devices; but this does not vitiate the system, or relieve property subject to taxation when listed against its owner. There was not shown in this case any systematic or intentional violation on the part of the state or its officers of the laws of congress in the valuation of moneyed capital. Some of them even allowed shareholders in national banks to deduct the value of their bank's real estate from the value of their shares; others did not, but it was not demanded of them. These officers could not have assessed legal-tender notes under any circumstances; and it was not shown that the millions of capital invested in state corporations was not assessed and taxed, and we are certainly not to presume that they escaped taxation, when there was nothing in our laws to justify it. We think that our laws, having assessed the same percentage of taxation against every description of property, excepting a few articles exempted from public policy, and having provided means for a just and fair assessment of all moneyed capital, so as to obtain as near as possible an equal rate of taxation upon all, have complied, as far as possible, with the true intent of the act of congress, and its taxation of the shares of national banks is not invalid.

Exact uniformity of taxation is almost unattainable. Shares of national bank stock could not be put upon an exact level with that of other institutions without taxing the shares in these as well as those of the national banks. But it is clear that congress did not intend that it should be done, or it would not

have stricken out the restriction which was in the law of 1864, and not in the law of 1868. States can now tax the capital and property of other corporations, while they, at the same time, tax shares in national banks, and our laws produce as much uniformity as can possibly be attained consistently with the paramount law of the United States. There is nothing in our laws requiring shares in national banks to be taxed elsewhere than in the place where they are located; and, if there were, then appellants are not affected by the provision.

In making this decision we have referred only to our Revised Statutes and the act of 1876, which is in effect the same in its provisions, those being the laws governing the case. By the act of March 31, 1885, the law now in force, an attempt has been made to more literally perform the requirements of the act of congress in reference to the taxation of national bank shares. The tax being valid, the fact that the assessment was not placed upon the proper roll, in a proper manner, does not vitiate it. The tax was due from the shareholders, and they should have paid or offered to pay so much as was legally due and chargeable upon this particular property, before asking relief of a court of equity. *Harrison v. Vines, supra.*

It was held in *Higgins v. Deane*, (Galveston term, 1881,) in an oral opinion in a case like the present, that the tax collector for the use of the state and county may reconvene for the taxes enjoined in a case like the present, and obtain judgment therefor. That decision is conclusive as to the point raised upon the plea in reconvention in the present case. Section 9 of the act of 1873, p. 127, and section 21 of 1876, seem to contemplate a recovery of interest on taxes overdue, and for which suit has to be brought; and on general principles a person should not be allowed to withhold from the government the taxes lawfully assessed against his property, and by injunction prevent their collection for a long period of time, without paying damages for the delay, though they could not be recovered in an ordinary suit by the state; and the most appropriate measure of such damages is the interest accruing upon the amount enjoined.

There is no error in the judgment, and it is affirmed.

BILES v. STATE.¹

(Court of Appeals of Texas. June 1, 1887.)

APPEAL—RECORD—IMPANELING THE JURY.

The record on appeal must show affirmatively that the jury trying the case was sworn in the manner prescribed by the statute; otherwise a conviction cannot stand.

Appeal from county court, Llano county. On motion for rehearing.

The appellant in this case was convicted under an indictment charging him with the offense of unlawfully permitting a game of cards to be played upon his premises, his said premises being then and there a public place. The penalty assessed by the jury was a fine of \$25. The disposition made of the case does not necessitate a statement of the facts proved.

Geo. S. Walton, for the motion. *Asst. Atty. Gen. Davidson* and *E. J. Darden*, contra.

WILLSON, J. As the record fails to show that the jury which tried this case was sworn, the conviction must be set aside. Code Crim. Proc. art. 657; *Dresch v. State*, 14 Tex. App. 175; *McHenry v. State*, Id. 209.

The motion for rehearing is granted, the judgment of affirmance is set aside, and the judgment of conviction reversed, and the cause remanded.

¹Reported by Messrs. Jackson & Jackson, official reporters of the Texas court of appeals.

SHORT v. STATE.¹

(Court of Appeals of Texas. April 27, 1887.)

1. GAMING—INDICTMENT.

Indictment charged that appellant bet and wagered at "a certain faro-bank."
Held sufficient, inasmuch as faro is one of the games specially denounced by statute.

2. TRIAL—VERDICT—RECORD.

The verdict in this case assessed a fine of \$10. The judgment recites that the fine assessed was five dollars. The recital in the judgment being clearly a clerical error, the judgment is reformed to conform to the verdict of the jury.

Appeal from county court, Tarrant county.

The opinion discloses the case.

No appearance for appellant. *Asst. Atty. Gen. Davidson*, for the State.

WILLSON, J. It is charged in the indictment that the defendant did "unlawfully bet and wager at a certain faro-bank." This sufficiently charges the offense of betting at a gaming table or bank. Pen. Code, art. 864; *Wardlow v. State*, 18 Tex. App. 356; Will. Crim. Forms, 245, cases cited, and note. "Faro" is one of the banking games specifically named in the statute, (Pen. Code, art. 860,) and to allege that the defendant bet at a "faro-bank" is to sufficiently allege the offense of which the defendant has been convicted.

There is an error in the judgment. It adjudges that the state of Texas have and recover of the defendant a fine of five dollars, etc. This is evidently a clerical mistake, as the verdict of the jury assessed the fine against the defendant at \$10. We will therefore reform and correct the judgment so as to make it conform to the verdict, as follows: "It is therefore considered and adjudged by the court that the state of Texas do have and recover from the defendant, Luke Short, said sum of ten dollars fine, assessed as aforesaid, together with all costs herein incurred," etc.

The judgment thus reformed and corrected is affirmed.

OLIVARES v. STATE.¹

(Court of Appeals of Texas. April 30, 1887.)

HOMICIDE—MURDER IN THE SECOND DEGREE.

See the statement of the case for evidence held insufficient to support a conviction for murder in the second degree, the deceased being the wife of the accused.

Appeal from district court, Atascosa county.

This conviction was in the second degree, for the murder of Jesusa Olivares, and the penalty assessed was a term of 10 years in the penitentiary.

The state failed in this case to prove the *corpus delicti*. The death of the woman, who was the wife of the accused, was established; and it was proved that, at the time of her death, she was heavy with child, and that her body displayed evidences of severe beating; but none of the witnesses, one of whom was a physician, could testify that her death resulted from other than natural causes. It was proved that her husband, the accused, was jealous of her, refused to employ a physician during her last illness, applied a Mexican epithet or oath to her before her death, and in explanation of the flow of foul blood from her privates, expressed his suspicion that she had been guilty of illegal cohabitation with a negro or some other person. No overt act of cruelty or threat was proved. The defense offered no testimony.

No appearance for the appellant. *Asst. Atty. Gen. Davidson*, for the State.

¹ Reported by Messrs. Jackson & Jackson, official reporters of the Texas court of appeals.

WHITE, P. J. Appellant in this case has been convicted for the murder of his own wife, his crime being ascertained to be murder in the second degree, and his punishment has been assessed by the verdict and judgment of the lower court at 10 years' imprisonment in the penitentiary. In our opinion, the evidence contained in the record sent up on this appeal is wholly insufficient to support the verdict and judgment; and the judgment is therefore reversed and the cause remanded.

ROBINSON v. STATE.¹

(Court of Appeals of Texas. May 4, 1897.)

1. TRIAL—VERDICT—FORM.

Trial courts have the power to reject an informal or illegal verdict, and such a verdict cannot operate to acquit unless the jury's intention to acquit is apparent. Likewise, informal verdicts may be amended, under the direction of the court.

2. NEW TRIAL—EFFECT.

The award of a new trial because of an informal or illegal verdict places the case in the same condition as if no trial had been had.

3. CRIMINAL PRACTICE—FORMER JEOPARDY.

Neither jeopardy nor former acquittal are such pleas as can be interposed by an accused at a subsequent trial, upon a showing that his conviction on his former trial was set aside because of an illegal verdict.²

4. SAME.

The failure of the jury to pass upon the pleas of jeopardy and former acquittal, in the absence of any supporting proof, cannot operate to the prejudice of the accused, and therefore becomes immaterial.

Appeal from district court, Bexar county.

This conviction was for the robbery of one L. Kronkosky, and the penalty assessed was a term of 30 years in the penitentiary.

The brief record in this case, in addition to the proceedings on the first trial as stated in the opinion, discloses the following state of facts: About noon on the day alleged in the indictment the defendant entered a camp on the Cibolo creek, in Bexar county, occupied by Kronkosky, a peddler, and his little son. He made inquiries of the peddler concerning the various settlements, and the roads traversing the country; and, upon the peddler's invitation, partook of dinner. Just as the peddler was in the act of starting his team to resume his journey, the defendant confronted him with a cocked pistol, and demanded his money. Before an answer to his demand could be given, he fired and shot the peddler in the body, and, when the peddler sprang from the wagon, fired a second shot, inflicting a scalp wound. The peddler's son then started towards a distant house for aid, and was fired on by defendant as he ran. The peddler became exhausted from the loss of blood, and the defendant rifled his pockets, securing about \$20 in money.

No appearance for appellant. *Asst. Atty. Gen. Davidson*, for the State.

HURT, J. This was a conviction for robbery, in which there were two trials. On the first trial the defendant pleaded guilty, and was convicted of "theft of \$20, and assessed his punishment at confinement in the penitentiary for 30 years." The foreman of the jury requested the presiding judge to have the verdict put in the proper form; whereupon the district attorney wrote the following verdict: "We, the jury, find the defendant guilty of robbery, as charged in the indictment, and assess his punishment at thirty years' confinement in the state penitentiary." This verdict, so amended, was signed by the foreman, and was read to the jury, they answering that it was their verdict. The jury was then polled, each juror returning a like answer. Appellant ob-

¹Reported by Messrs. Jackson & Jackson, official reporters of the Texas court of appeals.

²See note at end of case.

jected to the verdict being thus amended, and reserved a bill of exceptions. A new trial was granted, whether at the request of appellant, or by the court of its own motion, does not appear. Upon the second trial appellant pleaded, specially, former conviction and jeopardy.

Do the above facts confer upon appellant the right to either of these pleas? We think not. If there was no authority to amend the verdict, under the facts of this case, then judgment should have been entered upon it, unless it was illegal.

The verdict found the defendant guilty of theft, and the punishment was assessed at 30 years' confinement in the state penitentiary. The punishment was illegal, the maximum being 10 years for such theft. The verdict being illegal, the court, of its own motion, had the right to set aside and vacate it.

But it may be urged for appellant that the jury should not have been discharged, but should have been ordered to retire and consider still further of their verdict. An informal — and with greater reason, an illegal — verdict may be rejected by the court, and will not operate as an acquittal, unless plainly intended. *Alston v. State*, 41 Tex. 89; *Allen v. State*, 26 Ark. 333; *Murphy v. State*, 7 Cold. 516; *Townley v. Cady*, 10 Neb. 383, 6 N. W. Rep. 464. We have been proceeding upon the theory that the first verdict could not be amended. But we are clearly of opinion that under our statute, as well as at common law, it could. Code Crim. Proc. art. 628; 1 Bish. Crim. Proc. §§ 1005, 1013. The court having the authority to amend, the verdict, as amended, was legal, and the case stands as though there had been no informal or illegal verdict.

Under these conditions the appellant was granted a new trial, and upon the second trial pleaded acquittal and jeopardy. There is nothing in the record to support either plea; and upon motion for the state they should have been stricken out. Hence the failure of the jury to pass upon his pleas could work the defendant no injury.

We have examined the other grounds assigned as errors, and find them not well taken. The judgment of the lower court is affirmed.

NOTE.

CRIMINAL PRACTICE—FORMER JEOPARDY. When defendant obtains a new trial, he places himself in the same position as though he had not been tried, and a conviction on such first trial is no bar to a subsequent conviction, *Haskins v. Com.*, (Ky.) 1 S. W. Rep. 730; *State v. Oliver*, (La.) 2 South. Rep. 194; *State v. Clark*, (Iowa,) 28 N. W. Rep. 537; *Packer v. People*, (Colo.) 8 Pac. Rep. 564; *People v. Larsen*, (Cal.) Id. 517; *In re Garvey*, (Colo.) 3 Pac. Rep. 903; *People v. Keefer*, (Cal.) Id. 818; *Hilands v. Com.*, (Pa.) 6 Atl. Rep. 287, and note; and the former conviction is no bar to a conviction of a higher degree of the same offense, *State v. Miller*, (Kan.) 10 Pac. Rep. 885.

When the prosecution fails through any informality or defect in the proceedings, it is not a bar to another prosecution, *State v. Parker*, (Iowa,) 24 N. W. Rep. 225; *State v. Britton*, (N. J.) 7 Atl. Rep. 679; *State v. Priebe*, (Neb.) 19 N. W. Rep. 628; *People v. Clark*, (Cal.) 7 Pac. Rep. 178; *Johnson v. State*, (Ala.) 2 South. Rep. 466; *Ball v. State*, (Ark.) 2 S. W. Rep. 462; *State v. Waid*, Id. 191; or when the jury disagrees, and is discharged, *Brady v. State*, (Tex.) 1 S. W. Rep. 462; or when one of the jurors is taken sick, and the jury is discharged, *State v. Emery*, (Vt.) 7 Atl. Rep. 129; and a continuance being granted, and the jury discharged after the evidence is in, is not ground for dismissing the prosecution, *State v. Falconer*, (Iowa,) 30 N. W. Rep. 655.

But where a hearing is demanded upon a plea of guilty, a dismissal by the prosecutor is a bar to subsequent prosecution. *Boswell v. State*, (Ind.) 11 N. E. Rep. 788. See, also, *Jordan v. State*, (Ala.) 1 South. Rep. 577.

MURPHY v. STATE.¹

(Court of Appeals of Texas. May 7, 1887.)

HIGHWAY—OBSTRUCTION—LOCATION OF ROAD.

The *gravamen* of the offense of obstructing a public road is that the act was willfully done by the accused. See the opinion and the statement of the case for the effect and substance of evidence held insufficient to support a conviction for willfully obstructing a public road, inasmuch as it leaves the true location of the road in doubt.

Appeal from county court, Williamson county.

The opinion states the nature of the case. The fine imposed was in the sum of \$25.

The evidence disclosed that the road was located in 1881; that it traversed an open, unfenced prairie country; and that the road-bed, as the country became populated and fenced, shifted according to the fancy or convenience of the traveling public. It was shown that when defendant built his fence the said road nearly divided his land in halves, having at different periods traversed it at different angles. Defendant sought information from his neighbors, when he built his fence, as to whether the road was a public or private road, and was informed by more than one that it was not a public road. In short, the evidence fails to show that defendant knew the wanderings of the road, or that he knew it to be a public road when he built his fence across it.

Cochran & Parker, for appellant. *Asst. Atty. Gen. Davidson*, for the State.

HURT, J. Appellant was convicted for unlawfully and willfully obstructing a public road. After proving that the road obstructed was legally established, etc., the state, to sustain the charge that appellant was guilty of willfully obstructing the same, introduced several witnesses to show that appellant obstructed the road by building a new fence across the same. But it was also shown that the said road had no definitely settled route, the line of travel varying over a breadth of several hundred yards, rendering it reasonable that appellant was mistaken as to its true location. After a careful examination of the statement of facts, we are left in doubt as to the location of the road. Without noticing all the questions presented in the able brief of appellant's counsel, we hold that the conviction should not stand; for the reason that if appellant did obstruct the road as charged, it does not appear from the record that it was "willfully" done.

The judgment is reversed, and the cause is remanded.

GUTHRIE v. STATE.¹

(Court of Appeals of Texas. May 14, 1887.)

HIGHWAY—OBSTRUCTION—INTENT.

Evidence that the accused, by direction of the owner of land traversed by a public road, placed a gate across the road, but, on being told that he had thereby obstructed a public road, stated that he was ignorant of the fact that the road was a public road, and forthwith removed the gate, fails to show that the obstruction was willful, and, on the contrary, tends to show that it was not willful; wherefore a conviction is not supported by such proof.

Appeal from county court, Williamson county.

The opinion sufficiently states the case. The punishment of appellant was assessed at a fine of \$25.

No appearance for appellant. *Asst. Atty. Gen. Davidson*, for the State.

¹Reported by Messrs. Jackson & Jackson, official reporters of the Texas court of appeals.

WILLSON, J. It appears from the evidence that appellant placed the gate across the road by direction of the owner of the land upon which said road was located. When told that he had thus obstructed a public road, he stated that he was ignorant of the fact that it was a public road and without delay removed the obstruction. In our opinion the evidence fails to prove that defendant acted *willfully* in placing the gate across the road. On the contrary, we think it shows that the act was without an evil intent on his part, but was the result solely of ignorance of fact. He promptly removed the obstruction when he was informed that the road was public, which conduct is inconsistent with the theory that he had placed it there willfully. There is no evidence, either direct or circumstantial, which contradicts his statement that he was ignorant of the fact that the road was a public one at the time he placed the gate across it.

Because, in our opinion, the evidence does not support the conviction, the judgment is reversed, and the cause is remanded.

MOSELEY v. STATE.¹

(Court of Appeals of Texas. June 1, 1887.)

FALSE IMPRISONMENT—ARREST—WARRANT.

See the statement of the case for a special charge of the court, requested on a trial for false imprisonment, which, responding to an issue raised by the evidence, was erroneously refused.

Appeal from county court, Johnson county.

The conviction was for the false imprisonment of one Tom Broxton, and the penalty assessed was a fine of \$25.

Bref, the evidence of the state was to the effect that one Blake, then in company with Broxton, became intoxicated in the town of Alvarado, of which defendant was marshal, and committed a disturbance of the peace, for which the defendant arrested and placed him in confinement; that *en route* to jail Broxton appealed to the defendant to release Blake on bond, offering to provide bond, or to deposit money to secure his appearance before the mayor's court on the morrow. It was strenuously denied by the state witnesses that Broxton interfered any further with defendant in the discharge of his official duties.

For the defense it was proved, in substance, that on the fifteenth day of August, 1885, one J. T. Blake, Tom Broxton, and others came into the city of Alvarado; that Blake got drunk, used loud and vulgar language, and was guilty of violent conduct on the public streets; while Tom Broxton encouraged him, and declared that the "town officers could not arrest them," etc. Finally appellant and his deputies arrested Blake, and started to the calaboose with him. Broxton took hold of him, and undertook to release him. Failing in this, he demanded that he should be released on bond. This the appellant refused, and proceeded to the calaboose with his prisoner, Broxton following. When they reached the calaboose, Broxton again demanded Blake's release, at the same time cursing and swearing that Blake should not be imprisoned. Finally Broxton entered on the platform of the calaboose, and took hold of or pushed one of the deputies back and demanded the release of Blake; whereupon appellant and his deputies put him in the calaboose with Blake, and let them remain for about 10 minutes.

Appellant asked the court to charge the jury, in substance, that if Blake was drunk on the street, and was disturbing the peace, it was the duty of appellant, without warrant, to arrest and confine him in the calaboose, and that Tom Broxton had no right to force or compel defendant to release said Blake

¹Reported by Messrs. Jackson & Jackson, official reporters of the Texas court of appeals.

on bond while said Blake was drunk; that if, while appellant and his deputies were conveying said Blake to the calaboose, the said Broxton tried to release said Blake by force, then appellant had the right to arrest and imprison said Broxton.

Poindexter & Padelford, for appellant. *Asst. Atty. Gen. Davidson*, for the State.

WILLSON, J. It was error to refuse the second special charge requested by defendant. Said charge is applicable to the facts proved, is a part of the law of the case, and was not embraced in the general charge given to the jury. The action of the court in refusing said special charge was excepted to at the time of the trial, and is presented to this court by bill. For said error the judgment must be reversed, and the cause remanded for new trial. We find no other material error in the record. We will remark, however, upon the evidence, that it impresses us strongly with the belief that an officer has been convicted of an offense for doing that which the law not only authorized, but made it his duty to do.

SCOTT and others v. WOODRUFF and another.

(*Supreme Court of Arkansas. June 18, 1887.*)

1. LIMITATION OF ACTIONS—ADVERSE POSSESSION.

In Arkansas, where a person claims title by limitation, in order to recover, he must show actual and notorious possession in himself continuing peaceably and uninterruptedly for a period of seven years. Merely going upon the land, and girdling a part of the trees, then leaving it, and exercising no other acts of ownership, except to pay taxes thereon, is not sufficient evidence of itself to establish such possession.¹

2. TAXATION—TAX DEED—PRIMA FACIE VALIDITY.

By the Arkansas statute (Mansf. Dig. § 4246) a deed, from the commissioner of state lands, of lands forfeited to the state for non-payment of taxes, is made *prima facie* evidence of title in the purchaser to the lands conveyed, and that everything necessary to vest title in the state was done. Hence it is error for the court to find such deed void because of the certificate of the county clerk that he could not find in his office certain records, and that for that reason the assessment and forfeiture of this land was illegal.

Appeal from circuit court, Lonoke county.

John C. & C. W. England, for appellants. *S. R. Allen* and *T. J. Oliphint*, for appellees.

BATTLE, J. This was an action instituted by William E. Woodruff, Sr., and Anderson Mills, against Anthony and Albert Scott, for the recovery of certain lands in Lonoke county. Plaintiffs, to maintain their action, relied upon seven years' adverse possession under color of title. The color of title was sufficiently shown. Their right to recover depends upon the sufficiency of the evidence of adverse possession. The evidence on this point is: The plaintiff Mills, in 1870 or 1871, took possession of the land, and deadened the timber on about 68 acres, and paid the taxes on it from 1870 to 1876, inclusive. Plaintiffs did nothing on the land after making the deadening. After the payment of the taxes of 1876, it seems, they paid no attention to the taxes. Mills, however, testified he always claimed the land, and never intended to abandon it. The defendants relied on a deed from the state. The land was forfeited in 1878 on account of the non-payment of the taxes of 1877. Not having been redeemed within two years after the forfeiture, it was certified by the clerk to the commissioner of state lands as lands for-

¹ Respecting the character of occupancy that will constitute adverse possession, see *Merrill v. Tobin*, 30 Fed. Rep. 738; *Roots v. Beck*, (Ind.) 9 N. E. Rep. 698, and note; *Murray v. Hudson*, (Mich.) 32 N. W. Rep. 889, and note; *Murphy v. Doyle*, (Minn.) 33 N. W. Rep. 220; *Richards v. Smith*, (Tex.) 4 S. W. Rep. 571; *Baum v. Carrituck Shooting Club*, (N. C.) 2 S. E. Rep. —; *Babson v. Tainter*, (Me.) 10 Atl. Rep. 63.

feited to the state. On the twenty-seventh of August, 1880, the defendants purchased it, and the commissioner of state lands conveyed it to them by deed. This deed was introduced, and read as evidence in the trial. Evidence was also introduced showing that defendants took possession under it, and cleared and put into cultivation a part of the land, and were in possession at the commencement of this action. The only evidence introduced to show the invalidity of the deed was a certificate of the clerk of Lonoke county to show that the assessment and forfeiture of this land for the taxes of 1877 was illegal, in which he certified he could not find in his office any record or evidence of the following facts: "(1) Oath of assessor before entering on duties; (2) abstract of land in the county subject to taxation for 1876, delivered to assessor by clerk; (3) notice of collector, under section 5165, Gantt, Dig., that he would meet the tax-payers, etc.; (4) notice of clerk, under section 5185, Gantt, Dig., of sale of delinquent lands; (5) no proof of publication of notice of sale, except the certificate of clerk that the same was made; (6) no certificate of collector as to sale; (7) no record showing that collector offered the lands by beginning at N. E. corner of the tracts."

The court refused to declare the law, at the request of the defendants, as follows: "(1) That, when one claims title by limitation, he must show, first, actual, visible, open, and notorious possession in himself, and that such actual, visible, open, and notorious possession has continued peaceably and uninterruptedly for a period of seven years, and that, therefore, before the plaintiffs can recover herein, they must establish by positive proof that they have had the actual, open, peaceable, adverse, and continuous possession of said land either in person or through their agents or employes for a period of seven years, without break or interruption, and that the mere going upon the land, and deadening a part thereof, and afterwards paying the taxes thereon, is not sufficient evidence of itself to establish such possession; (2) that if the evidence in this case shows that plaintiffs went upon said land in 1870, and deadened a part thereof, and then left said land, and did not re-enter upon it again for a period of seven years from 1870, and they exercised no other acts of ownership over it except to pay taxes, their plea of title by limitation fails, and they cannot recover."

But declared it, at the instance of plaintiffs, as follows: "(1) The court declares the law to be that possession once established by material acts of visible, notorious ownership, must be presumed to continue until open, notorious, and adverse possession be proven to be taken by another; (2) that the tax deeds of plaintiffs, although void upon their face, are competent evidence to show color of title, and to define the boundary of plaintiffs' claim to title under the statute of limitations; (3) that the possession of lands, under deeds, for the statute period, of a part of said tracts described in them, confers title to the whole."

The court, sitting as a jury, found that plaintiffs acquired a good title to the land by seven years' adverse possession under color of title, and that defendants' deed was void, "(1) because assessor did not, before entering upon the duties of his office, take and subscribe to the oath required by law; (2) because there is no proof that the land was advertised as required by the statute; (3) because there is no certificate of the collector as to the sale of the lands; (4) because there is no notice given by collector, under section 5165, Gantt, Dig., that he would meet the tax-payers, etc.; (5) because there was no notice by the clerk, under section 5185, Gantt, Dig., of sale of said lands; (6) because it does not appear that the lands were offered for sale by the collector, beginning at the N. E. corner of said tracts." And the court rendered judgment for the land in favor of plaintiffs. Defendants, after filing motion for new trial and saving exceptions, appealed.

In support of the action of the court in refusing to declare the law as asked by appellants, and declaring it as asked by appellees, *Clements v.*

Lampkin, 34 Ark. 598, is cited. Appellees call our attention to the fact that Mr. Justice EAKIN, in delivering the opinion of this court in that case, said: "The possession of Topp's vendee, once established by material acts of visible, notorious ownership, which was done by putting negroes upon it, and making a deadening long known afterwards as the 'Lampkin Deadening,' must be presumed to have continued until open, notorious, and adverse possession be shown to have been taken by another." In order to understand what was meant by this remark, it is necessary to know the facts in that case. The facts are as follows: The heirs of John W. Lampkin, deceased, sued the heirs of Robertson Topp, deceased, for specific performance of a title-bond to convey a tract of land, executed by Topp to Lampkin, in the life-time of both. Clements was made a party defendant. He was charged with claiming a part of the land in controversy under color of an invalid title. The prayer of the complaint as against him was to remove a cloud from the title of plaintiffs. He denied the validity of plaintiffs' title, set up his own claim of title, and relied upon adverse possession and the statute of limitations. In order to sustain their action against Clements, it was necessary for plaintiffs to show that Topp had the title to the land, and they were in possession. This court first found that Topp had the title. It then proceeded to say: "They [plaintiffs] show then the title-bond from Topp to their ancestor, and prove, with reasonable certainty, that said ancestor, about the year 1854, entered into possession of said land, and deadened a large area, for clearing." Having shown that Topp had the title, and that Lampkin purchased of him, and, under his contract of purchase, took possession, it follows that he and his heirs were entitled to the possession until they were ousted, and, holding under the legal title, it was presumed they remained in possession until the contrary was shown. In connection with this fact, when considering Clements' title by adverse possession, this court said: "The possession of Topp's vendee, once established by material acts of visible, notorious ownership, which was done by putting negroes upon it, and making a deadening long known afterwards as the 'Lampkin Deadening,' must be presumed to have continued until open, notorious, and adverse possession be shown to have been taken by another;" and proceeded to show that Clements had not ousted plaintiffs by any acts of open, notorious, and adverse possession. Plaintiffs in that case made no effort to show title acquired by adverse possession, and any remarks made to show that they had, would have been superfluous.

All the court meant to say was, the plaintiffs, having taken possession under the legal title, were presumed to remain in possession until open, notorious, and adverse possession be shown to have been taken by another; for the rightful owner is deemed to be in possession until he is ousted or disseized. This is the result of the well-settled principle of law that possession follows title, in the absence of any possession adverse to it, and that there can be but one actual seizin of the same estate at one and the same time.

Appellees rely upon *Wilson v. Spring*, 38 Ark. 181, in which it is said: "We think the presumption a fair one that a possession under color of title, once adversely taken, has continued in the grantee, and passed to his grantees in turn. Any interruption of it must be shown by the other party. Otherwise it would be necessary to make some proof of possession each day. If the land had been in fact abandoned, or there had been any interruption of the possession in Spring and his grantees, it devolved on defendants to show it." The rule announced is only a rule of evidence, and it is unnecessary, for the purposes of this case, to stop to inquire into its correctness, as the facts in this case are proven, and not left open to presumption.

The question as to what is necessary to constitute an abandonment of possession was considered by the court in *Sharp v. Johnson*, 22 Ark. 84. That case was an action of ejectment. It was contended that the action was barred

by the statute of limitations. The defendant claimed under one Cunningham. He relied on the possession of Cunningham to sustain his defense under the statute of limitations. The evidence was that Cunningham had possession of an inclosed field on the land in controversy from the spring of 1840, by himself or tenants cultivating it and keeping up the fences about it, till 1848, when he left the place, remaining absent from it, and not holding it by cultivation or occupancy of himself or others in the years 1848 and 1849. Mr. Justice FAIRCHILD, in delivering the opinion of this court in that case, said: "During the interval of two years, Cunningham must be taken to have been out of the possession of the field and of the land; for the evidence is satisfactory that he did nothing to keep it in repair, in use, or in possession. The fence had fallen down, as the witness who testified upon the subject says that when Cunningham returned to the place, in 1850, he rebuilt the fence, and that the fence was kept up about it from 1840 to 1852, except during the years 1848 and 1849. The place was then abandoned by Cunningham, was vacant for two years, and whatever the legal effect of such vacancy, and of the abandonment of Cunningham, may be, it is to be applied to him, as he knew and adopted the consequences of his act, or will be held by the law to have so done. And it is well settled that the possession upon which the statute of limitations will operate for the holder must be an unbroken, continuous possession; that, if there be an interruption of holding, the term of adverse possession is closed, and, upon a resumption of possession, a new point is made from which limitations will again begin to run. Ang. Lim. c. 31, § 84; *Potts v. Gilbert*, 3 Wash. C. C. 478; *Doe v. Campbell*, 10 Johns. 477; *Pederick v. Searle*, 5 Serg. & R. 240; *Andrews v. Mulford*, 1 Hayw. (N. C.) 320; *Den v. Ridley*, Law Repos. 282; *May v. Jones*, 4 Litt. (Ky.) 23. It is only, then, a possession from 1850 that Cunningham, or his representatives, or the defendant, their tenant, can date from as the beginning of a defense from being in possession, which, of course, is no defense to a suit begun in 1852. And this results from the fact of abandonment, which is evidence to the world of the intention of him who leaves his occupancy. What secret wish or anticipation he may indulge of returning, and reasserting his yielded claim, none but himself can know. Or, if he should assert his claim to be a continuing one in his absence, that would not make it any better for him; for although, in aid of possessor, the law will presume it to be well founded, and will respect, as rights, interests that have become ancient, a claim of possession without the fact agreeing therewith is not to be recognized by law as productive of right, or as capable of having connected with it any interest."

The adverse possession necessary to vest title in the holder must be continuous and unbroken for the full period prescribed by the statute. "Adverse possession," says Mr. Justice GIBSON in *Stephens v. Leach*, 19 Pa. St. 262, "professing, as it does, to be founded, not on title, but on trespass, is essentially aggressive, and the stamp of its character must always be preserved by acts on the premises. A man does not discontinue his possession by locking up his house in town, or suspending his cultivation in the country, provided he do not suffer the buildings in the one case, or the fields in the other, to be thrown open; but he is bound to continue a positive appearance of ownership, by treating the property as his own, and holding it within his exclusive control. An intention to resume suspended intrusion, of which the owner of the title may know nothing, is short of the requirements of the statute. The question is not, what did the outgoing occupant intend, but what did he do? Did he keep his flag flying, and present a hostile front to adverse pretensions? An adverse possession ought to be such as to challenge the right of all the world; but when an occupant has evacuated the place, and suffered it to go to wreck, he hauls down his colors, and his challenge is withdrawn." In other words, when one leaves the ground personally during the period of limitation

prescribed by the statute, he must leave it under circumstances indicating that he has not left the possession, but still holds it. He must so leave it that the condition and appearance of the premises themselves show to the world that there is still a person in actual control and exercise of dominion. If he should leave the premises personally, but not in the condition or manner indicated, before the expiration of the time prescribed by the statute of limitations, he acquires no title by adverse possession. *Byers v. Danley*, 27 Ark. 92; *Ringo v. Woodruff*, 43 Ark. 486, 487; *Williams v. Wallace*, 78 N. C. 854; *Susquehanna, etc., R. Co. v. Quick*, 68 Pa. St. 189; *Byrne v. Lowry*, 19 Ga. 27; *Joiner v. Borders*, 82 Ga. 239; *Virgin v. Land*, Id. 572; *Holliday v. Cromwell*, 37 Tex. 437; *Tegarden v. Carpenter*, 36 Miss. 404; *Sedg. & W. Tr. Title Land*, (2d Ed.) § 744, and cases cited. The court below therefore erred in refusing to declare the law as asked by appellants.

The next question presented for our consideration is, what was the effect of the deed relied on by appellants as evidence? The statutes under which this deed was executed provide that, "immediately after the expiration of the two years allowed for the redemption of lands sold for taxes, the clerk shall make out a certificate of sale to the state for all land purchased by the state, as shown by the records of such tax sale in his office which have not been redeemed, and cause the same to be recorded in the recorder's office of the county, and thereupon the title to all lands embraced in such certificate shall vest in the state, and the clerk shall immediately transmit such certificate to the commissioner of state lands, and thereupon the said lands shall be subject to" private sale at 50 cents per acre; and that the commissioner of state lands, upon selling the same, and immediately after the filing in his office of a receipt showing that the full amount of the purchase money has been paid into the state treasury, shall execute to the purchaser a quitclaim deed in behalf of the state to the land; and that such deed shall be received as evidence in any court of the state. Evidence of what? Manifestly, of title to the land conveyed. The statute having provided that the title to the land forfeited shall vest in the state upon the performance of certain acts by the clerk, it is clear that the object of the commissioner's deed is to convey that title to the purchaser from the state, and that the deed was intended to be *prima facie* evidence of that title. Such has been the policy of the state, as a general rule, in respect to tax deeds long prior to and at all times since the enactment of the statutes under which appellants' deed was executed. It was in pursuance of this favorite policy that the deed of the commissioner of state lands to lands forfeited for taxes was made *prima facie* evidence of title in the purchaser to the lands conveyed. As of all such legislation, the object is to relieve the grantee, and those holding under him, from making proof until evidence is introduced showing, or tending to show, that the deed conveyed no title. Acts 1874-75, p. 227, § 19; Acts 1875, p. 95, § 6; *Mansf. Dig.* § 4246.

It was not, therefore, necessary for appellants to have proved that all things necessary to vest title in the state was done. Their deed was *prima facie* evidence of that fact. The certificate of the clerk that he could not find in his office certain records or evidence did not overcome this *prima facie* evidence. The only effect of it, if admissible for any purpose, was to show that so much of such records or evidence as was required to be filed or of record in the clerk's office was lost. The truth is, a part of this evidence which the clerk certified could not be found in his office was not required to be filed there, and a part, if not all, of it was immaterial, and could not affect appellants' title. How far it is immaterial is unnecessary for us to decide at this time.

The circuit court erred in finding from the evidence before it that appellants' deed is void. For the errors indicated, the judgment of the court below is reversed, and this cause is remanded for a new trial.

EDWARDS v. THOMPSON.

(Supreme Court of Tennessee. May, 1887.)

EXECUTION—CROPS—POSTPONEMENT OF LIEN.

Under the Tennessee statute, an execution may not be levied on a growing crop "until the fifteenth day of November, after such crop is mature." Where, therefore, in December, a levy was made under an execution tested as of the July preceding, *held*, that the rights of one who purchased the crop in September, before its maturity, were paramount to those of the execution creditor; the effect of the statute being to postpone the lien of the execution.

Appeal from circuit court, Weakley county.

C. M. Ewing, for plaintiff in error. *H. H. Barr*, for defendant in error.

CALDWELL, J. In July, 1879, A. M. Boyd obtained a decree in the chancery court, at Dresden, against W. T. Edwards, for \$1,073.31. Execution issued on this decree December 6, 1884, and two days thereafter was levied upon a crop of corn as the property of the execution debtor. The writ bore teste of the first day of the preceding July term, and the corn was standing in the field, ungathered, at the time of the levy. T. R. Edwards, who had purchased the corn from M. T. Edwards about the first of September, 1884, before it was mature, brought his action of replevin against the sheriff for the possession of the corn. His honor, the circuit judge, tried the case without the intervention of a jury, and rendered judgment in favor of the sheriff. Edwards has brought the case to this court by writ of error.

It is familiar doctrine that the lien of an execution from the judgment or decree of a court of record relates to its teste, and attaches to all personalty owned by the debtor between the teste and the levy, so as to defeat the title of all intermediate purchasers. *Battle v. Bering*, 7 Yerg. 529; *Daley v. Perry*, 9 Yerg. 443; *Johnson v. Ball*, 1 Yerg. 291; *Black v. Planters' Bank*, 4 Humph. 867; *Union Bank v. McClung*, 9 Humph. 91; *Barnes v. Hayes*, 1 Swan, 304; *Evans v. Barnes*, 2 Swan, 292; *Peck v. Robinson*, 3 Head, 438; *Neil v. Gaut*, 1 Cold. 396; *Rocco v. Parczyk*, 9 Lea, 335. Growing crops, when *fructus industriales*, the product of annual planting, such as corn, wheat, rye, potatoes, etc., are personal property. *Kimball v. Sattley*, 45 Amer. Rep. 616; *Purner v. Piercy*, 17 Amer. Rep. 591, and note; 1 Benj. Sales, (Ed. of 1883,) §§ 120-127; *Carson v. Browder*, 2 Lea, 701. At common law such crops are subject to levy and sale under execution. *Whipple v. Foot*, 2 Johns. 422; *Smith v. Tritt*, 1 Dev. & B. 242, and citations; Herm. Ex'ns, § 125; *Kimball v. Sattley*, 45 Amer. Rep. 616; Benj. Sales, § 121. In this state the right of a creditor to levy upon the growing crop of his debtor is recognized by statute, but that right cannot be exercised "until the fifteenth of November after such crop is mature," unless the owner absconds, conceals himself, or leaves the country. Code M. & V. § 3749.

The contention of the learned counsel for Thompson is that the limitation contained in this statute does not affect the lien of the execution, but only defers the time of levy and sale. The position is plausible, but we think it is not in accordance with the spirit and letter of the statute. The doctrine of relation as to executions had its origin in a desire on the part of the courts to prevent the debtor from claiming his property, to the injury of the creditor, after judgment. Hence the lien of the execution relates to its teste, (as to personalty,) and attaches to all such property as the creditor may be entitled to take in satisfaction of his writ. But if, for any reason, the property of the debtor cannot be seized under execution, it cannot be affected by the usual lien or the doctrine of relation. If the property be absolutely protected from execution under statutory exemption laws, of course there is no lien upon it. So, if it is free from execution during a specified period, it is free from the lien during the same period. The lien of an execution, as such, exists only

in connection with the execution itself, and cannot attach to property before the property is subject to levy. The corn in the case before us passed to the purchaser free from the lien of the execution; the sale having been made before the fifteenth of November, when the corn first became subject to levy.

Speaking upon this subject, Mr. Freeman says: "As an illustration of this rule, we may mention that, in a state where growing crops are liable to be seized and sold, they are bound by execution lien; while in states where they cannot be levied upon until gathered they are not, before gathering, subject to such lien." *Freem. Ex'ns*, § 197. For the first part of this statement the author cites *Lindley v. Kelley*, 42 Ind. 294; and for the other he cites *Evans v. Lamar*, 21 Ala. 333, and *Adams v. Tanner*, 5 Ala. 740.

In discussing the power of a judgment debtor to lawfully mortgage a crop to be planted by him, this court, speaking through Judge SNEED, said: "The judgment in this case certainly created no lien upon the crop which the statute protected from levy until after maturity." *Watkins v. Wyatt*, 9 Baxt. 256, 257.

The judgment below is reversed, and judgment rendered here for Edwards. Thompson will pay all costs.

PETERS v. WALLACE and others.

(Court of Appeals of Kentucky. June 2, 1887.)

BANKRUPTCY—RIGHTS OF BANKRUPT.

The mere fact that the assignee in bankruptcy declines to sue for land claimed by the bankrupt, or has verbally surrendered his right to do so to him, does not invest the bankrupt with title sufficient to support an action of ejectment by him.

Appeal from chancery court, Pendleton county.

Ejectment by H. M. Peters, appellant, against John Wallace and others, appellees. Both parties claimed title under one William Holland, the appellant, by mesne conveyance through Thomas Holland, a son of William, and the appellees as purchasers at a chancery sale in the case of *Holland v. Holland*, brought by the executors of William Holland against his heirs and creditors, for a settlement of the estate.

C. H. Lee, for appellant. L. T. Applegate and John H. Barker, for appellees.

PRYOR, C. J. It is not necessary to determine the nature or extent of the title acquired by the appellees, who were the purchasers of the land in controversy at the decretal sale had under the judgment of the Campbell chancery court. The appellant, Peters, who brings this ejectment, shows that he divested himself of title by his proceedings in bankruptcy, and is now attempting to maintain the action without any evidence whatever of title in himself. The mere fact that the assignee in bankruptcy declines to sue, or has verbally surrendered his right to the appellant, does not invest the latter with title.

The judgment below is therefore affirmed.

THOMPSON'S ADM'R v. WILLIAMS, Receiver.

THOMPSON'S ASSIGNEE v. SAME.

(Court of Appeals of Kentucky. June 11, 1887.)

ABATEMENT AND REVIVAL—DEATH OF PARTY.

Under Civil Code Ky. §§ 501-503, an order to revive cannot be made on motion of the plaintiff within six months from the qualification of the personal representative or successor of the defendant, and if made after six months from the qualification, and so entered of record, if there is no service of the order of revival for

12 months from the time of qualification, or from the time the order could have been made, it is a bar to the right to revive, and the plaintiff is required to resort to his action against the personal representatives.

Appeal from circuit court, Clark county.

W. M. Beckner, H. L. Stone, and G. B. Nelson, for appellants. Chas. Eginton and B. F. Buckner, for appellee.

PRYOR, C. J. 1. The present litigation should have a final termination. In an action in equity pending between Williams, receiver, the present appellee, and Thompson's administrator, the case was decided adversely to the receiver, and he appealed to this court. There were other appellees on the appeal besides Thompson's administrator. When the case reached this court, Thompson's administrator moved to dismiss the appeal as to him because he was not a party to the proceedings below. Thompson, who was a party, died before judgment, and an order of revivor was entered, but never issued, or was served on his administrator, and in this condition the judgment below was rendered. When the administrator made his motion to dismiss the appeal, as to him, for want of revivor, an affidavit was filed by the appellant, or those representing him, to the effect that the order of revivor was in fact a consent order reviving the case, and the clerk had omitted to so state when entering the order below. This court continued the case in order that the present appellee might have the mistake corrected in the court below, and then make it a part of the record in this court. He made no effort, so far as this record shows, to have the order of revivor corrected, so that it might be made a part of the proceedings on the appeal then in this court, and his appeal was dismissed. The receiver thereupon (the appellee now) filed his petition in equity to vacate and set aside the judgment from which the appeal had been taken, alleging that by mistake the order of revivor showing the consent had not been entered, and that the administrator of Thompson had appeared in this court, and fraudulently caused the appeal to be dismissed on the ground that there was no revivor. A demurrer was sustained to the petition below to this proceeding, and on an appeal the judgment was affirmed, and the case reported in 80 Ky. 328; this court holding that no effort had been made to supply the record in this court on the original appeal that was dismissed, and the appellant (now the appellee) had been guilty of such laches, in failing to have that record amended, as constituted a bar to the proceeding to vacate the judgment. This, in our opinion, ended the litigation; but, if not, it was too late to revive the action in the summary manner provided by the Code.

While the appeal in the case of *Williams v. Thompson* was pending in this court, in which the motion to dismiss for want of revivor was entered, viz., on the twenty-second of October, 1879, the present appellee had an order of revivor that seems to have been made at the May term, 1872, reviving the action against Thompson's administrator, served on the administrator, and, having the case redocketed, (the same having been filed away,) proceeded to litigate the questions between him and Thompson's administrator. It was seven years before the action was revived against the administrator, and that revivor was had while an appeal was pending in this court about the same matter, and time given the appellant to show that the order of revivor had in fact been entered and served or revived by consent. The order of revivor, having been made within six months from the qualification of the administrator, was a nullity, unless by consent, or the representative had afterwards made defense or entered his appearance.

2. Seven years had elapsed before this order was served. Therefore no revivor could be had. By section 501, Civil Code, the order of revivor may be made on the motion of either party, or of his representative or successor. By section 502: "If the order be made by consent of the parties, the action

shall stand forthwith revived; and, if not made by consent, the order shall be served, in the same manner as a summons, upon the party adverse to the one making the motion." By section 507 it is provided: "An order to revive an action against the personal representative of a defendant, or against him and the real representative of the defendant, cannot be made, unless by consent, within six months after the qualification of the personal representative." Section 508 provides: "An order to revive an action against the representative or successor of a defendant shall not be made, without his consent, unless within one year after the time in which it could have been first made." Section 509 provides: "An order to revive an action in the name of the representative of the plaintiff may be made forthwith, but shall not be made, without consent of the defendant, after the expiration of one year from the time the order might have been first made, except that if the defendant shall have also died, or his powers have ceased in the mean time, the order of revivor on both sides may be made in the period limited in the last section." The ancient mode of revivor was by bill setting up the facts constituting the original cause of action, and that had to be filed within a reasonable time, and that time was fixed within one year from the time the revivor could have been first had.

The question presented in this case, is: Can the order to revive be made, on motion of the plaintiff, within six months from the qualification of the personal representative or successor of the defendant; and, if made after six months from the qualification, and so entered of record, if there is no service of the order of revivor for twelve months from the time of qualification, or from the time the order could have been made, is it a bar to the right to revive, and the plaintiff required to resort to his action against the personal representative? The Code is plain that no order to revive against the defendant's representative, unless by consent, shall be made within six months from the date of his qualification; and it is equally plain that time does not run against the order to revive until there is some one representing the original defendant, against whom an order of revivor may be had. The order to revive is a summary mode of bringing the representatives or successors of the deceased party before the court, and is a substitute for the former bill of revivor; but this mode of revivor must be pursued as provided by the Code, and had within the period therein prescribed. There is a difference between an order reviving the action and an *order to revive*; and although when entered in either mode by consent, or when served, it amounts to a revivor regardless of the mere form of the order, still it is plain from sections 507 and 508 of the Code that it is the *order to revive* that must be entered within the twelve months from the time the revivor could have been had, and not that the action must actually be revived within that period. The *order to revive* must be made within the twelve months, and, when made, a copy served as a summons; and, when served, the case stands revived unless valid objections are interposed.

Suppose, however, the order to revive is entered within the proper period, and no copy is issued and placed in the hands of some one authorized by law to serve it on the representative of the decedent within 12 months; then, by analogy to the ancient practice, and under a proper construction of the several provisions of the Code on the subject, it is such laches as should compel the plaintiff to pursue his remedy by action; but we are not inclined to adjudicate that, where the order is entered within the 12 months, and a copy issued, and placed in the hands of an officer who can serve the summons or order, the plaintiff is barred of his summary remedy by reason of the neglect of the officer to serve it, or the absence of the representative of the decedent, for the time being, although not purposely, from the jurisdiction. Here was the lapse of seven years in this case before the order was served, and the motion to revive should have been overruled, and the objections of the appellant sustained.

It is argued that there was no necessity for a revivor against Thompson's administrator, for this reason: that his administrator, having appeared in this court on the first appeal, and having it dismissed as to him, was an appearance to the action, and no summons or revivor was necessary; and the case of *Bently v. Gregory*, 7 T. B. Mon. 363, is relied on in support of this position. In that case, Bently filed a bill enjoining a judgment recovered against him by Pile as assignee of Gregory; and, the case having been decided on its merits adversely to Bently, he appealed to this court. Before the judgment below was rendered, Pile died, and an order of revivor was made, but not served on Pile's administrator. The administrator, however, entered his appearance to the appeal in this court, and the judgment was reversed. The court, alluding to the irregularity of the proceeding below in regard to the revivor, said that it would be unnecessary for a copy of the order to be served on the administrator after the return of the cause, for the reason that he had made himself a party by appearing in this court. So, if the administrator in this case, had entered his appearance here by his motion to dismiss, if his motion had been overruled, and the judgment reversed, no service of the order of revivor would have been necessary, because he had made himself a party by making the motion. He will not be allowed to move to dismiss, and, when his motion is overruled, then insist that he was only a party for the purpose alone of making the motion; but when his motion is sustained, and this court adjudges that he is not a party to the record, and therefore dismisses the appeal, it is difficult to perceive in what manner this made him a party, or dispensed with the necessity of service in any future action, or in the same action when pending below. The motion to dismiss because he was not a party was at his peril. If the court sustained the motion, this ended the appeal as to him; but, if overruled, he is then a party to the action for all the purposes of the litigation.

Judgment reversed, and remanded for proceedings consistent with this opinion.

HOLT, J., not sitting.

ADLER and others v. KANSAS CITY, S. & M. R. Co. and others.

(*Supreme Court of Missouri*. June 6, 1887.)

1. ASSIGNMENT—INSTRUMENT—SUFFICIENCY.

A person entitled to money under a contract with the Springfield & Memphis Railroad Company made an assignment of his rights thereunder by a written notice and declaration thereof addressed to "N., president of the Kansas City, Springfield & Memphis Railroad Company." The Springfield & Memphis Railroad Company was also known as the Kansas City, Springfield & Memphis Railroad Company, and the two companies, though nominally distinct, were virtually under the same control. *Held*, that the assignment was sufficiently identified with the subject-matter, and that so much of the description in the address as was false could be rejected.

2. SAME—CONTRACT—ENTIRETY.

Where a contract provides that payments equal to 85 per cent. of the contract value of the work to be done were to be paid monthly, and 15 per cent. of the contract value of the work done each month was to be retained, and be paid within 90 days after the entire completion of the work, *held*, that the retained percentage became a separate and distinct demand, which could be assigned.

Appeal from Jackson county.

Action on an alleged assignment of rights under a contract. The main facts are stated in the court's opinion. The court, among others, gave the following instructions:

"The court, sitting as a jury, declares the law to be that although the court should believe from the evidence that in the paper executed by Boas on the thirteenth of March, 1883, and addressed to George H. Nettleton, president of the Kansas City, Springfield & Memphis Railroad Company, that there was an

inaccuracy in such description, in that it should have been addressed to said Nettleton as president of the Springfield & Memphis Railroad Company, yet if the court further finds from the evidence that the subject-matter of said paper was understood alike by the parties to be affected thereby, and particularly by both of said railroad companies, and that the Arkansas corporation was known as and by the name of the Kansas City, Springfield & Memphis Railroad Company, as by its own special name, and was managed by the same officers throughout, then the court may and should disregard as surplusage the abbreviation 'K. C.,' and treat it as properly addressed.

"The court, sitting as a jury, declares the law to be that if under the evidence it can determine the subject-matter of the paper of March 13, 1883, executed by H. Boas, and addressed to Nettleton, president, etc., so as to give effect to the purpose and intention of the parties, it should do so, although the court may believe from the evidence that there was an inaccuracy in the words or abbreviation 'K. C.,' descriptive of the railroad company intended to be named; provided the court believes from the evidence that neither the Arkansas Railroad Company or the Missouri Railroad Company was misled or prejudiced by such inaccuracy.

"The court, sitting as a jury, declares the law to be that, under the pleadings and evidence in this case, the defendant, Henry Boas, is not entitled to any relief.

"The court, sitting as a jury, declares the law to be that if the court finds, from the evidence, that the plaintiffs should recover against the railroad company defendant, it should assess plaintiff's damages at the amount due from the defendant Boas, on the account given in the evidence, together with interest at six per cent. from the time demand was made upon defendant railroad company, after the balance due Boas had been settled."

The court refused to give the following declarations of law, at defendant's request, to-wit:

"The papers read in evidence by plaintiffs, directed to Nettleton, president and general manager Kansas City, Springfield & Memphis Railroad Company, and signed by Boas, dated March 13, 1883, had reference to a contract between Boas and the Kansas City, Springfield & Memphis Railroad Company, and not to a contract between him and the Springfield & Memphis Railroad Company; and parol evidence is not admissible to show that he meant the Springfield & Memphis Railroad Company, and not the Kansas City, Springfield & Memphis Railroad Company.

"The paper read in evidence by plaintiffs, directed to Nettleton, president and general manager Kansas City, Springfield & Memphis Railroad Company, and signed by Henry Boas, dated March 13, 1883, and the letter to Nettleton, general manager and president K. C., S. & M. R. R., dated March 17, 1883, signed by Henry Boas, did not create an assignment to plaintiffs of the contract between Boas and the Springfield & Memphis Railroad Company, or of what might be due thereon upon final settlement, or of any indebtedness, or of any portion of what might be so due.

"Under the pleadings and the evidence, plaintiffs cannot recover against defendant the Kansas City, Springfield & Memphis Railroad Company.

"The court declares the law to be that the railway company had the right to pay H. Boas, during the progress of the work, and for the purposes thereof, money out of the fifteen per cent. retained percentage, notwithstanding the paper of March 13, 1883, signed by H. Boas, read in evidence by plaintiffs, and notwithstanding the letter of Nettleton, also read in evidence, dated March 19, 1883, to plaintiffs, by them read in evidence."

McKeighan & Jones, for respondents.

Where, upon applying a written instrument to its subject-matter, whether person or thing, the description contained in the instrument is true in part, but not true in every particular, so much of the description as is false may

be rejected, if sufficient remains to ascertain its application. 1 Greenl. Ev. § 301; 2 Whart. Ev. § 945; *Winkley v. Katme*, 32 N. H. 268, (274;); *Trustees v. Peaslee*, 15 N. H. 317, (329;); *Loomis v. Jackson*, 19 Johns. 449, (451;); *Worthington v. Hytler*, 4 Mass. 196, (205;); *Lush v. Druse*, 4 Wend. 313, (319;); *Button v. Tract Soc.*, 23 Vt. 336, (349;); *Fitzpatrick v. Fitzpatrick*, 36 Iowa, 674, (682;); *Allen v. Lyons*, 2 Wash. C. C. 475; Redfield's note to *Kurtz v. Hibner*, 10 Amer. Law. Reg. (N. S.) 93; J. D. Caton's note on same case, Id. 353.

When there is a latent ambiguity in a written instrument, parol evidence is competent to remove it. 1 Greenl. Ev. § 297; 2 Whart. Ev. §§ 956, 957. See, generally, *King v. Fink*, 51 Mo. 209; *Edwards v. Smith*, 63 Mo. 119; *Amonett v. Montague*, Id. 201; *Charles v. Patch*, 87 Mo. 450; *Coe v. Ritter*, 86 Mo. 277; *Williams v. Bank*, 72 Mo. 292; *Campbell v. Johnson*, 44 Mo. 247; *Hardy v. Matthews*, 38 Mo. 121; *Scott v. Bailey*, 23 Mo. 140.

Pratt & Tichnor, for appellants.

In *Jackson v. Sill*, 11 Johns. 215, the court says: "It is a general and settled distinction, running through all the cases on this subject, that extrinsic evidence cannot be received to contradict, vary, or add to an instrument of writing, but only to explain and elucidate it, and this only in a case of a latent ambiguity. * * * An ambiguity is properly latent, in the sense of the law, when the equivocality of expression or obscurity of intention does not arise from the words themselves, but from the ambiguous state of extrinsic circumstances to which the words of the instrument refer, and which is susceptible of explanation by a mere development of extraneous facts, without altering or adding to the written language, or requiring more to be understood thereby than will fairly comport with the ordinary or legal sense of the words made use of."

In *Means v. De La Vergne*, 50 Mo. 343, this court says: "Applying the description which is necessary in all deeds is very different from contradicting or varying the contents of a written instrument."

In *King v. Fink*, 51 Mo. 209, an ejectment suit, an attempt was made to show that although the land was described as in the S. W. $\frac{1}{4}$, that it was in reality in the N. E. $\frac{1}{4}$, but the court said: "It is not admissible to reject a description which is definite and certain in a deed, and incorporate other premises by a different description. * * * It is not simply removing a difficulty arising from a defective description; it is making the deeds speak in reference to a matter on which they are altogether silent." See, also, *Jennings v. Brizeadine*, 44 Mo. 333.

NORTON, C. J. Plaintiffs for cause of action substantially allege in their petition that the Kansas City, Springfield & Memphis Railroad Company is a corporation created under the laws of Missouri, to build and operate a road from Springfield to a point on the state line in the direction of Memphis, Tennessee; that the Springfield & Memphis Railroad Company was created under the laws of Arkansas, to build and operate from the last-named point to a point opposite the city of Memphis; that both of said corporations were organized as a part of the same enterprise, and for the purpose of constructing a continuous line of road between Springfield and Memphis, to be under the same management, and, while nominally two corporations, they were under the same management, the same persons holding the chief offices in both corporations, keeping the general offices of both together at Kansas City; that both corporations were organized in 1881, and on the thirty-first of March, 1883, said corporations, under the laws of Missouri, were consolidated into one corporation, under the name of the Kansas City, Springfield & Memphis Railroad Company. It is further alleged that on the fourth of May, 1882, one Henry Boas and the Springfield & Memphis Railroad entered into a written contract; under which said Boas was to do certain work for the construction of

several miles of its road, for which monthly payments were to be made to him for work done the preceding month, on the certificate of the chief engineer, deducting from each monthly estimate 15 per cent. to be held by the company as an indemnity for any loss or damage by reason of any failure of said Boas to do the work as provided in the contract; that said 15 per cent. so retained was to be paid said Boas within 90 days after he had completely performed his contract. It is further alleged that, while said contract was in the name of the Arkansas corporation, it was in fact executed by and in the name of the Missouri corporation; that all the estimates of work done under it, and payments and vouchers therefor, were made in the name of the Missouri corporation; that on the thirteenth of March, 1883, said Boas, for value, assigned and transferred to the plaintiffs all of his right, title, and interest in and to the percentage retained by said company which had then or might thereafter accrue, and that both of said companies were notified of the said assignment. It is for the recovery of this retained percentage for which plaintiffs sue, and, having obtained judgment in the trial court, defendants have appealed, and, in order to a proper disposition of the questions arising thereon, reference will be made to the facts disclosed by the evidence bearing upon them.

There is no dispute as to the contract, or its terms; nor as to the organization of the respective corporations, nor their consolidation; nor as to the fact that the chief officers were the same in both corporations; nor as to the object of both to construct and operate a continuous line of road from Springfield to Memphis; nor as to the fact that the accounts of the Arkansas corporation were kept in the name of the Missouri road for account of the Arkansas road; nor as to the fact that the engineer's monthly estimates of work done by Boas were not only made out on blanks of the Kansas City, Springfield & Memphis Railroad, but were signed by him as the engineer of that company; nor can any question be fairly raised from the evidence as to the fact that the Springfield & Memphis Railroad Company was known by the name of the Kansas City, Springfield & Memphis Railroad Company, as well as by its own, not only among the officers and employes, but by others not directly connected with either road. The disputed questions grow out of the evidence offered by plaintiffs to establish the transfer to them of Boas' interest to them in the retained payments, and notice of such transfer. To establish said transfer and notice plaintiffs put in the following evidence:

"St. Louis, March 13, 1883.

"*Geo. H. Nettleton, Esq., Pres't and Manager K. C., Springfield & Memphis R. R., Kansas City, Mo.*—DEAR SIR: For and in consideration of advances made to me by Mess. Adler, Goldman & Co., of about ten thousand or more dollars, I hereby transfer to them all right, title, and interest to the retained percentage from all my estimates for work under contracts made between us. When final settlement is made, and payment becomes due, notify them, and oblige

Yours truly, HENRY BOAS."

"St. Louis, March 13, 1883.

"*Mr. Geo. H. Nettleton, Pres't K. C., S. & M. R. R., Kansas City, Mo.*—DEAR SIR: We herein hand you a copy of an order given by Mr. Henry Boas, and which explains itself. As soon as the retained percentage due Boas is payable, we trust you will promptly advise us, and original order will be sent you. We trust you will let us know that this notice has been duly received, and will have attention.

Very truly, ADLER, GOLDMAN & Co.

"By MAX STERN."

"KANSAS CITY, MO., March 13, 1883.

"*Messrs. Adler, Goldman & Co., 108 Main Street, St. Louis, Mo.*—GENTLEMEN: I have yours of March 13th, inclosing copy of an order given you by Mr. Henry Boas, and the same has been placed on file in the comptroller's office. We have also been notified of the order by Mr. Boas himself.

"Yours, truly,

GEO. H. NETTLETON, President."

"POWHATAN, ARKANSAS, March 17, 1883.

"George H. Nettleton, Esq., Gen'l Mangr. and Pres. K. C., S. & M. R. R.
—DEAR SIR: A few days ago I was compelled to assign the 15 per cent. retained by the company for the following reasons: As my work is approaching its finish and end, and having had a strong and large force of men, and under the above circumstances having no use of so many men, I am and was compelled to discharge most of them, and they want and were compelled to have their wages before pay-day; and having used all my available means, and my only chance to realize money was by assigning above per cent. held back by the company, and the same I assigned to Mess. Adler, Goldman & Co., of St. Louis, as they advanced me amount needed to pay these men off; and you will please accept order should Mess. Adler, Goldman & Co., send order I assigned to them. It is understood with Adler, Goldman & Co. that they are not to receive the money of the 15 per cent. until final settlement is made by the company with me. Trusting you will give this your kind attention, I remain
Yours truly, HENRY BOAS."

The circuit court, as is shown by the instructions given and refused, tried the case on the theory that although these *memoranda* show an inaccuracy in the paper executed by Boas on the thirteenth March, 1883, in being addressed to Nettleton, president of the Kansas City, Springfield & Memphis Railroad Company, instead of to him as president of the Springfield & Memphis Railroad Company, still, if the subject-matter of said paper was understood alike by the parties affected thereby, and the Springfield & Memphis Railroad Company was known by the name of the Kansas City, Springfield & Memphis Railroad Co., as well as by its own special name, and was managed by the same chief officers, that then the court should disregard the abbreviation "K. C.," and treat the paper as properly addressed; and also upon the further theory that the paper dated the thirteenth of March, 1883, signed by Boas, and addressed to Nettleton, was, when signed and delivered, an assignment to plaintiffs of the percentage retained by defendant under the contract between Boas and the said Springfield & Memphis Railroad Company, and the said company, on receiving notice thereof, could not thereafter rightfully pay over said retained percentage to said Boas, whether it consented to said assignment or not. It is insisted by counsel that the theory on which the case was tried is erroneous in this: that it was not competent for the court to apply the assignment to the subject-matter by rejecting or disregarding the letters "K. C." in the description of Nettleton's office.

This objection is sufficiently replied to by section 301, 1 Greenl. Ev., where it is said: "There is another class of cases, * * * namely, those in which, upon applying the instrument to its subject-matter, it appears that in relation to the subject, whether person or thing, the description is true in part, but not true in every particular. The rule in such cases is derived from the maxim, *falsa demonstratio non nocet, cum de corpore constat*. Here so much of the description as is false is rejected, and the instrument will take effect if a sufficient description remains to ascertain its application."

The numerous authorities cited in the brief of counsel are to the same effect as the above. Besides this, Nettleton was the president of both these corporations, and, although addressed as the president of the Kansas City, Springfield & Memphis road, inasmuch as the evidence tended to show that the Springfield & Memphis Railroad Company was also known by the name of the Kansas City, Springfield & Memphis Railroad Company, it was competent to remove the latent ambiguity thus arising by resorting to other evidence on the same subject, calculated to explain the intent. *King v. Fink*, 51 Mo. 212; 1 Greenl. Ev. § 297.

It is next insisted that the assignment in question is an attempt to divide or transfer to plaintiffs a part only of an entire demand, without the consent of defendant, and that, therefore, the theory adopted by the court in trying

the case was erroneous. The principle invoked by counsel that a part of an entire debt cannot be assigned without the consent of the debtor is undoubtedly correct, and has received the sanction of this court in the cases cited by counsel; but we are of the opinion that it has no application to the facts in this case. Under the contract payments equal to 85 per cent of the contract value of the work to be done by Boas were to become due and payable monthly, and 15 per cent of the contract value of the work done in each month was to be retained by the company, and to be paid within 90 days after the entire completion of the work. While the contract is entire, there can be no doubt, under the ruling in the case of *Unton R. & T. Co. v. Traube*, 59 Mo. 363, that each monthly payment as it became due constituted a separate demand for the recovery of which an action could be maintained; and there can be no question as to the fact that within 90 days after the completion of the work, in the event of the non-payment of the retained percentage, an action would be maintainable for its recovery as a separate and distinct debt or demand. It is this separate demand as an integer which is the subject of the assignment, and hence the rule invoked by counsel has no application.

Having considered and disposed of the questions raised by the appeal affecting the merits of the case, and finding no reversible error in the record, the judgment is hereby affirmed, in which all concur.

MOUND CITY PAINT & COLOR CO. v. CONLON.

(*Supreme Court of Missouri. June 6, 1887.*)

NEGLIGENCE—CARELESS DIGGING.

The defendant, owner of property adjoining which a cellar was being dug, engaged A., who was digging the cellar under contract with B., to under-pin the wall of his house adjoining such cellar. Defendant ordered A. not to commence under-mining until the wall was properly under-pinned. A. disobeyed, by commencing before the shores were up, in consequence of which the wall fell, doing damage to plaintiff's property. Held that, as the evidence showed A. to be under the control of defendant, defendant was liable for his acts, though caused by disobedience of orders, and that instructions which hinged defendant's liability upon whether A. was at the time a servant of defendant or B., were misleading and erroneous.

Appeal from St. Louis court of appeals.

Action to recover damages done to plaintiff's goods by the fall of a wall caused by the alleged negligence of defendant. A Mr. Snyder, who was the contractor for the erection of a house adjoining the wall, employed one Archibald to do the cellar excavation. The owner of this property employed defendant to under-pin the wall. Defendant also made arrangements with Archibald to do the under-pinning. It is alleged by defendant that Archibald was not to do this work till defendant had shored up the wall, and that Archibald proceeded to work in disregard of these instructions, and caused the accident. Defendant claimed that Archibald was not to be his servant till this under-pinning had been done, and asked and obtained the following instructions:

"*Third.* If the jury believe from the evidence in this case that the proximate cause of the fall of the building in question was the removal of the earth or foundation wall of the premises next adjoining on the south, and also believe from the evidence that one William Archibald removed, or caused said earth or wall to be removed, under a contract held by him for excavating a cellar on such adjoining premises, and not as the employe or under a contract with the defendant, then they will find for the defendant.

"*Fourth.* If the jury believe from the evidence in this case that the proximate cause of the fall of the building in question was the removal of the earth from under a part of the south wall of said building, and that such earth was removed, or caused to be removed, by one William Archibald, and that in removing, or causing such removal, said Archibald was not acting as

the agent or employe of the defendant, or under his direction, then the jury will find for the defendant in this case. And the court instructs the jury that if they believe from the evidence that an arrangement was made between said Archibald and defendant, whereby said Archibald was to take charge for said defendant of under-pinning the south wall of said building, but that said employment of said Archibald was not to begin until the defendant had shored up said building, and that said building fell before said shoring up had been done by defendant, and before any direction had been given said Archibald by said defendant, as hereinbefore required, then said Archibald at the time of such fall was not the agent or employe of said defendant.

"*Fifth.* The court instructs the jury that although they may believe from the evidence that defendant, in pursuance of his employment by Charles Green, as administrator of the estate of Leon Boucher, deceased, employed or contracted with one William Archibald to under-pin the south wall of the building described in the petition, by excavating beneath the same and building a new wall underneath the foundation thereof; yet if they further believe from the evidence that said Archibald, by the terms of his contract, was not to begin the work of under-pinning said south wall of said building until defendant Conlon had first shored up or supported said wall by timbers to be by said Conlon placed against the same, and also that said building fell down before said Conlon had shored up, or supported, said south wall or building, then the court instructs the jury that they must find a verdict in favor of the defendant in this case, unless they shall also further find that said Conlon directed said Archibald to proceed with the work of under-pinning before he, said Conlon, had shored up said building."

Other facts appear in the opinion.

Phillips & Stewart and *W. C. Marshall*, for respondent. *Madill & Ralston*, for appellant.

BLACK, J. The plaintiff, a corporation, brought this suit to recover damages done to its goods by the falling of the south wall of the brick building known as No. 704, on Twentieth street, in St. Louis. The wall, it is alleged, fell by reason of the negligence of defendant, who had been employed by the owner of the property to under-pin it. Mr. Snyder was the contractor for the erection of a new house on property south of and adjoining the wall, and he had employed Mr. Archibald to excavate the cellar, which had been done to the depth of nine feet, three or four feet below the wall to 704; but Archibald had left next to the wall a retaining bank of earth as a support until the wall should be made safe.

The third instruction, and a part of the fourth, given at the request of defendant, proceed upon the hypothesis that at the time the building fell Archibald was not acting under his employment with the defendant, but in the execution of his contract with Snyder for the excavation of the basement of the new building. Another part of the fourth and fifth is based upon the theory that if Archibald was not to begin the work of under-pinning the wall until defendant had shored up the building, and that the building fell before the shoring had been done, then Archibald was not the servant of the defendant, and defendant was not liable for Archibald's acts. It was urged that there was no evidence which warranted the giving of these instructions, containing the proposition before stated, and that they were designed to mislead the jury.

Mr. Archibald, in substance, testified: "I agreed with Conlon, at least four days before the wall fell, to take charge of the excavating and walling,—that is, the under-pinning, at four dollars a day, and commissions on each day's outlay. He told me to let him know when he could get the braces in the cellar, and I went to see him on three different days, but could not find him. He came to the cellar on the morning of the day the wall fell, and told me to

commence digging on Second street,—to dig square down,—but not to undermine, and he would go home, and his men would be there with shores in an hour. Said he thought the building was pretty safe. I told him Mr. Snyder was anxious, and I felt anxious myself about the wall. Said he would have his men there immediately, and put up the shores. My men commenced at the end of the cross-wall, on Second street, and took the width of that out, so we could get to the depth we had to go, and the drift under the wall, according to Conlon's directions. At 4 o'clock, when I left, my man had gone straight down, and had not got to the bottom of where we had to go,—had not got to the bottom of the excavation I had to make for Snyder. When I came back the building was down. Had lime and sand on the ground ready, and had made arrangements with the mason on the other wall for the stone."

Mr. Conlon testified: "Saw Archibald three or four days before the wall fell, but did not make any arrangement with him then. The next time I saw him [Archibald] was the morning of the day the building fell. I then made arrangements with him to take the dirt from under the wall, and do the underpinning, for \$4 a day for his own services, and a commission on the men he would employ. *Question. What did you say to him about it, when it was to be commenced?* *Answer. As soon as we would have the shoring done.* *Q. What did you tell him on that subject?* *A. I told him not to take a pound of dirt out from under the wall until he had shored it up. He said he thought it was perfectly safe.* *Said I: 'That may be, but it will be still safer when we get the braces up, and I don't want you to touch a pound of dirt till that is done.'* I told him I would order the poles right away, and I supposed they would be down in an hour or two. My foreman was present at this conversation, which was about half past seven or a quarter to eight o'clock in the morning. *I instructed my foreman about bracing up, and not allowing any dirt to be taken from under the wall till he had his shores put up, before I left.* I had nothing to do with the bank of dirt. All I had to do was to take the dirt from under the wall, and do the underpinning."

Carney, who was Conlon's foreman, states that he went to the cellar in the morning, and stayed there until 4 o'clock in the afternoon; that he was preparing for the braces; that Conlon directed him to see that no dirt was dug from the wall; that he saw the laborer, and told him to quit, but the latter said that he (Carney) was not his boss.

David Breslin, the laborer who dug out the hole at the corner, speaks of it as a trench, but says he does not know what it was for. It may be stated here that what the stone-masons said to him was incompetent evidence, and should have been excluded.

Besides the foregoing evidence, it appears that masons under Snyder were at work on the end wall of the new house, on Second street; had extended that wall up to within six or eight feet of the wall of 704; and there is evidence tending to show that the trench or hole dug on the day the wall fell was in a continuation of that wall. This circumstance, and the fact that Archibald's contract with Snyder required him to remove all the earth to a depth of nine feet, are urged as proof that Archibald was then at work in the execution of his contract with Snyder. But the proof is undisputed that Snyder had forbidden the removal of the bank of earth, and that in other respects the cellar had been excavated for ten days. It was no part of Archibald's contract to dig the trenches for the foot corners of the walls to the new house. The wall to 704 could not be undermined without throwing the bank of retaining earth back in short sections, and it was this at which the laborer under Archibald was engaged, no braces having yet been put up when the wall fell. We do not see any evidence tending to show that Archibald was at the time the wall fell performing his contract with Snyder, but it all tends to show that he was then working for Conlon. It may be that Archibald was bound to remove the earth from the cellar after the wall was under-pinned, in virtue of his

contract with Snyder; but, be that as it may, the evidence is all to the effect that, by the direction of Snyder and the agreement of Archibald, the work of excavating the cellar had ceased for the wall of 704 to be made safe. Saying nothing about the evidence of Archibald, which directly contradicts that of Conlon, still the evidence of Mr. Conlon shows that he and his foreman and Archibald were all in the cellar when the latter was employed to work by the day; and Archibald then had lime and sand on the ground to go on with the work. They all expected the shores to be on hand in one or two hours, and the foreman was charged with the duty of preventing the removal of any earth until the shores were up. The contract was a present engagement; and the very most that can be said of the evidence is that it tends to show that Archibald disobeyed the directions of his employer by commencing work before the shores were up.

In *Wood on Master and Servant*, § 306, it is said: "The relation of master and servant only exists where the party sought to be charged as master either employed or controlled the servant, or had the right of control over him at the time when the injury happened, or expressly or tacitly assented to the rendition of the particular service by him. He must, at the time, have had the right to direct the action of the servant, and to accept or reject its rendition by him." To the same effect is *Coolley on Torts*, 538. The fact that the servant disobeys the instructions of the master does not relieve the latter from liability. *Garretzen v. Duemckel*, 50 Mo. 104. There can be no doubt, from the evidence of Conlon himself, that Archibald was under his control, and that of his foreman, during the time the digging was done on the day the wall fell, and while they were waiting for the shores.

Instructions 3, 4, and 5 therefore present issues not fairly raised by the evidence, *i. e.*, that Archibald was at the time the wall fell engaged in the execution of his contract with Snyder, and that there was an arrangement or contract between defendant and Archibald whereby the latter was not to commence work until defendant had shored up the wall. The instructions, as prepared, could but mislead the jury, and should have been refused.

The judgment of the court of appeals, reversing that of the circuit court, is affirmed.

(All concur.)

MULLEN and others v. CONLON.

(*Supreme Court of Missouri*. June 6, 1887.)

Appeal from St. Louis court of appeals.

Madill & Ralston, for Conlon, appellants. *Phillips & Stewart*, for Mullen and others, respondents.

PER CURIAM. The ruling made in the case of *Mound City Point & Color Co. v. Conlon*, *ante*, 922, leads to an affirmance of the judgment of the court of appeals in this case, and it is so ordered.

STATE *ex rel.* CRAMER v. HAGER and others.

(*Supreme Court of Missouri*. June 6, 1887.)

TAXATION—INJUNCTION OF LEVY.

County judges will not be enjoined from levying a tax to pay the interest on township bonds, when no evidence appears that they ever threatened or intended to make such a levy, or that the plaintiff had reason to believe that they contemplated doing so; more especially since the Missouri act of March 23, 1868, under which the bonds were issued, has been held to be unconstitutional and void, and the Missouri act of 1879 would make them criminally liable for it.

Appeal from circuit court, Cape Girardeau county.

Hawkins & Cramer, for respondent. *Oliver & Limbaugh*, for appellants.

BRACE, J. This is a proceeding by injunction, instituted by the respondent as prosecuting attorney of Cape Girardeau county, against the appellants, judges of the county court of said county, seeking to restrain said judges from levying taxes upon the property of the tax-payers of Cape Girardeau township, in said county, to pay the interest on certain bonds issued by said county in behalf of said township in aid of the Cape Girardeau & State Line Railway, by virtue of an act of the general assembly of the state of Missouri approved March 23, 1868, generally known as the "Township Aid Act." A temporary injunction was granted by the judge of the circuit court in vacation. The appellants appeared, filed their answer, denying each and every allegation contained in the petition, and the case, coming on to be heard on their motion to dissolve the injunction, was submitted to the court upon the following agreed statement of facts:

"It is hereby agreed by and between the parties plaintiff and defendant in this cause that the same shall be submitted to the court upon the following agreed statement of facts, which, it is believed, embraces all matters material to either party:

"(1) That Maurice Cramer is the prosecuting attorney of Cape Girardeau county, Missouri.

"(2) That William Hager, Samuel Hitt, and Robert M. Snider are the judges of the county court of said county.

"(3) That in the year 1869, under the provisions of an act of the general assembly of the state of Missouri entitled 'An act to facilitate the construction of railroads in the state of Missouri,' approved March 23, 1868, the county court of Cape Girardeau county, for and in behalf of the township of Cape Girardeau, in said county, subscribed \$150,000 to the capital stock of the Cape Girardeau & State Line Railroad Company, a corporation duly organized under the laws of the state of Missouri, and afterwards issued bonds in that sum, with interest coupons attached, running twenty years, and bearing eight per cent interest.

"(4) That the said bonds so issued by said county court are yet outstanding and unpaid.

"(5) That the holders of such interest coupons heretofore becoming due have brought their several suits to enforce the collection thereof, and to compel the collection of taxes for the payment of their several claims.

"(6) That the said bonds so issued are now about to become due, and that there are interest coupons now past due, and unpaid, and not yet in suit, as well as others about to fall due, which the holders thereof threaten to collect, or attempt to collect, by suits at law, and by compelling or causing the county court of said county to have assessed, levied, and collected a tax or taxes for the payment of such claims."

It was charged in the petition "that the said defendants, judges as aforesaid, have heretofore levied and caused to be collected a special tax upon all the property, real and personal, in said township of Cape Girardeau, to pay off said interest coupons, and the said county court now threatens, as the plaintiff is informed and believes, to make further levies of taxes upon property of the tax-payers of said township, both real and personal, and will cause the same to be collected unless restrained by the orders and judgment of the circuit court."

This essential and material allegation of the petition, upon which rested plaintiff's right to maintain this action, was denied by the defendants in their answer, and remains wholly unproved by any or all of the facts contained in the agreed statement. There is not a *scintilla* of evidence that the county judges have ever levied the tax complained of, or tending to prove that they ever threatened or intended to do so, or that plaintiff had any reason to believe that they ever contemplated doing so. Since the bonds mentioned in the agreed statement of facts were issued, the act of March 23, 1868, has been

held by this court to be unconstitutional and void. *State v. Brassfield*, 67 Mo. 331; *Webb v. Lafayette Co.*, Id. 353; *State v. Walker*, 85 Mo. 41. And, by an act of the general assembly passed in 1879, the judges of the county court were prohibited from making a levy of taxes to pay an indebtedness or liability of this character, except upon the order of the circuit court, or the judge thereof in vacation, made upon being satisfied of the necessity of such taxes, and that the assessment, levy, and collection thereof will not be in conflict with the constitution and laws of this state. Rev. St. 1879, §§ 6798, 6799. Should they have made such levy without such an order they would have been guilty of a criminal offense, and have incurred heavy penalty. *Supra*, § 6800. It cannot be presumed, in the absence of any proof, that the appellants would be guilty of a violation of the constitution and laws of the state, and thereby bring upon themselves the punishment of such criminal conduct. On the contrary, the presumptions are all the other way. The temporary injunction should have been dissolved, and the bill dismissed, on the evidence in the case; and the appellants should have had judgment for costs, with an assessment of their damages, if any, upon the bond; and, in order that such action be taken, this cause is reversed and remanded to said circuit court.

OVERSPECK and Husband v. THIEMANN.

(*Supreme Court of Missouri.* June 6, 1887.)

1. SPECIFIC PERFORMANCE—CONTRACT TO EXECUTE DEED.

Where, in an action brought to enforce specific performance of an alleged agreement to sell real property, it appeared that plaintiffs, upon paying defendant \$400 for a tract of land which defendant had a few days before bought for \$375, was permitted to enter upon the land, and continued in possession, under claim of title, for a number of years, making valuable and permanent improvements thereon, held, that these circumstances, in connection with plaintiff's supporting testimony, were sufficient to rebut the contradictory averments of defendant, and establish that the agreement had been to convey an estate in fee-simple to plaintiff.¹

2. HUSBAND AND WIFE—SUIT BY WIFE—JOINDER OF HUSBAND.

The plaintiff, who had for many years lived separate from her husband, made him a co-plaintiff without his knowledge or consent. Held that, where the husband himself did not object to such joinder during the trial or by appeal, the defendant was not entitled to attack plaintiff's judgment on that ground.

SHERWOOD, J., dissents.

Appeal from circuit court, St. Louis county.

Richard H. Stevens, Jr., for respondent. *Zach. J. Mitchell*, for appellant.

RAY, J. This was a proceeding in equity, to enforce the specific execution of a contract for the purchase of certain real estate mentioned in the petition. The land in question being a certain five-acre tract, lying, being, and extending along the west side of the S. E. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of section 15, 45, 5 E., in St. Louis county.

The amended petition, on which the cause was tried, was filed January 21, 1884, and is to the effect following: That plaintiffs were husband and wife; that, on March the first, 1874, the defendant was the owner in fee of said real estate; that the plaintiff Martha Overspeck, on the day last aforesaid, entered into a contract with defendant for the absolute purchase of all of defendant's estate in the said land, for the price and sum of \$400; that defendant

¹Where no part of the purchase money is paid, or possession taken of the land, a parcel contract to convey land cannot be enforced. *Higgs v. Louisa Co.*, (Iowa,) 14 N. W. Rep. 206; *Recknagle v. Schmaltz*, (Iowa,) 33 N. W. Rep. 366.

See, also, *Berry v. Hartzell*, (Mo.) 8 S. W. Rep. 582; *Sullivan v. O'Neal*, (Tex.) 1 S. W. Rep. 186; *Magee v. McManus*, (Cal.) 12 Pac. Rep. 451; *Barker v. Critzer*, (Kan.) 11 Pac. Rep. 382; *Langellier v. Schaefer*, (Minn.) 31 N. W. Rep. 690; *Henderson v. Stokes*, (N. J.) 8 Atl. Rep. 718; *Higgins v. Butler*, (Me.) 7 Atl. Rep. 276.

agreed to accept said sum as the consideration for his estate in said land, and then and there agreed to make, execute, and deliver to plaintiff Martha Overspeck a good and sufficient deed, conveying to said Martha the fee-simple estate in said land, upon the payment to him of the said sum of \$400, and thereupon the plaintiff Martha Overspeck paid defendant the said \$400, and fully performed, all and singular, on her part, said contract; and the defendant thereupon delivered to said plaintiff Martha the possession of said land, who is, and ever since has been, in the possession thereof, and has also erected thereon a good and substantial dwelling-house, stable and other improvements, to the value of \$600. The plaintiff Martha Overspeck further states that she has often demanded of defendant a good and sufficient deed to and for said land, according to the terms of said contract, but that he has wholly failed and refused, and still fails and refuses, to perform his contract aforesaid, whereupon plaintiff prays that said defendant may be decreed to specifically perform his said contract, and to make, execute, and deliver to plaintiff Martha Overspeck a good and sufficient deed, conveying to and vesting in said Martha Overspeck the fee-simple estate in and to said land, and for such other relief as may be just and proper.

The answer of defendant was (1) an admission of his ownership of said land, but a denial of all other allegations contained in the petition; (2) that at the solicitation of plaintiff Martha, and in consideration of \$400 to him paid by said plaintiff Martha Overspeck, he verbally *leased* and let said land to said plaintiff, to use, have, hold, and enjoy by her for and during her natural life, or for such lesser period as she might elect, conditioned that she and her children only should occupy the same; and that in case she should abandon or desire to vacate same, or at her death, the said tract of land should revert to and be turned over to him, the defendant, upon his returning to said Martha Overspeck, if living, or, in case of her death, then to the children and heirs at law of said Martha, the said \$400, so paid over and held by him as aforesaid. Defendant states that he has fully performed said contract on his part, and stands ready and willing to execute to plaintiff his deed of conditional life-estate to said land as aforesaid, and here tenders such deed; or, upon said Martha's electing to abandon said lands, and deliver possession thereof to defendant, he is ready and willing, and here tenders to restore to her, the said sum of \$400 so received by him of her, in consideration of being permitted to hold, use, and enjoy said land, upon the terms and conditions aforesaid.

The reply was a general denial of new matter set up in the answer. Upon a trial before the court, upon the pleadings and the evidence, there was a finding of the issues for the plaintiff Martha Overspeck, and a decree of specific execution of the contract accordingly, from which the defendant, after an unsuccessful motion for a rehearing, appeals to this court.

From the pleadings it will be observed that the only controverted question between plaintiff and defendant was whether the contract in question was for the absolute purchase of the fee-simple title to said land, as claimed by plaintiff, or for a lease or life-estate only, conditioned as claimed by defendant. The only witnesses testifying directly on this point were the plaintiff Martha Overspeck, and the defendant, each testifying explicitly, as charged respectively in the petition and answer. Besides this, there were undisputed facts and circumstances bearing on this point that will be noticed in the progress of the opinion. At the trial the evidence in the cause developed other facts and circumstances, upon which other questions were attempted to be raised, which also will be noticed hereafter.

As to the main and controlling question in the case presented by the pleadings, there is no dispute as to the fact that the plaintiff Martha paid the defendant, at the time of making the contract, the purchase price of \$400; that defendant thereupon delivered her the possession of said land; and that she

thereupon made various valuable and permanent improvements thereon, consisting, among others, of a dwelling-house, stable, cistern, and the like, at a cost of about \$600, and has ever since held and occupied the same under claim of title, and that she had repeatedly demanded of defendant a deed therefor, as claimed by her, and that he had refused to make and deliver such a deed, but had tendered a deed, in conformity to his view of the contract, or a return of the purchase money, at her election, which she declined to accept. It also appeared in evidence that the defendant, a few days before said contract, had bought the 40-acre tract, of which the 5-acre lot in question was a part, at and for the price of \$75 per acre; and that the plaintiff Martha paid him for the five acres at the rate of \$80 per acre; making \$400, and thereupon, on the faith thereof, had made and erected valuable and lasting improvements thereon to the value of \$600; that at the time of the contract the plaintiff, Martha Overspeck, with her children by a former marriage, had been living separate and apart from her present husband, Joseph Overspeck, some eight or nine years, and deriving no support from him; and that she paid the purchase money, and made said improvements with her own means, and had continued to reside upon said 5-acre lot, with her said children, for some eight or nine years before this suit was commenced; and that defendant, in trading with her, supposed her to be a widow and unmarried. At the trial it further appeared that it was agreed, among other things, that the evidence of Joseph Overspeck, the husband and co-plaintiff, on behalf of defendant, if competent, was to the effect, among other things, "that her claim to the property in question was acquired without his knowledge or consent, as was this suit instituted; and that he never consented to being made a party plaintiff thereto, but has always been opposed to her recovery herein, as it only encouraged her in her abandonment of his bed and board." On this point also it was agreed that the plaintiff Martha would state "that she did not ask him [the husband] to join in the suit with her; nor did he have any knowledge of the suit, or in any way consent thereto." There was other unimportant testimony in the case not necessary to notice.

Upon the state of the record, a reversal is here insisted on by the defendant's counsel for two reasons: (1) There was no authority, in law or equity, in the court, to retain and force Joseph Overspeck to be and remain a party plaintiff therein. (2) The finding of the court, upon the law and the evidence, should have been for the appellant.

As to the first point, it is perhaps sufficient to say that the co-plaintiff husband did not appeal from the judgment below, nor except to the rulings of the court on this point, and is not here complaining, and that it does not lie in the mouth of the defendant to make that objection for him. On the other point, which is the only real question presented by the record, it is to be observed that, while the direct testimony of the plaintiff, Martha Overspeck, and the defendant Thiemann, as to the terms of the contract,—whether it was for the fee, or a life-estate only, conditioned, as alleged by defendant,—is in direct conflict, yet the undisputed facts and circumstances accompanying the transaction show, we think, with reasonable certainty, if not to a demonstration, that the contract in question was for the "fee of the land" as charged by the plaintiff Martha. In this behalf it is shown that defendant, a day or two before the contract in question, bought the 40-acre tract, of which that in controversy is a part, for the price and sum of \$75 per acre, and that plaintiff Martha paid him at the rate of \$80 per acre for that portion she purchased. There is nothing in the evidence tending to show that the five-acre tract was of more than an average value to the entire tract. It also appears that immediately thereafter the plaintiff Martha, on the faith of said contract, took possession, and expended \$600 more in the making and erection of valuable and lasting improvements thereon, and has continued to occupy and claim the fee in the same, besides paying the taxes thereon. It is a

little strange and unlikely, to say the least of it, that she should have paid in cash the full value of the fee in the property, and then expended, in addition thereto, largely more than the full value in permanent and valuable improvements thereon, for the uncertain and inadequate consideration of a life-estate only, coupled with the promised conditioned return of the purchase money only, at her death or earlier, if she chose to abandon the same to defendant.

The evidence is that she had been living separate and apart from her husband some eight or nine years before the purchase, and about the same length of time after the purchase, without deriving any support from her said husband during all that time. Why this was so may not clearly appear, nor is it material. It is true that while the pleadings contain no allegation, and present no issue, on the point, and while the agreed statement shows that the co-plaintiff husband would testify, if competent, to the effect "that, as husband of plaintiff, [Martha,] he never abused or ill-treated her, that she abandoned his house and bed in St. Louis county, without cause, some sixteen years ago,—yet the decree of the court on this point recites in its findings that the plaintiffs were married in 1862, and lived together till about 1865, when the plaintiff Martha Overspeck was compelled by the cruel and barbarous treatment of Joseph Overspeck, to leave his house and home, and ever since that time has lived separate and apart from him."

The record does not disclose how, when, or where the wife obtained the means with which she made the purchase and improvements; yet the whole case tends to show that they were hers, or, at least, not provided by the husband. Taking the whole case, in all its aspects, and examining the testimony, facts, and circumstances in all their bearing, we have not been able to agree with defendant's counsel that "the finding of the court upon the law and the evidence should have been for the appellant." On the contrary, we are of the opinion that the finding and judgment of the court were for the right party, and ought to be affirmed, and it is accordingly so ordered. *Neaf v. Redmon*, 76 Mo. 195, and cases cited; *Bish. Mar. Wom.* § 250, and section 89; *Chamberlin v. Robertson*, 31 Iowa, 401.

(All concur, except SHERWOOD, J., who dissents.)

STATE v. THRUSTON.

(*Supreme Court of Missouri.* June 6, 1887.)

STATUTES—AMENDMENT—CONSTITUTIONAL LAW.

Missouri act of 1883, (Acts 1883, p. 90.) amending act of 1881, (Acts 1881, p. 130.) prohibiting the sale of intoxicating liquors by druggists and pharmacists in certain quantities without a prescription, by adding three new sections thereto, and amending section 8 thereof, section 8, as amended, being set out in full in the amendatory act, is not violative of section 34, art. 4, of the constitution of Missouri, providing that "no act shall be amended by providing that designated words thereof be stricken out, or that designated words be inserted, or that designated words be stricken out and others inserted in lieu thereof; but the words to be stricken out, or the words to be inserted, or the words to be stricken out and those inserted in lieu thereof, together with the act or section amended, shall be set forth in full as amended."

Appeal from Cooper county.

The Attorney General, for respondent. *Draffen & Williams*, for appellant.

NORTON, C. J. The defendant was indicted in the Cooper county circuit court, as a druggist and pharmacist, for selling intoxicating liquors in less quantities than one gallon, without a written prescription first had and obtained from a regularly registered and practicing physician. Defendant was tried, convicted, and fined \$100, and has appealed to this court; and the sole ground relied upon for a reversal of the judgment is the alleged unconstitutionality of the act of the legislature on which the indictment is founded.

The act of 1883, (Acts 1883, p. 90,) on which the indictment was founded, amends the act of 1881, (Acts 1881, p. 130,) by adding three new sections thereto, and amending section 8 of said act, the section 8, as amended, being set out in full in the amendatory act. It is claimed by counsel that said amendatory act is violative of section 34, art. 4, of the constitution, because it does not set out in full the whole of the act amended. Said section 34 is as follows: "No act shall be amended by providing that designated words thereof be stricken out, or that designated words be inserted, or that designated words be stricken out and others inserted in lieu thereof; but the words to be stricken out, or the words to be inserted, or the words to be stricken out and those inserted in lieu thereof, together with the act or section amended, shall be set forth in full as amended." It will be perceived that this section does not forbid the amendment of an act by the passage of an act adding new sections to the act amended; and it will be seen that, if any section of a statute or act to be amended provided the section when amended shall be fully set forth in the amendatory act as amended, it is only when all the sections of an act are amended that the entire act as amended is required to be set out. *State v. Chambers*, 70 Mo. 625. The act in question is not open to the objection urged against it, and the judgment is hereby affirmed, with the concurrence of the other judges.

STATE v. PAGELS.

(*Supreme Court of Missouri. June 20, 1887.*)

1. INSANITY—HOMICIDE—INSTRUCTION.

On a murder trial, the defense being insanity, the court charged, in substance, that the criterion of defendant's responsibility was whether, at the time of the killing, he knew said act to be wrong and a violation of law; that insanity must be established to the reasonable satisfaction of the jury; and that the burden of proving such defense rested with defendant. *Held* a proper instruction, and that a requested charge in substance that, if defendant obeyed an uncontrollable impulse springing from an insane delusion, the jury should acquit, was properly refused.

2. CRIMINAL PRACTICE—CONTINUANCE—AFFIDAVIT.

A motion for a continuance by defendant on the ground of the absence of witnesses is properly denied when the affidavits fail to disclose the materiality and relevancy of the proposed testimony, or that due diligence was used.

3. SAME—WITNESS—INDORSEMENT OF NAME ON INDICTMENT.

Under Rev. St. Mo. § 1802, the evidence of an officer is competent for the state on the trial of a criminal offense, although the name of such witness is not indorsed on the indictment.

4. SAME—COMPULSORY PROCESS FOR WITNESSES.

The right to compulsory process for witnesses does not extend to non-resident witnesses.

5. JURY—COMPETENCY—CITIZENSHIP.

One who had lived in this country about 18 years, resided in the city of St. Louis 3 years, was over 21 years of age, had declared his intention of becoming a citizen according to law not less than 1 nor more than 5 years prior to the trial, is a citizen under section 2, art. 8, Const. Mo., and, under the statutes of said state, a competent juror upon the trial of a criminal case.

6. SAME—COMPETENCY—PREJUDICE AGAINST INSANITY PLEA.

An aversion to a bogus plea of insanity does not disqualify a person from serving as a juror who is otherwise competent.

7. EVIDENCE—DOCUMENTARY—RECORD OF INSANE ASYLUM.

To render certified copies of the records of hospitals for the insane situated in another state admissible in evidence on a criminal trial in this state, it is necessary, under section 2285, Rev. St., to show that such institutions are "public offices of a sister state."

8. SAME—PROOF OF INSANITY—DOCUMENTARY.

A certificate from the superintendent of the poor-house in the city of St. Louis, in the form of a private letter that a person has been confined there as an insane patient, does not fall within section 2285, Rev. St., as evidence to prove the insanity of such person; such document being neither a record, nor exemplification of office books kept in any public office of the United States, nor of a sister state.

9. CRIMINAL PRACTICE TRIAL—QUESTIONS BY JUDGE.

A trial judge has the right to interrogate a witness to supply some omitted and legitimate question, or to fully develop the facts bearing on the case.

10. SAME—TRIAL—PRESENCE OF STENOGRAPHER.

Whether or not the official stenographer shall attend upon a trial in the St. Louis criminal court is discretionary with the trial judge. The action of said judge in that respect is not reviewable on appeal.

11. APPEAL—HARMLESS ERROR.

Upon a murder trial, the fact of the killing being established both by the testimony and the admissions of the accused, *held* immaterial that dying declarations of deceased were admitted improperly in evidence, since such declarations only went to prove an admitted fact, to-wit, the homicide.

12. SAME—OBJECTION NOT RAISED BELOW.

The circuit attorney in his concluding remarks misstated the testimony of one of the witnesses, and thrice his attention was called to the impropriety. *Held*, without deciding whether the remarks would have been error had an exception been saved thereto, in the absence of such exception the appellate court would not rule on the point.

Appeal from St. Louis criminal court.

Atty. Gen. Boone, for respondent. *Geo. Bullock* and *J. R. Kinsaly*, for appellant.

SHERWOOD, J. On the evening of November 12, 1885, in the city of St. Louis, Jerry Pagels, the defendant, with a double-barreled shotgun, shot and killed Samuel Kohn. He was indicted for the crime at the January term, 1886, was arraigned, and pleaded not guilty, March 22, 1886. At the May term following, the cause was continued, and at the same term, June 7th, on the representation of the defendant that he was without counsel, the court appointed Messrs. George Bullock and James R. Kinealy as his attorneys. At the July and October terms the cause was continued by general order, and was finally set for trial December 1, 1886; but, on representation of defendant's counsel that the defendant was not ready for trial, the trial was further postponed until the thirteenth of that month, when it began, resulting in a verdict of guilty, and sentence accordingly; whereupon an appeal was granted the defendant, accompanied by what in capital cases is its necessary incident, a stay of execution until his appeal could be heard by this court. The right of appeal in a capital case is necessarily coincident with that of a stay of execution until that appeal can be heard. Indeed, it is somewhat difficult to see how, in such a case, the former right can be exercised or be efficacious unless in conjunction with the latter right. There are many errors assigned as reasons for reversing the judgment of the criminal court. They will now be considered.

1. The application for a continuance was properly denied. The defendant's affidavit therefor disclosed neither relevancy nor diligence. The witnesses resided in Illinois who were relied on to prove the insanity of the defendant's blood cousin, Frederick Just, who it seems had been confined at various times in asylums for the insane at Jacksonville and Anna, Illinois, and that the insanity of said Just was "hereditarily transmitted from the paternal ancestors." Of the fact of ancestral insanity the defendant could not well have been ignorant; and, as he states he was acquainted with the witnesses, their condition in life, and places of residence, it is inconceivable that before December 8, 1886, he was not aware that those witnesses knew the facts already mentioned. But waiving that view of the matters, and treating the affidavit as true according to the usual rule, it does not appear that the "paternal ancestors" of Frederick Just, "the son of the brother of affiant's mother," were the paternal ancestors of the defendant; and, if they were not, the materiality of the desired testimony is not apparent, and in cases of this sort all intentions are taken against the statements in the application. But the application is insufficient, for the reason that, though it alleges that

the testimony is "*material*," its materiality is not shown by any statement. What does it matter if the facts set forth in the application be admitted? How do they affect the *defendant*? It does not appear that he intended to interpose the plea of insanity; and, if he did not, it was wholly immaterial whether the allegations in the application were true or otherwise. The relevancy of the statements in the application to the issue joined must always appear, together with what will render apparent the defendant's own want of laches in order to make the application good. 1 Bish. Crim. Pr. § 951a. The fact that the defendant did afterwards rely on the defense of insanity could not retroactively make the affidavit good.

As the affidavit of the defendant did not comply with legal requirements, the affidavits of his counsel could add to it no strength. Besides, those affidavits disclose no diligence. Over six months had elapsed between the time of the appointment of the counsel and the occurrence of the trial; and during that time they did nothing, so far as appears, in ascertaining what the line of defense would be, and making preparations therefor; and they certainly had no right to rely on the statements of the circuit attorney, or the clerk of the criminal court, as to when the case of the defendant would be docketed or called for trial. And the refusal of the continuance involved no denial of a constitutional right. The right to compulsory process for witnesses does not and cannot extend to non-resident witnesses. *State v. Butler*, 67 Mo. 59.

2. Was Lang competent to serve as a juror? He had lived in this country about 18 years, resided in the city of St. Louis some 3 years, was over 21 years of age, had declared his intention of becoming a citizen according to law not less than 1 year nor more than 5 years prior to the defendant's trial. He was therefore a citizen under the terms of section 2 of article 8 of our state constitution, so far as being a voter is concerned, and that privilege is one of the highest marks and attributes of citizenship. Taken in its "plain, ordinary, and usual sense," as words are required to be taken by section 3126, Rev. St.,—and this is the general rule, (Smith, Comm. § 481,)—the word "citizen" may well mean one entitled to vote. If so, Lang was competent to serve as a juror under the provisions of section 2777, Rev. St., nor was Ryan disqualified as a juror because of his aversion to a "bogus plea of insanity." *State v. Burns*, 85 Mo. 47; *State v. Baber*, 74 Mo. 292.

3. It belongs alone to the judge of the criminal court to say whether the official stenographer "shall attend upon said court" in any given cause; and his action, whether reasonable or otherwise, (in this instance it appears to have been reasonable,) is not the subject of review here,—certainly furnishes no ground for reversal of the judgment.

4. The fact of the killing of Kohn by the defendant was abundantly established by the evidence, as well as by the admissions of the defendant. Indeed, the plea of insanity is itself and of necessity a plea in the nature of a plea of confession and avoidance; the courts differing as to the quantum of evidence to sustain such a plea. 1 Whart. Crim. Law, (9th Ed.) § 61. Such plea is but a bare denial of a *part* of the government's case. It admits the *act* charged, but avers that there was no criminal intent accompanying the act, and therefore denies the *crime* charged. 2 Bish. Crim. Pr. (3d Ed.) § 669. This being the case, it is wholly immaterial to discuss the point whether testimony as to Kohn's dying declarations was properly received in evidence, since those declarations only went to an admitted fact, to-wit, the homicide.

5. Under the provisions of section 1802 it was competent for Officer Emmett to testify on behalf of the state, though his name was not indorsed on the indictment. *State v. Roy*, 83 Mo. 268; *State v. Griffin*, 87 Mo. 608; *State v. O'Day*, 89 Mo. 561, 1 S. W. Rep. 759.

6. In order for the introduction as evidence of certified copies of the records of the hospitals for the insane at Anna and Jacksonville, Illinois, it was necessary, under the terms of section 2285, to show that such institutions

were *public offices* "of a sister state." Under section 2272 the printed statute book of *Illinois* was competent evidence to show what the statutes of that state were, and thus lay the basis for introducing the evidence desired; and error occurred in rejecting that book. There was, however, no exception saved to the ruling of the court rejecting the statutes of *Illinois* when offered in evidence for that purpose, and without those statutes the certified copies aforesaid were worthless.

Relative to what is termed the certificate of Thomas Cloany, superintendent of the poor-house of the city of St. Louis, it suffices to say that it does not fall within the provisions of section 2285, since it is neither a record nor exemplification of office books kept in any public office of the United States, nor of a *sister state*. In form it is but a *private letter* from the superintendent in relation to J. F. Pagel's having been confined there as an insane patient.

7. There can be no doubt of the right of a trial judge to interrogate a witness, if he deems it necessary to supply some omitted and legitimate question, or to fully develop the facts bearing on the case. Whart. Crim. Ev. § 452, and cases cited. In the present instance the question propounded to Drs. Lutz and Bauday were proper, and not obnoxious to any valid objections.

8. The concluding remarks of the circuit attorney were not based on the evidence of Dr. Bauday, were a misrepresentation of that evidence, and his attention had been thrice called to the misstatement of the testimony which he had made. It is true that the trial judge, on objection made by defendant's counsel, indirectly administered a rebuke by causing the stenographer to read Dr. Bauday's answer to the question propounded by the court; but it would have been better if such conduct had received pointed rebuke. Prosecuting officers, even in the heat of debate, ought not to forget that they owe a duty to the defendant as well as to the state; to the state, to fairly prosecute, and to endeavor to secure conviction by all proper methods and legitimate modes; to the defendant, to refrain from doing or saying aught which the highest sense of professional honor will not sanction. But, notwithstanding these observations,—observations not infrequently made heretofore, (*State v. Leabo*, 1 S. W. Rep. 288; *State v. Barham*, 82 Mo. 67,)—inasmuch as no exception was saved to the objectionable remarks, we say no more on the point; by no means intimating, however, that it would have been reversible error even if exception had been saved.

9. As some of the instructions are now to be examined, it becomes appropriate to give a *résumé* of the evidence in the cause *pro* and *con*, so that the propriety of those instructions can be the better understood. For some months prior to the killing, Kohn and the defendant had been buyers, respectively, for different hide-houses in the city of St. Louis, and there had grown up between them quite a brisk business rivalry. In connection with this, one witness speaks of the defendant using on one occasion an expression of strong and contemptuous dislike for Kohn, the deceased. On the evening of the homicide, and after it had become quite dark, the defendant, who had been discharged from employment that day, went down to the warehouse of Brown & Co., where Kohn was at work, and asked Mullen if Kohn was in, and, being answered in the affirmative, told him to tell Kohn "a man wanted to see him;" and when Kohn came towards the door of the warehouse, which it seems was on an alley, and was in about five or six feet of the entrance, he spoke to the defendant, and said, "Do you want to see me?" when the defendant replied: "Sam, you son of a b——, I want to see you;" and immediately shot him, and in a moment or two shot him again. Within a very short time after this, the defendant, with the gun still in his hand, met Chris. Luittile, and told him, "I shot the son of a b——." Proceeding on his way, the defendant went to the store of Metzger, an acquaintance of his, and left the gun there, saying, "I'll be back in a minute," walked out through the back way, and never returned. From there he went over to *Illinois* in a skiff, almost

immediately recrossed the river on the bridge, and went out into the city some four miles distant from the scene of the homicide, had his hair cut short, and his goatee and mustache shaved off, and was in a saloon playing cards when arrested by Officer Emmett some three days after the killing occurred. On his way to the four courts, defendant confessed the homicide to the officer; spoke of the deceased in most opprobrious terms; said he ought to have been dead long ago; that Kohn had been telling people that he, the defendant, was drunk, when he had taken the pledge, and was not drinking anything. Asked by Emmett where he went after killing Kohn, he replied, as testified to by Emmett, as follows: "I asked him where he went to; and he says: 'I will tell you just to show what presence of mind a man has got after doing such a thing as this.' He says: 'I had sense enough to go to the river, and jump into a skiff; and when I got down there some fellow knew me, and hallooed out to me, "Is that you, Jerry?" He says: "Where are you going? Are you going hunting?" I said: "I am going over, and you can come over to get your skiff."' Then he said he went across the river, and came back over the bridge, and went out to Cheltenham, and he had been out around in that neighborhood until he was captured." The defendant also told the officer he would have gotten away; but that, in trying to jump on the 'Frisco train, he got caught on the switch and hurt, and this was what detained him. He further stated to Emmett that, if he had not arrested him that day, he would not have been arrested, for he intended to go away that night.

In support of the defense of insanity "it was shown that defendant's father had always been sober and industrious till he attained the age of sixty-four, when he suddenly became addicted to excessive drink, which habit he continued for about one year, when he stopped it altogether; and at this time marked peculiarities began to be noticed in his conduct, such as delusions and hallucinations. This continued, with gradual augmentation, till he finally was placed in an asylum for the insane at the age of sixty-eight, where his malady was pronounced hopeless, in which condition he died at the age of seventy. Defendant's mother was of a very nervous, excitable temperament, and was stricken with paralysis, in which condition she languished for two years, when she died. The defendant's brother committed suicide at the age of nineteen while in good physical health, and while his wants were all provided for. For the last fifteen years the defendant himself had been addicted to excessive drink, several times having had *delirium tremens*, and about seven years ago he became infected with syphilis, and several years ago he received a blow on the head which has since left a deep depression in the skull, and for the last several years marked peculiarities had been noticed in his conduct, such as acting at times under apparently incontinent impulses; on one occasion cutting off his daughter's hair with a knife, to her great disfigurement, assigning no reason for the deed, and making no comment, and not being under the influence of liquor at the time. He would get up in the night, and be gone for several hours at a time, and used often to complain of pains in his head. That, the day before and the day of the killing, he complained of being sick, and immediately before the killing, while returning to his house on the street car, his talk and manner attracted the attention of an old acquaintance; and, in crossing the street while going for his gun, his wild gesticulations and distorted features attracted a neighbor's attention, as well as that of the members of his own family."

That portion of the instruction to which objection is made, is as follows:

"In this case, insanity is interposed by defendant's counsel as an excuse for the charge set forth in the indictment. This defense, when established, is one the law recognizes, and, should insanity be proved by the evidence in this case to the reasonable satisfaction of the jury, it would be the duty of the jury in that event to acquit the defendant altogether. Insanity is a physical disease located in the brain, which disease so perverts and deranges one or

more of the mental and moral faculties as to render the person suffering from this affliction incapable of distinguishing right from wrong in reference to the particular act charged against him, and incapable of understanding that the particular act in question was a violation of the laws of God and of society. Wherefore the court instructs the jury that if they believe and find from the evidence that, at the time he did the killing charged in the indictment, the defendant was so perverted and deranged in one or more of his mental and moral faculties as to be incapable of understanding, at the moment he killed Samuel Kohn, that such killing was wrong, and that he, the defendant, at that time, was incapable of understanding that this act of killing was a violation of the laws of God and society, if the jury find he was so insane, they should find him not guilty. Insanity is either partial or general. General alienation always excuses. Partial insanity does not always excuse. One may be partially insane, and yet be responsible for his criminal acts. The law does not excuse, unless the derangement is so great that it actually renders the person incapable, at the time of its commission, of distinguishing between right and wrong in respect to the particular act charged and proved against him. The law presumes every person who has reached the years of discretion to be of sound mind, and this presumption continues until the contrary is shown. So that when, as in this case, insanity is pleaded as a defense to a criminal charge, the fact of the existence of such insanity at the time of the commission of the act complained of must, before you can acquit on that ground, be established by the evidence to your reasonable satisfaction, and the burden of proving this fact rests with the defendant. To establish the insanity of the defendant, positive and direct proof of it is not required. To entitle him to an acquittal by reason of his insanity, circumstantial evidence which reasonably satisfies your minds of its existence is sufficient. The law presumes the defendant innocent, and the burden of proving him guilty rests with the state; and, before you should convict him, his guilt must be established beyond a reasonable doubt. On the other hand, to entitle the defendant to a verdict of not guilty by reason of his insanity, the law requires him to prove it,—not, however, beyond a reasonable doubt, but only to your reasonable satisfaction. From all this it follows that, although you may believe and find that the defendant did the killing alleged, yet if, from the evidence, you further find that at the time he did it he was in such an insane condition of mind that he did not know he was doing wrong, and did not comprehend the nature and character of the act, then such killing was not in law malicious or felonious, and you ought to acquit him on the ground of insanity, and by your verdict so say.

"The jury are the sole judges of the credibility of the witnesses, and the weight to be given to their testimony. If you believe that any witness has knowingly sworn falsely to any material facts, you are at liberty to reject all or any portion of such witness' testimony. This is applicable alike to the medical expert testimony as to the testimony of the ordinary witnesses. Whether the hypothetical case on which the opinion of the expert is based corresponds to and coincides with the case of the defendant, the jury alone must determine in the light of the testimony presented on this trial; and, whenever it supposes facts not given in evidence, it should be disregarded by the jury.

"The previous good character of the defendant, if proved to your reasonable satisfaction, is a fact in the case which you ought to consider in passing upon the question of his guilt or innocence of this charge. But if all the evidence in the cause, including that which has been given touching the previous good character of defendant, shows him guilty of the charge, then his previous good character cannot justify, excuse, palliate, or mitigate the offense.

"The court instructs you that, if you find the defendant not guilty on the ground that he was insane at the time of the commission of the homicide

charged, you will so state in your verdict, and you will also state whether defendant has entirely and permanently recovered from such insanity. If, on the whole case, you entertain a reasonable doubt of the guilt of the defendant, you should give him the benefit of it and acquit; but, to justify an acquittal on the ground of doubt alone, it should be reasonable and substantial, and not a mere guess or conjecture of the possibility of innocence."

The court refused to give, at defendant's instance, this instruction: "The court instructs the jury that if they believe and find from the evidence that, in the commission of the deed with which he stands charged, the defendant obeyed an uncontrollable impulse springing from an insane delusion, they will find him not guilty."

Of the instructions given the jury it is unnecessary to say more than that they express in an exceedingly happy and lucid manner the well-established law of this court as shown by the instances from our own reports cited by counsel for the state.

The approval of the instruction given necessarily approves the refusal of the instruction refused. It will be a sad day for this state when uncontrollable impulse shall dictate "a rule of action" to our courts. There are disclosed by the evidence in this case so many indications of intelligent purpose, premeditated design, a sense of guilt, desire and intention to escape punishment, as would have made it a marvel had the jury found otherwise than they did. And in relation to experts, and the value of their testimony in regard to questions of insanity and criminal responsibility, it is well enough to refer to the following authorities: Whart. Crim. Ev. (9th Ed.) § 420, and cases cited; Lawson, Exp. Ev. 240, rule 44.

Finding no error in the record, we affirm the judgment, and direct the sentence pronounced to be executed. Rev. St. § 1994.

(All concur.)

HUHN v. MISSOURI PAC. RY. CO.

(*Supreme Court of Missouri. June 8, 1887.*)

1. MASTER AND SERVANT—NEGLIGENCE—RISKS OF EMPLOYMENT.

An unblocked guard-rail is not an appliance so dangerous as to threaten immediate injury to those who work about it, and the fact that a yard-master knew that the rail was not blocked, and continued to pursue his employment of cutting out cars on that track, will not defeat a recovery on the part of his representatives, when, at the time he got his foot caught and was run down, he was in the exercise of all due care and proper caution.

2. SAME—NEGLIGENCE—DEFECTIVE APPLIANCES.

When it is clear from the testimony that the blocking of guard-rails adds to the security of the employees, and it is in proof that the company has made use of them on some parts of its road, a verdict against the company for damages resulting from the death of one of its yard-masters, who got his foot caught in an unblocked guard-rail, and was run down, will not be set aside on the ground that there is no evidence in the case to show negligence on the part of the company.

3. APPEAL—OBJECTIONS NOT RAISED BELOW.

Objections to the admission of evidence not made below will not be considered on appeal.

Appeal from circuit court, Jackson county.

Gates & Wallace, for respondent. *T. J. Portis*, for appellant.

BLACK, J. The plaintiff's husband, Charles Huhn, was, and for three or four months had been, defendant's yard-master at Independence, Missouri. It appears a freight train was about due at that place, and it became the duty of Huhn, an engineer, fireman, and switchman to set out a car for that train. Huhn directed the switchman to go forward, and flag the train. The engine then, with a string of seven cars, pulled out on the main track, and stopped for Huhn to throw the switch, which he did, and then signaled the

fireman to back the train. As the car which he intended to take out passed him, he stepped in between it and the one next to it towards the engine, intending to pull the pin. His foot caught between the guard-rail and track-rail, and he received the injuries from which he died. No one saw him at the moment of the accident, but his shoe was found between the rails with the heel towards the east, the direction in which the cars were moving, showing that he was stepping backward when his foot caught. It was necessary to leave the link in the car to be cut out, and this faced him in a direction opposite to that in which the train was moving when in the act of pulling the pin. The negligence alleged is a failure to block the guard-rail.

The evidence upon this question offered by the plaintiff shows that some roads at their yards place a wooden block between the guard and track rail, so as to fill the space up to the ball of the rails, leaving room for the flange of the car-wheels. At least three roads block the rails, and there is evidence that this defendant does the same at its yards in Kansas City, though none of the rails were blocked at its yards at Independence. One of the witnesses who had been in the railroad business for seven years says it is customary for the roads in this state to block these rails, but from the evidence of other witnesses it appears that many do not. Some of the witnesses say, in emphatic terms, that it is dangerous to work in yards where the guard-rails are not blocked, and all who profess to know anything about it agree that blocking adds to the safety of those employes engaged in switching. One witness on the cross-examination stated that spikes, nuts, and stones were liable to get in the open space, and then there would be more danger of the cars being thrown off than there would be if not blocked; and that, upon the whole, it was a disputed question among railroad men which was best, blocking or no blocking. Another witness says he had never found one man but said blocking was proper and safer for the employes.

The defendant offered no witnesses, and the court, of its own motion, gave the following instruction: "Before the plaintiff can recover in this action, it must appear that the accident resulting in the death of Charles Huhn was occasioned by the want of ordinary care on the part of the defendant railroad company in protecting its employes, in that it failed to block the track and guard-rail at the point complained of, and that, by reason thereof, the said Huhn was killed in the manner charged in the petition; and, further, it must appear that the injury was not occasioned by the carelessness and negligence of said Huhn which directly contributed to said injury. The ordinary care demanded of the railway company is that degree of care which ordinarily prudent men, in operating railroads, would and do generally exercise under similar circumstances towards the protection of their employes; and as to whether or not Charles Huhn was guilty of contributory negligence resulting in his death, it is your duty to consider what knowledge he had of the absence of a block to the said guard-rail, and, if he had knowledge thereof, whether, at the time, he was acting as a prudent man would under similar circumstances." Other instructions were given and refused, but they need not be set out in full.

1. The first question presented by the instruction given and refused is whether the plaintiff must fail in her suit because her husband had full knowledge of the condition of the guard-rails in the yards, and, with that knowledge, continued in the service of the defendant, and was injured. Counsel for respondent intimate that there is no proof that deceased knew that these guard-rails were not blocked, but such an intimation cannot receive a moment's consideration; for he had been in the employ of the defendant at these yards for three or four months, was a sober, observant, and intelligent man; and that he knew of the exact condition of the guard-rails cannot be doubted.

It is often said that the servant waives his right to recover for injuries received from defective machinery and appliances, where, with knowledge of

the defect, he continues to use such defective machinery or appliances; but the rule, as thus broadly stated, is not correct in its application to a large class of cases. Thus in the case of *Snow v. Railroad Co.*, 8 Allen, 441, three lengths of plank had been laid down between the rails across a highway. One of these planks had become defective, and there was a hole in it large enough to admit a man's foot. The hole had existed for two months, and the brakeman knew of it, and had made complaint to the track repairer, but there does not seem to have been any promise to repair. His foot was caught in the hole while he was engaged in uncoupling cars, and he could not get it out before the wheels of the tender ran over his leg. Upon the point in question here the court made these observations: "Nor do we think it was any the less a question of fact to be decided by the jury, because it appeared that the plaintiff had previous knowledge of the defect in the road which caused the accident. * * * It may be suggested that the plaintiff ought not to recover because he continued in the performance of his duties after he was aware of the existence of the defect in the road. There may be cases where a servant would be wanting in due care by incurring the risk of injury in the use of defective or imperfect machinery or apparatus after he knew it might cause him bodily harm, but we do not think this case is one of that class. His continuance in the employment did not necessarily and inevitably expose him to danger." In *Patterson v. Railroad Co.*, 76 Pa. St. 389, an employee was injured by improper construction of a frog. The conductor in that case knew it was hazardous to run cars over it, and had notified the foreman of the road of the danger, and the latter had promised to repair the same. The promise to repair, under the decisions of this court, justified the conductor in continuing in the service. But the case was not made to stand on that ground, and the court, after referring approvingly to the case before cited, says: "In this discussion, however, we are not to forget that the servant is required to exercise ordinary prudence. If the instrumentality with which he is required to perform his service is so obviously and immediately dangerous that a man of common prudence would refuse to use it, the master cannot be held liable for the resulting damage. In such case the law adjudges the servant guilty of concurrent negligence, and will refuse him that aid to which he otherwise would be entitled. But where the servant, in obedience to the requirement of the master, incurs the risk of machinery, which, though dangerous, is not so much so as to threaten immediate injury, or where it is reasonably probable it may be safely used by extraordinary caution or skill, the rule is different."

It has been several times held by this court that, where the instrumentality with which the servant is required to perform service is so glaringly defective that a man of common prudence would not use it, the master could not be held responsible for damages resulting from it. But if the servant incurs the risk of machinery which, though dangerous, is not so much so as to threaten immediate injury, or where it is reasonable to suppose that it may be safely used with great care or skill, a different rule applies. In such cases mere knowledge of the defect will not defeat a recovery. Negligence on the part of the servant in such cases does not necessarily arise from his knowledge of the defect, but it is a question of fact to be determined from such knowledge and the other circumstances in evidence. *Stoddard v. Railroad Co.*, 65 Mo. 514; *Devlin v. Railroad Co.*, 87 Mo. 545. See, also, *Railroad v. Ogden*, 3 Colo. 500; *Lasure v. Graniteville Manuf'g Co.*, 18 S. C. 276; *Perigo v. Railroad Co.*, 55 Iowa, 926, 7 N. W. Rep. 627; *Hawley v. Railroad Co.*, 82 N. Y. 370.

The instruction given at the instance of the plaintiff asserted the proposition that Huhn's knowledge of the unsafe condition of the guard-rail, if it was unsafe, would not defeat a recovery, if it was not so dangerous as to threaten immediate injury, or if he might have reasonably supposed that he could safely work about it by the use of care and caution, and that he did use all

the care incident to the situation in which he was placed. This instruction, and the one before quoted, submitted the question properly to the jury, and there was no error in refusing to give an instruction which placed a complete defense on knowledge of the condition of the guard-rail, and his continuance in the service of the company after such knowledge, and after knowledge of danger attending the use of it.

2. But it is contended by the appellant that the demurrer to the evidence should have been sustained because the evidence shows no negligence on the part of the defendant. There is no obligation on the part of the master to furnish absolutely safe appliances; nor is a railroad bound to adopt every new invention, though an actual improvement it may be. The company is not required to discard its machinery and implements because better has come into use; but it is the duty of the company to use reasonable care and precaution in procuring and keeping its appliances in good condition and order, and it cannot remain wholly silent as to the improvements of the day.

In *Smith v. Railroad Co.*, 69 Mo. 32, the complaint relied upon was that the guard-rail was constructed of the T rail when a different one would have been as serviceable and less dangerous, and the proof was that the V rail would have been as serviceable, and, on account of its form, less dangerous to the employees. The V rail was shown to be used as a guard-rail on one bridge, but the T rail was in general use. Some of the witnesses, though engaged in railroading for years, had never seen the V rail in use. It was held that, though the V rail would have been safer, that fact would not establish negligence on the part of the defendant, and it was also said there was no evidence of any negligence on the part of the defendant. That case ought not to control the disposition of this one; for here negligence is clearly alleged in the petition, and the proof as to the use of blocked guard-rails in this case is essentially different from the evidence of the use of the V rail in that case.

The case of *Chicago, R. I. & P. R. Co. v. Londeryan*, (Ill.) 7 N. E. Rep. 55, is cited and much relied upon by the appellant. Some observations made in the opinion, when detached from the question decided, might lead to the conclusion that the demurrer in this case should have been sustained, but we think a fair consideration of the whole opinion will lead to no such conclusion. The plaintiff was a brakeman on the defendant's road, and it became his duty to assist in switching cars at certain way-stations. The charge was that the defendant negligently failed to block the joints of a turn-out from the main line to a branch railroad. The evidence showed that some roads blocked the frogs and turn-outs, and that others did not; that if they were blocked it would be hard to get the foot below the ball of the rail. One witness stated that the blocking was to keep men from catching their feet between the rails; that the necessity for something for a foot-guard was known and recognized,—not half of the roads used the blocks. The case seems to have turned on the propriety of two instructions, as to one of which it is said: "The jury must have understood from the instruction that the railroad company was absolutely required to use blocks in its switches and turn-outs;" and as to the other it is said it was not the province of the court to tell the jury that the omission to block the joints of the turn-out was a wrongful act. The judgment was reversed, and the cause remanded, and it cannot be affirmed of that case that the court held there was no evidence of negligence on the part of the defendant.

It is true that the question of negligence cannot be resolved alone upon the fact as to how many roads do or do not block the guard-rails; nor can it be said the company was guilty of negligence simply because the blocks made it safer for the employees. These are facts, however, to receive a proper consideration from the jury. It may be that the use of blocks would be imprudent on the main line, and quite essential in the car-yards, where the employees are constantly engaged in coupling and uncoupling cars; for, as the danger increases, the care should increase. The guard-rail in this case was on the side

track leading to the main track. The defendant was not called upon to discard the existing rails. The defendant seems to have recognized the propriety of using the blocks in some of its car-yards. There is certainly evidence that it does use them in one. They are used by some other roads; and there can be no doubt but the evidence here, in no way contradicted, shows that they add much to the safety of the employes. Where the facts are either disputed, or different inferences may be fairly drawn from the undisputed facts, the question of negligence should be submitted to the jury. *Mauerman v. Siemerts*, 71 Mo. 101; *Nagel v. Missouri Pac. Ry. Co.*, 75 Mo. 654. We think this case comes within the rule, and the question was properly submitted to the jury.

3. The objection made here to some of the evidence received in the cause does not appear to have been made on the trial of the cause, and no such question is therefore before us for consideration.

The judgment is affirmed.

(All concur.)

EVANS v. ROBERSON.

(*Supreme Court of Missouri. June 6, 1887.*)

1. EXECUTION—SALE—SHERIFF'S DEED.

In Missouri, a sheriff's deed reciting that he gave notice that certain property would be sold between the "lawful hours" of the day specified, and further reciting that the property was sold "between the hours of 9 o'clock in the forenoon and 5 o'clock in the afternoon of that day," shows that the sale was proper and valid as to time of day when made.

2. SAME.

A sheriff's sale under Gen. St. 1866, p. 541, § 44, is so far presumed to be valid that if the deed should fail to state that the notice of sale was put up "at the front door of the court-house," nothing appearing to negative the presumption, it is presumed that this was done according to law; and under the same section, should it even appear that this ministerial act was omitted, such omission could not affect the title of an innocent purchaser, without notice, in a collateral proceeding.

3. TAXATION—TAX DEED—VALIDITY.

A tax deed executed under Laws Mo. 1877, p. 386, must be based upon a judgment in an action wherein the owner of the land conveyed, if known, and, if unknown, the party appearing of record to be the owner of such land, was a party to the proceedings; otherwise the deed is invalid.

Appeal from circuit court, Greene county.

The facts appear in the opinion of the court.

O. H. Travers, for respondent. J. A. Patterson, for appellant.

BRACE, J. This was an action in ejectment for the W. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ of section 4, township 30, range 22, in Greene county, Missouri. The petition, in usual form, was filed April 14, 1883. The answer of the defendant admitted possession, and denied the other allegations of the petition. The case was tried by the court without a jury. Verdict and judgment for plaintiff. Both parties claim title under one Theophilus Leathers, who it was admitted was the owner of the land at the time of his death in 1857, and who by will devised said land to his wife, Elizabeth, (who died on the twenty-fourth of January, 1883,) during her life; remainder in fee to his sons, Edwin R. and John W. Leathers. Plaintiff claims to have acquired all the undivided interest of the said Edwin R. in the said N. W. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ by virtue of a sheriff's deed dated June 5, 1873, properly acknowledged and recorded March 3, 1883, and the undivided interest of John W. in the W. $\frac{1}{2}$ of said N. W. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$, (the land sued for,) by a verbal partition between him and the said John of said 40-acre tract, and on the trial offered said sheriff's deed in evidence, to which defendant objected, but which was admitted in evidence over his objection. The deed contained the following recitals:

"Whereas, on the ninth day of May, 1872, judgment was rendered in the circuit court of Greene county in favor of Elisha Headlee, public administrator of Greene county, Missouri, having in charge the estate of Nathan Boone, deceased, and against E. R. Leathers, John Evans, and D. M. Evans, for the sum of two hundred and 29-100 dollars for debt, and twenty-one and 25-100 dollars for damages, and also for costs in said suit, upon which judgment an execution was issued from the clerk's office of said court in favor of the said Elisha Headlee, public administrator as aforesaid, and having in charge the estate of said Nathan Boone, deceased, and against the said E. R. Leathers, John Evans, and D. M. Evans, dated eleventh of January, 1873, directed to the sheriff of Greene county, and the same was to me on said day delivered, by virtue of which execution I did on the eleventh day of January, 1873, levy upon and seize all the right, title, interest, and estate of the said E. R. Leathers, John Evans, and D. M. Evans of, in, and to the following described real estate, situate in said Greene county, to-wit, the north-west quarter of the south-west quarter of section four, (4,) township thirty, (30,) range twenty-two, (22;) and whereas, in pursuance of law, and by virtue of authority in me vested by law as sheriff of said county, I caused said real estate to be advertised for at least twenty (20) days before the twenty-second day of February, 1873, giving the time and place of sale, and of the real estate to be sold, and where situate, as the law directs, by publication in the Springfield Leader, a newspaper printed and published in my said county of Greene, that I would, on the twenty-second day of February, 1873, that being the sixth day of the February term of said court, offer the above-described real estate for sale at public auction at the court-house door in my said county while said circuit court was in session, between the 'lawful hours' of said day, for cash in hand; and whereas, by an act of the legislature approved January 18, 1873, the time of holding the said February term of said circuit court of Greene county for the year 1873, was changed from the third Monday in February to the first Monday in May, 1873; and whereas, I did, on the first day of the said May term, 1873, of said circuit court, that being the first term of said court held in pursuance of the said change of time of holding the same made by the act of the legislature aforesaid, put up a written notice that I would, by virtue of law, and the said judgment and execution, on Saturday, the tenth of May, 1873, that being the sixth day of the said May term, and the said day of the term that said sale was advertised to take place at said previous February term, sell said real estate above described, and in said notice I specified the names of the parties to said execution, the list of the property sold, and stated the fact that said property had been previously advertised; giving the name of the paper and its date; and whereas, by virtue of authority in me vested, I did, on the tenth day of May, 1873, while the circuit court was in session, and between the hours of 9 o'clock in the forenoon and 5 o'clock in the afternoon of that day, expose for sale said real estate at public vendue to the highest bidder at the court-house door of my said county, and at said sale D. M. Evans being the highest and best bidder for said real estate," etc.

It is contended for the appellant that the recital in said deed that the real estate was advertised to be sold between the "lawful hours" of the day upon which it was to be sold, renders it invalid. There is nothing in this contention. It was the duty of the sheriff to designate the day upon which the land would be sold in his advertisement. The law fixed the hours of that day between which it must be sold; and, while it was not necessary that the hours should be stated in the advertisement, it was the duty of the sheriff to sell between those hours, (1 Wag. St. 610, § 45,) and the recital in the deed shows that the sheriff did sell the land between the hours of 9 A. M. and 5 P. M., as the law required.

It is next objected to said deed that it does not appear that the notice therein recited was put up "at the front door of the court-house." The law govern-

ing the case is as follows: "In all cases where the times of holding the terms of the several courts of this state shall be changed by the legislature, all sales of property which would have been made at the terms previously established by law shall be made at the first term of the court to be held in pursuance of such change; and, where such sales have been advertised to be made on any day of such previously established term to satisfy any execution returnable thereto, * * * the sale shall be made on the same day of the term held in pursuance of the change aforesaid, and no second advertisement of such sale shall be necessary; but it shall be the duty of the sheriff having in charge the execution aforesaid to put up at the front door of the court-house of the proper county, on or before the first day of the changed term, a list of the property to be sold, specifying the names of the parties; the property to be sold, and the day of sale, and stating the fact that said property has been previously advertised, giving the name of the paper and its date." Gen. St. 1865, p. 541, § 44.

It will be observed that the recitals in the deed show a compliance with the requirements of the law in every particular, except in that it does not thereby affirmatively appear that the notice was put up "at the front door of the court-house." There is nothing in the deed that tends to negative or is inconsistent with the idea that in fact the notice was put up at the front door of the court-house, and it is to be presumed that the officer in this respect discharged his duty. It is the policy of the law that every reasonable presumption should be indulged in favor of sustaining the ministerial acts of officers making judicial sales. Besides, the advertisement designated the day of the February term on which the land would be sold. The law required that it should be sold on the same day of the next changed term. The act making the change fixed the day on which such term should commence, and everybody was informed by the advertisement and the law, in such cases, of the day on which alone the land could and would be sold at such changed term, and it was accordingly so sold; and, even if the sheriff should have failed to put up the required notice at the front door of the court-house, his failure to do so, at best, would have been an irregularity, which, although it might have afforded grounds for setting aside the sale in a direct proceeding for that purpose by the parties interested, could not affect the title of an innocent purchaser without notice in a collateral proceeding. *Ror. Jud. Sales*, 794; *Dra-per v. Bryson*, 17 Mo. 71; *Wilhite v. Wilhite*, 53 Mo. 71; *Buchanan v. Tracy*, 45 Mo. 437.

There was no error in admitting said sheriff's deed in evidence. Its legal effect was to convey to plaintiff the undivided interest of Edwin R. Leathers in the N. W. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of said section, and he thereby became a tenant in common in fee with John W. Leathers of said tract, and, by virtue of the partition between him and the said John W., became the sole owner of the W. $\frac{1}{4}$ of said N. W. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 4, the land sued for, and entitled to recover the same in this action, unless the defendant acquired plaintiff's title thereto by virtue of the tax deed by him offered in evidence. The tax deed under which defendant claims was executed by the sheriff of Greene county, dated the fourteenth day of November, 1883, properly acknowledged, and is based on a judgment rendered on the twenty-fourth day of December, 1879, in the circuit court of Greene county in favor of the state of Missouri at the relation of the collector of said county against Elizabeth Leathers in an action to enforce the state's lien for delinquent taxes for the year 1877. The law in force at the time the suit by the collector was instituted, which resulted in the judgment against Elizabeth Leathers, required "that all actions commenced under its provisions shall be prosecuted in the name of the state of Missouri at the relation and to the use of the collector, and against the owner of the property; that all notices and process in suits under this act shall be sued out and served in the same manner as in civil action in circuit courts;

and in case of suits against non-resident, unknown parties, or other owners on whom service cannot be had by ordinary summons, the proceedings shall be the same as now provided by law in civil actions affecting real or personal property;" and "in all suits under this act the general laws of the state, as to practice and proceedings in civil cases, shall apply," etc. Laws Mo. 1877, p. 386. In order to bind the interest of the owner of land by a judgment rendered in an action of this character, it is necessary that he should be made a party to the proceeding if known; and if not known, and not made a party, then his interest in the land can only be affected by making the party appearing by the record to be the owner a party. *Vance v. Corrigan*, 78 Mo. 94; *State v. Sack*, 79 Mo. 661; *Gitchell v. Kreidler*, 84 Mo. 473. In this case neither the plaintiff, who was at the time the owner in fee of the undivided half (by the unrecorded sheriff's deed aforesaid) of the land sued for, nor Edwin R. or John W. Leathers, who appeared of record to be the owner in fee of said land, and whose title the plaintiff has acquired, were made parties to the suit, and the judgment therein, and the sale and tax deed made in pursuance thereof, did not have the effect to pass such title to the defendant.

The instructions given for the plaintiff contained correct declarations of the law applicable to the case, and there was no error in refusing those asked for the defendant. The judgment of the circuit court is affirmed.

(All concur.)

END OF VOLUME 4

INDEX.

NOTE. A star (*) indicates that the case referred to is annotated.

ABATEMENT AND REVIVAL.

Action for personal injuries, see *Conflict of Laws*.

Death of party—Substitution.

1. Under Civil Code Ky. §§ 501-509, an order to revive cannot be made on motion of the plaintiff within six months from the qualification of the personal representative or successor of the defendant, and if made after six months from the qualification, and so entered of record, if there is no service of the order of revivor for 12 months from the time of qualification, or from the time the order could have been made, it is a bar to the right to revive, and the plaintiff is required to resort to his action against the personal representatives.—*Thompson's Adm'r v. Williams*, (Ky.) 914.

2. In an action against the vendee to enforce notes given for the purchase money of land, the vendee, who had only a title bond, set up a defect in the title, and by cross-petition claimed a rescission of the purchase, and a cancellation of the notes; but he died before the trial. *Held*, that the action should have been revived, not only in the name of his administrator, but also of his children; the vendee's title, such as it was, having descended to his heirs upon his death.—*Roberts v. Hoskins' Adm'r*, (Ky.) 35.

Survival of action for assault.

8. A right of action against a railroad company for an assault committed on a passenger by a servant of the company, will survive in favor of the administrator, if the plaintiff counts upon the injury as a breach of the contract between carrier and passenger, although Gen. St. Ky. c. 10 excepts, from actions that survive, actions for assault and battery.—*Winnegar's Adm'r v. Central Passenger Ry. Co.*, (Ky.) 237.

ACCORD AND SATISFACTION.

See, also, *Payment*.

Power of compromise, see *Executors and Administrators*, 8, 9.

v 4s.w.—60

Performance of compromise agreement.

Where a creditor makes a compromise of his claim with his debtor, by which the latter agrees to do certain things in discharge of the debt, and the debtor does some of them, but fails to do others, the creditor cannot abandon the compromise agreement, and sue to recover the original debt; his proper action is for breach of the agreement.—*Love v. Van Every*, (Mo.) 272.*

Accounting.

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Before suit on official bond, see *Bonds*, 8.

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Power to take, see *Notary Public*.

Of married women.

All conveyances of land, executed under a power of attorney, given by a married woman, and not acknowledged in due form, are void, so far as they purport to transfer her interest.—*Wilson v. Simpson*, (Tex.) 839.

Action.

See *Contracts*, 6; *Covenant*; *Divorce*; *Ejectment*; *False Imprisonment*; *Limitation of Actions*; *Partition*; *Quieting Title*; *Qui Tam and Penal Actions*; *Replevin*; *Specific Performance*; *Trespass*.

When right of action accrues, see *Adoption*, 2.

ADOPTION.

Part performance of contract, see *Frauds, Statute of*, 8.

Specific performance of contract of adoption.

1. A man and his wife agreed to adopt a child, and leave her their property at their death. The child went to live with them, obeyed them as parents, and paid them her wages for many years, amounting to \$2,500. The man died devising the estate to his wife, and the wife afterwards died sud-

denly without making a will. They had failed to formally adopt the child as required by statute. *Held*, in an action by the child against the heirs at law, that the agreement was valid, and she was entitled to specific performance of it.—*Sharkey v. McDermott*, (Mo.) 107.

3. The child's right of action did not accrue upon the death of the man devising the property to his wife, who still survived; the agreement being to leave the child their property upon *their* death. And, though the wife was not bound by the original agreement, being then *jens covert*, yet she, continuing, after her husband's death, to maintain the child and to collect her wages, must be considered as confirming and ratifying the original agreement, or as accepting the devise from her husband, subject to the child's equitable right to a devise over in her favor upon her death, and the cause of action accrued upon her death without making such devise.—*Id.*

Descent and distribution.

3. L., desiring to adopt S., a girl residing in his family, procured the enactment by the legislature of a special act to that end, which changed the name of S., and provided that she should inherit the estate of L., both real, personal, and mixed. S. died before L., leaving children. *Held*, that such children were to be considered the legal grandchildren of L., and, as such, entitled to share in the distribution of his estate.—*Power v. Hasley*, (Ky.) 883.

4. The *event* of adoption fixes the legal status of the adopted child, who thereafter stands, as to the property of the adopted parent, in the same light as a child born in lawful wedlock, save in so far as the statute authorizing the adoption may otherwise provide.—*Id.*

5. "Kindred," as used in chapter 81, § 1, Gen. St. Ky., (law of descents,) is not necessarily confined to blood relations; nor is "children" in subsection 1 necessarily confined to children born in lawful wedlock. Both these words may be properly construed to take in persons adopted by a decedent.—*Id.*

Adverse Possession.

See *Boundaries*, 9, 10; *Limitation of Actions*, 5-8.

Deed by disseizee, see *Champerly and Maintenance*.

ALIENS.

Children of naturalized citizens.

Under the act of congress of April 14, 1802, § 4, (2 St. U. S. 154,) providing that the children of persons duly naturalized under any law of the United States, who

may have become citizens of any one of the states, being under 21 years of age at the time of their parents being naturalized, shall, if dwelling in the United States, be considered citizens thereof, infant children of aliens, though born out of the United States, yet, if dwelling in the United States at the time of their parent's naturalization, become citizens thereof; the section is prospective, and intended to embrace the children of those who should thereafter be, as well as those who had already been, naturalized.—*State v. Andriano*, (Mo.) 263.

ANIMALS.

See, also, *Carriers*, 8-16.

Stock killing by railroads, see *Railroad Companies*, 14-20.

Cattle brands.

Although Rev. St. Tex. art. 4556, provides that a party shall have but one mark and brand for his cattle, this was not intended to prohibit a stock-owner from changing his mark and brand; and the records of different counties, showing different brands for the same cattle, are admissible when the evidence shows that the owner removed his cattle from one county to the other, and there registered a different brand because the former was claimed by other parties.—*McClure v. Heirs of Sheek*, (Tex.) 552.

APPEAL.

I. APPELLATE JURISDICTION.

II. REQUISITES OF APPEAL.

III. PRACTICE ON APPEAL.

IV. REVIEW ON APPEAL.

V. DECISION ON APPEAL.

Decision, reversal, see *Public Lands*, 2, 3.

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—record, see *Criminal Practice*, 46; *Receptions*, *Bill of*.

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—matters not apparent of record, see, also *Criminal Practice*, 53-55; *Equity*, 5.

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—presumptions, see, also, *Criminal Practice*, 40; *Executors and Administrators*, 27; *Judgment*, 1; *Municipal Corporations*, 11; *Taxation*, 15.

Review, weight and sufficiency of evidence, see, also, *Criminal Practice*, 47; *Negotiable Instruments*, 18.
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L. APPELLATE JURISDICTION.

Final orders.

1. In an action against an indorser to recover the amount due upon a promissory note, a verdict for the plaintiff was set aside by the court, and a new trial was granted. Plaintiff tendered his bill of exceptions, and refused to take part in the new trial, and judgment of dismissal was ordered. *Held* that, having excepted to such judgment, plaintiff may take and support an appeal.—*Iron Mountain Bank v. Armstrong*, (Mo.) 720.

2. A probate court rescinded its order appointing the relator guardian of a minor, and refused to grant him an appeal to the circuit court. *Held* that, as the rescinding order was a final judgment, the relator was entitled to an appeal from it as a matter of right, and might have a peremptory *mandamus* from the circuit court compelling the probate judge to grant the appeal.—*State v. Allen*, (Mo.) 414.

Error in granting new trials.

3. The supreme court of Tennessee has the same power to reverse for error in granting new trials, and enforce verdicts improperly set aside, that it has to reverse judgments rendered upon improper verdicts. Act 1875, c. 124.—*Chesapeake, O. & S. W. R. Co. v. Higgins*, (Tenn.) 47.

II. REQUISITES OF APPEAL.

Appeal-bond.

4. An appeal-bond contained the name of the principal in the body of the bond, and a blank was left for the names of the sureties, the latter signing under the signature of the principal at the bottom. *Held*, that the bond sufficiently designated who were the sureties.—*Baldrige v. Penland*, (Tex.) 565.

III. PRACTICE ON APPEAL.

Assignment of errors.

5. An assignment of error to the admission of evidence must rest upon the same objection in the appellate court as was taken to it below.—*Fort Worth & D. C. Ry. Co. v. Hogsett*, (Tex.) 865.

6. Where no assignment of error is made as to the effect of certain parol evidence produced on the validity of an instrument, the appellate court cannot consider such effect.—*Johnson v. Robinson*, (Tex.) 625.

7. In the absence of a distinct assignment of error on appeal, the question whether a remitter of damages by appellee could properly have been made, will not

be reviewed on appeal.—*Sabine & E. T. Ry. Co. v. Hadnot*, (Tex.) 188.

8. Where an action is brought in Texas upon a liquor dealer's bond, breaches of which are alleged, and leave is given to make and file a statement of facts within 10 days after adjournment of the term of court, which statement is not filed until after the expiration of said time, the supreme court will not, upon appeal, consider the statement so filed; and, there being no facts properly before the court, the assignments of error will not be considered, nor the judgment of the court below reversed.—*White v. Parks*, (Tex.) 245.

— Must be specific.

9. Rev. St. Tex. art. 1087, and rule 26 of the supreme court, require an assignment of error to point out the specific error relied on; and where, in an assignment, several errors are collectively referred to, the assignment will not be considered.—*Hughes v. Galveston, H. & S. A. Ry. Co.*, (Tex.) 219.

10. An alleged error of the lower court cannot be revised by the appellate court without an assignment specifically pointing it out.—*International & G. W. R. Co. v. Underwood*, (Tex.) 216.

11. Under the Texas practice, the failure of appellant to specify, in the assignment of errors, the errors complained of, is not remedied by specifying them in the "propositions" as set out in appellant's brief.—*Jackson v. Cassidy*, (Tex.) 541.

12. An assignment of error containing a general exception to the court's refusal to give special charges asked, but without pointing out the specific grounds of objection, will not be considered.—*McClure v. Heirs of Sheek*, (Tex.) 552.

13. Assignments of error that "the court erred in refusing to give the instructions asked for by defendants and refused by the court," and that "the court erred in not granting a new trial, because the verdict and judgment were contrary to and against the law, and were not supported by the evidence," are too general, and will not be considered, because they do not distinctly specify in what the error consisted.—*Koepsel v. Allen*, (Tex.) 856.

14. An assignment of error that "the court erred in not rendering a judgment for the plaintiff for the land sued for, costs of this suit, the damage proved, and in not ordering a writ of possession to put defendants out of, and put plaintiff in, possession of said land, under the pleadings of the parties filed in this case, and the evidence given on the trial of the case," cannot be considered, because it does not specifically point out the error complained of.—*Mynders v. Ralston*, (Tex.) 854.

15. Where the exceptions are 15 in num-

ber, and relate to different matters, an assignment of error that "the court erred in overruling defendant's * * * special exceptions" is too general, under rules 23-27 of the Texas supreme court.—County of Caldwell v. Crocket, (Tex.) 607.

16. In Texas an assignment of error that "the court erred in overruling appellant's eleven special exceptions to the appellee's petition" is in violation of the rules governing appeals, and will not be considered.—Yoe v. Montgomery, (Tex.) 622.

17. The supreme court of Texas will not review testimony upon an assignment of error which goes no further than to state that the verdict is not supported by sufficient evidence.—Id.

Record.

18. Where the appellant fails to file a transcript, and the appellee does so, and asks an affirmance, which is resisted on the ground that it was agreed by the parties that no transcript need be made out, the supreme court will not try the issue of fact in regard to such alleged agreement, but will affirm.—Kiber v. Kiber, (Tenn.) 221.

19. Where evidence is offered on the trial as to the statute law of another state, and the bill of exceptions shows that fact, the statute itself, under Code Tenn. § 4554, need not (unless by direction of the circuit judge) be transcribed into the record, but the supreme court may take judicial notice of it. But, if such evidence is not offered below, the appellate court will not take such notice where the result will be to put the court below in error.—Bagwell v. McTighe, (Tenn.) 46.

Statement of facts.

20. Exceptions incorporated in a statement of facts filed after the adjournment of the term at which the case was tried, cannot be considered on appeal.—Yoe v. Montgomery, (Tex.) 622.

21. The action of the trial judge in admitting or rejecting evidence will not be revised on appeal, when there is no statement of facts in the record.—Dull v. Drake, (Tex.) 364.

22. Under the Texas practice there is no authority for bringing to the knowledge of the supreme court the facts proved upon the trial of a case through the medium of a bill of exceptions. Such a bill brings up rejected testimony, or testimony admitted over objections. But evidence introduced without complaint, and which formed part of the case made before the court or jury, must be put in the statement of facts; otherwise it will not be noticed on appeal.—Id.

23. Where there are no bills of exceptions relating to the rulings of the trial court in admitting and rejecting evidence, except such as are found in the statement

of facts filed after the close of the term at which the case was tried, the assignments of error will not be considered.—County of Caldwell v. Crocket, (Tex.) 607.

Second appeal.

24. The supreme court of Texas is not absolutely bound by its former adjudication, though rendered upon a previous appeal in the same case; but it is only in exceptional cases that a former ruling will be departed from upon the same question when presented a second time in the same case.—Bomar v. Parker, (Tex.) 599.

IV. REVIEW ON APPEAL.

Objections must be raised below.

25. Objections to the admission of evidence not made below will not be considered on appeal.—Huhn v. Missouri Pac. Ry. Co., (Mo.) 987.

26. Testimony as to the reputation of the associates of a defendant on trial for swindling not having been objected to in the trial, its admission cannot be urged as error on appeal.—State v. Beauchleigh, (Mo.) 666.

27. Objections to questions asked a defendant on cross-examination must be made, and exceptions saved at the time. Of others the appellate court can take no cognizance.—Id.

28. In a civil case where the damages for personal injuries awarded by the verdict do not appear to be excessive, and no objection was made or exception saved, and no ruling of the trial court had, an appellate court will deem that an objection which might have been interposed to the remarks of opposing counsel in their closing argument as to the measure of recovery was waived.—Sidekum v. Wabash, St. L. & P. Ry. Co., (Mo.) 701.

29. It is not error for the court, upon the jury reporting that they cannot agree, to say to the jury that there has been a mistrial at a former term in the cause, and that the business of the court, and the interests of the country, made it important for them to agree, if it could be done; and any exception to such action of the trial court, in order to be considered upon appeal, must be taken at the time, and a bill of exceptions prepared, tendered to, and signed by the judge, after having been submitted to the opposing attorney as required by statute. The mere statement of the judge of these facts in the record, although written by him and signed officially, cannot be received as its substitute.—Owens v. Missouri Pac. Ry. Co., (Tex.) 593.

Weight and sufficiency of evidence.

30. Where there is evidence tending to support the verdict of a jury, it will not be disturbed on appeal.—Gordon v. Eans, (Mo.) 112.

31. Where the facts of a case are fairly submitted to a jury, under proper instructions from the court, an appellate court will not disturb the conclusions of the jury.—*Henry v. Allen*, (Ark.) 201.

32. Where there is a conflict of testimony, but there is sufficient evidence to support the conclusions reached by a jury, an appellate court will not reverse because the jury believed some of the witnesses in preference to others.—*Willis v. Whitsitt*, (Tex.) 253.

33. On appeal in an action at law tried by the court, the findings of fact cannot be interfered with unless they are against the undisputed evidence. The weight of evidence cannot be passed upon by the higher court.—*Rothschild v. Wabash R. Co.*, (Mo.) 418.

34. Where the statement of facts has been stricken from the record, the appellate court cannot review alleged errors of the court below in giving and refusing instructions, or as to the sufficiency of the evidence to sustain the verdict.—*International & G. N. R. Co. v. Underwood*, (Tex.) 216.

35. In an action for damages for burning plaintiff's property, the evidence being of the most cogent character to show that defendant was guilty of the act charged, but the verdict being for defendant, *held*, that judgment on such verdict would be reversed by the supreme court upon appeal.—*Garrett v. Greenwell*, (Mo.) 441.

Rulings on evidence.

36. Where a general objection is made to the introduction of evidence at the trial, but no specific grounds of objection are pointed out, the appellate court will not consider the objection.—*Greer v. Redman*, (Mo.) 745.

37. Where evidence is ruled out on account of the subject-matter offered to be proved thereby, it is necessary, in a bill of exceptions, to set out the proposed testimony, in order that the appellate court may be able to judge whether it is relevant and material. But when a witness is rejected on the ground of his legal disability to testify, the presumption is that he would have been rejected, no matter how important the evidence might have been, and the error will be considered, though such testimony is not so set out.—*Scott v. State*, (Ark.) 750.

Matters not apparent on the record.

38. Error in the refusal of an instruction cannot be reviewed on appeal, where it does not appear from the record that the plaintiff in error in his motion for a new trial assigned such refusal as one of the grounds upon which his motion was based.—*Griffith v. Hanks*, (Mo.) 508.

39. Where the record fails to show that the plaintiff in error excepted at the time to the ruling of the trial court in admitting evidence over his objection, the correctness of the ruling is not before the appellate court for review.—*Id.*

40. Where an objection is made by the plaintiff to the action of the court in sustaining the objection of the defendant to a question put by the plaintiff to a witness, it cannot be said that the answer proposed to be drawn out by the question was improperly excluded where its nature does not appear in the bill of exceptions, and where the information sought to be elicited might have been as to some transaction with or statement by defendant's testator.—*Smith v. Caswell*, (Tex.) 848.

Harmless error.

41. The refusal of the trial court to give an instruction upon a particular issue asked by appellant, and to which he was clearly entitled, is no ground of reversal where the jury finds for appellant upon that issue.—*Pritchard v. Hewitt*, (Mo.) 437.

42. An appellate court will not reverse for an error of the court below in wrongly requiring a party to prove a certain fact, if the fact was actually proved.—*Willis v. Whitsitt*, (Tex.) 253.

43. Where the plea of stale demand was set up by defendants in a trial court, a verdict having been given in their favor on another ground, the appellate court will not review instructions given by the trial judge in reference to such plea.—*Shifflet v. Morelle*, (Tex.) 848.

44. The refusal of an application by plaintiff for leave to file interrogatories will be disregarded on appeal, where plaintiff examined the defendant on the trial touching all the matters and things contained in the interrogatories, and plaintiff's rights do not appear to have been prejudiced by such refusal.—*Gordon v. Eans*, (Mo.) 112.

45. A. filed a bill to rescind a contract, whereby he sold his interest in a partnership to B., his co-partner, alleging that B. had fraudulently misrepresented the value of the assets, and that a mistake had been made in the estimates furnished him by the book-keeper. On the trial of issues submitted to a jury, the court refused to compel B. to produce the books. The jury found that no fraud had been committed by B., and that at the time of the sale A. knew approximately the value of his interest. *Held* that, on these findings, the complainant would not have been entitled to relief, even if the books had been produced, and that the ruling of the court was not prejudicial error, justifying a reversal of the decree.—*Pearce v. Pettit*, (Tenn.) 526.

Waiver of objections.

46. Where pleadings are amended, the prior pleadings are to be regarded as abandoned, and error in the rulings of the trial court upon the original pleadings is not available.—*Bobb v. Bobb*, (Mo.) 511.

47. Where, in the court below, the defendant treats the plaintiff's complaint, and an account annexed to it, as parts of one and the same complaint, he cannot, on appeal, call the statement an exhibit, and complain that it cannot be regarded to aid the complaint.—*St. Louis, I. M. & S. Ry. Co. v. Brown*, (Ark.) 781.

V. DECISION ON APPEAL.**Opinion in writing.**

48. Mansf. Dig. Ark. §§ 1818, 1821, requiring every opinion of the supreme court to be reduced to writing, and to adjudicate and decide all points presented that legitimately arise in the case, whether their decision be necessary to the determination of the case, or not, is repealed by Code Civil Pr. § 888, which provides for written opinions "in all cases involving a principle of law not previously settled by the court and reported."—*Vaughan v. Harp*, (Ark.) 751.

ARSON.**Of church.**

Under Gen. St. Ky. c. 29, art. 7, providing penalties for the willful burning of certain specifically described buildings, "or any other house whatever," *held*, that the burning of a church was punishable.—*McDonald v. Commonwealth*, (Ky.) 687.

ASSAULT AND BATTERY.

Civil action, see *Abatement and Revival*, 8.
Criminal prosecution, see *Indictment and Information*, 9.

Damages, see *New Trial*, 6.

Ejecting from dwelling-house, see *Trespass*, 1.

What constitutes assault.

The Arkansas statute defines an assault to be an unlawful attempt, coupled with present ability, to commit a violent injury on the person of another. Upon a trial for assault, defendant requested instructions embodying the statutory rule, but the court modified the same so as to include the idea of an *apparent*, as well as a real, ability to commit the crime. *Held* error.—*Pratt v. State*, (Ark.) 785.

ASSIGNMENT.

See, also, *Assignment for Benefit of Creditors*; *Insurance*, 1, 2; *Mortgages*, 6.

Assignee's liabilities, see *Corporations*, 2.
Assignment to change venue, see *Venue in Civil Cases*, 8.

— of errors, see *Appeal*, 5-17.

Suits by assignee, see *Contracts*, 8; *Schools and School Districts*, 3, 4, 6.

Validity, firm assets, see *Partnership*, 2.

— land certificates, see *Deed*, 8.

Installment of payment.

1. Where a contract provides that payments equal to 85 per cent. of the contract value of the work to be done were to be paid monthly, and 15 per cent. each month was to be retained, and paid within 90 days after the entire completion of the work, *held*, that the retained percentage became a separate and distinct demand, which could be assigned.—*Adler v. Kansas City, S. & M. R. Co.*, (Mo.) 917.

Sufficiency of description.

2. A person entitled to money under a contract with the S. & M. R. Co., made an assignment of his rights thereunder by a written notice and declaration thereof addressed to "N., president of the K. C. S. & M. R. Co." The S. & M. R. Co. was also known as the K. C. S. & M. R. Co., and the two companies, though nominally distinct, were virtually under the same control. *Held*, that the assignment was sufficiently identified with the subject-matter, and that so much of the description in the address as was false could be rejected.—*Id.*

ASSIGNMENT FOR BENEFIT OF CREDITORS.

See, also, *Attachment*, 1, 2; *Bankruptcy*; *Banks and Banking*; *Fraudulent Conveyances*; *Insolvency*; *Partnership*, 8.

What constitutes.

1. Where a firm, through one partner, conveyed its whole stock of merchandise in trust, first, to defray the expenses of such trust, next to pay a debt due to the trustees, and, third, to distribute the surplus *pro rata* among its other creditors, *held*, that such conveyance was an assignment, and not a mortgage; but that, since it did not show that the assignors were insolvent, it was not a general assignment within the scope of the Texas statutes relating to assignments for benefit of creditors, which in terms relate only to assignments by an insolvent debtor, or made in contemplation of insolvency, and was therefore not invalid for failing to comply with the statute.—*Johnson v. Robinson*, (Tex.) 625.

2. When an instrument shows an intention to make an assignment in compliance with Acts Tex. 1879, c. 53, and the amendments thereto,—relating to assignments for the benefit of creditors, and containing the provision that such an assignment

shall be construed to pass all the insolvent's real and personal estate not exempt, whether specified therein or not,—the only indication that the assignment is a partial one being that it does not state that all the insolvent's property subject to the payment of debts is included, he will be presumed to have intended to convey all such property.—*McIlhenny v. Miller*, (Tex.) 614.*

— Preferential mortgage.

8. Gen. St. Ky. c. 44, art. 2, § 1, provides that every mortgage made by a debtor in contemplation of insolvency, and with a design to prefer one creditor over another, shall operate as a transfer of the debtor's property for the benefit of creditors generally. *Held*, that this statute does not prohibit a debtor, though he be in failing circumstances, from executing a mortgage to secure a debt created simultaneously with the execution of the mortgage. But if such mortgage be executed partly in consideration of a prior debt, with intent to give a preference, and with the knowledge of the grantee, it falls within the statute.—*McCann v. Hill*, (Ky.) 837.*

4. Where a general creditor brings an action against the debtor to have a preferential mortgage declared to operate, under the statute, as a transfer for the benefit of all creditors, *held*, that the debtor cannot move on the land, never having lived on it before, and claim a homestead. The mortgage, operating as a transfer of all his interest in the land, precludes him from afterwards setting up any claim to or in the land.—*Id.*

Requisites and validity.

5. A power granted to the assignee in a deed of assignment to sell and dispose of the goods, and collect the accounts, "converting the same into cash or its equivalent," is not a power to sell on credit, or if so, and therefore constituting a badge of fraud, is not sufficient to render the deed void upon its face.—*Kellogg v. Muller*, (Tex.) 361.

6. Under the Texas act of March 24, 1879, and amendments, providing that creditors under a deed of assignment for their benefit shall not be required to give a release of their claims unless they receive a dividend of one-third the amount thereof, a deed of assignment is not rendered invalid by reason of a stipulation contained in it that the accepting creditors shall execute releases of their claims without making a dividend of one-third a condition precedent. Such condition is implied.—*McIlhenny v. Craddock*, (Tex.) 616.*

— Schedule and inventory.

7. A provision in a deed of assignment, after giving a list of creditors, preferred

and not preferred, that "should the said party of the second part have omitted or forgotten any creditor, and his claim is just and correct, he shall share alike with those in Schedule B, class 2, not preferred," is a substantial compliance with the requirement that the beneficiaries must be pointed out.—*Kellogg v. Muller*, (Tex.) 361.

8. An inventory attached to a general assignment for the benefit of creditors in these terms: "The entire stock of goods, wares, and merchandise in the storehouses, * * * consisting of dry goods, boots, shoes, hats, caps, gentlemen's furnishing goods, clothing, notions, trunks, valises, counters, shelving, chairs, stoves, desks, one iron safe, and one mirror, in all to the value of \$7,600, and choses in action,"—is sufficient, within New Code Tenn. § 2738, requiring the inventory to be full and complete; since an itemized inventory would take several days to frame, during which the property could be levied on, and the object of the statute be defeated.—*Rosenbaum v. Moller*, (Tenn.) 10.

— Fraud.

9. A general assignment is fraudulent as against attaching creditors, where it appears that the assignee had previously aided the assignor in fraudulently disposing of property; that a fictitious debt to the assignee was secured to him by the assignment; that the assignment lacked an inventory of notes and accounts due the assignor, and a detailed schedule, and failed to indicate the quantity and value of the property assigned; and that, although *bona fide* debts were secured by the assignment, yet, the controversy being between the assignor and assignee on the one hand, and the attaching creditors on the other, no creditors intervened to uphold the assignment. Under such circumstances the assignee's acceptance should not be treated as an acceptance by creditors.—*Solinsky v. Lincoln Sav. Bank*, (Tenn.) 836.

10. Where, in a contest in equity between attaching creditors and the assignee under a general assignment, the assignment is found to be fraudulent in fact, and the assignee is found to have participated in the fraud, he will be charged with costs, and will not be allowed his disbursements.—*Id.*

Rights of creditors.

11. Under the Missouri assignment law, the assignee stands in the shoes of the assignor, and as between the assignee and a judgment creditor of the assignor seeking to set aside certain deeds by the assignor, valid as between him and his grantee, because in fraud of creditors, the property conveyed, upon the deed being canceled,

should not go to the assignee, but should be sold and applied to the payment of the judgment.—*Roan v. Winn*, (Mo.) 736.*

12. Under Rev. St. Mo. 1879, § 376, providing that "the decision of the assignee in relation to all claims presented to him for allowance shall be final," unless appealed from and reversed, a creditor whose claim has been so allowed, without appeal, has as good standing in a court of equity to impeach a conveyance by the assignor as fraudulent as if he had reduced his claim to judgment in a court of law.—*Id.*

Rights of creditors on attachment.

13. Where a creditor issues an attachment against property which has been assigned for the benefit of certain creditors under a valid assignment, and claims that such creditors have been paid, whereby the property has reverted to the assignor, the burden is on the attaching creditor to show such payment before he can establish his attachment as against the assignee.—*Kellogg v. Muller*, (Tex.) 861.

14. Where, as between attaching creditors and the assignee under a general assignment, a decree sustaining the assignment is reversed on appeal, the decree of the appellate court sustaining the attachments will be limited to those of the attaching creditors who appealed.—*Solinsky v. Lincoln Sav. Bank*, (Tenn.) 836.

ATTACHMENT.

See, also, *Garnishment; Landlord and Tenant*, 5, 6.

Right to.

1. The fact that an insolvent corporation makes a deed preferring some creditors, including some of its directors, does not give an unpreferred creditor the right to take out an attachment at law charging the corporation with attempting to defraud its general creditors.—*Foster v. Mullanphy Planing-Mill Co.*, (Mo.) 260.

2. Where a debtor's previous fraudulent conduct affords ground for an attachment, the attachment is none the less valid because the creditor has reason to believe that a general assignment is in preparation, such assignment not being of record.—*Solinsky v. Lincoln Sav. Bank*, (Tenn.) 836.

Requisites—Affidavit.

3. In an action on a bill of exchange, where there was appended to the petition an affidavit of defendant's non-residence, and an order of publication was made, and an attachment issued, and certain lands of the defendant sold thereunder, *held*, that the affidavit was an affidavit for attachment.—*Burnett v. McCluey*, (Mo.) 694.

4. When defendants are duly notified by publication, and fail to appear, and prop-

erty is seized and brought into the custody of the court by a writ of attachment formal on its face, the judgment obtained in the action cannot be assailed in a collateral proceeding on the ground that the affidavit upon which the attachment was obtained was defective.—*Id.*

5. An affidavit for a writ of attachment being amendable by 1 Rev. St., Mo. 1855, p. 254, § 58, a judgment founded upon an attachment obtained on an affidavit defective in not stating that plaintiff had a just demand against defendants, and omitting the amount due, less credits and set-offs, but correctly giving plaintiff's name, the court in which the action is pending, and the ground of attachment, cannot be attacked in a collateral proceeding.—*Id.*

—Bond.

6. Plaintiffs obtained a writ of sequestration against the property of defendants, and executed the bond required by the Texas statute, making it payable to certain named parties, but without describing them as defendants, though they were in fact such. The bond also recited that it was upon condition that plaintiffs should "pay to the defendants all such damages," etc., without stating who the defendants were. *Held*, that this was not a sufficient bond under the statute which requires that it shall be payable to the defendants in the action.—*Rohrbough v. Leopold*, (Tex.) 460.

Plea in abatement.

7. Section 438, Rev. St. Mo., provides that, where property is attached, defendant may file a plea in the nature of a plea in abatement "verified by affidavit," etc. *Held*, that defendant's attorney could, by leave of the court, file the plea, and could also make the affidavit.—*Irwin v. Evans*, (Mo.) 693.

8. A verification to such plea in the following language: "This affiant, attorney for the defendant, upon his oath says that the allegations contained in the foregoing plea are true,"—is in all respects sufficient. It is not necessary for the affiant to set out and show that he has a knowledge of the facts stated in the plea, or the means of his knowledge.—*Id.*

Levy and sale.

9. An attachment of goods is not invalid because levied in the night-time, and by forcing an outer door or raising a window of a store-house disconnected with the dwelling-house, and forming no part of the curtilage.—*Solinsky v. Lincoln Sav. Bank*, (Tenn.) 836.

10. A writ of attachment, and an order of publication notifying a non-resident thereof, having been issued against certain lands belonging to him, he made default,

and general execution was issued, under which the sheriff levied upon the attached lands, selling them to M. *Held* that, while there should have been a judgment to be levied of the attached property, and a special execution issued thereon, yet, as the property levied upon and sold was only that actually seized by the attachment, the deed given by the sheriff to M. would be upheld in ejectment against him by one claiming under the non-resident.—*Burnett v. McCluey*, (Mo.) 694.

Priority.

11. The acts of a deputy-sheriff being, under Rev. St. Tex. art. 4520, the acts of the sheriff, the doctrine that property *in custodia legis* cannot be attached by another officer has no application to prevent such deputy from levying an attachment in the name of the sheriff upon property which has been already levied upon by the sheriff himself under another writ, subject to such first attachment; and an attachment so levied by the deputy will take precedence of a third attachment levied subsequently thereto by the sheriff himself.—*Heye v. Moody*, (Tex.) 242.

Actions for wrongful attachment.

12. In an action, afterwards dismissed, brought against A. and B., to recover the price of goods sold to A., an attachment was sued out, and B.'s property attached, on the ground of his non-residence. In an action against the plaintiff therein for wrongful attachment, he testified that he sued out the attachment because B. had the reputation of not paying his debts until obliged to do so. The only evidence of B.'s liability was the representation of A., who kept B.'s sheep, of authority to contract the debt on behalf of B., and the fact that B. had paid debts of his contracting before. B. was a man of property, residing in another county. *Held*, that the action for wrongful attachment was maintainable.—*Farrar v. Talley*, (Tex.) 558.

13. An action will lie for the wrongful attachment of sheep, although the attachment is afterwards released, and the sheep are then in better condition than when attached.—*Id.*

14. Release of property from a wrongful levy of attachment will not relieve plaintiff in the attachment from liability for the value of the property, if he does not return it to the owner, but it is lost to the latter without any fault on his part, by reason of another attachment being immediately levied thereon for the debt of another.—*Id.*

Attorney and Client.

Arguments of counsel, see *Appeal*, 28; *Criminal Practice*, 50-52; *Trial*, 8.

Attorney's fees, see *Bonds*, 7; *Garnishment*, 4, 5; *Principal and Surety*, 7.

Attorneys for state, see *States and State Officers*, 2.

Authority, see *Attachment*, 7, 8.

Stipulations by counsel, see *Practice in Civil Cases*, 2.

Attorney General.

Suits by, see *States and State Officers*, 2.

Bailment.

Public funds, see *Counties*, 1.

BANKRUPTCY.

See, also, *Assignment for Benefit of Creditors*; *Insolvency*.

Rights of bankrupt.

The mere fact that the assignee in bankruptcy declines to sue for land claimed by the bankrupt, or has verbally surrendered his right to do so to him, does not invest the bankrupt with title sufficient to support an action of ejectment by him.—*Peters v. Wallace*, (Ky.) 914.

BANKS AND BANKING.

Insolvency, see *Fraudulent Conveyances*, 4.

National banks, real estate, see *Taxation*, 5.

Stock, see *Taxation*, 6, 7.

Assignment for benefit of creditors.

1. An assignment by a savings bank for the benefit of creditors is valid, if made in good faith, although the consent of all the stockholders was not first obtained.—*Descombes v. Wood*, (Mo.) 82.

— Action to set aside.

2. Any shareholder may be complainant in an action to set aside an assignment for the benefit of creditors made by the board of directors of an insolvent banking corporation, on the ground that such assignment was *ultra vires*.—*Id.*

3. Such action properly purports to be brought on behalf of plaintiff, and others similarly situated, without stating who they are, or how numerous, or whether they constitute a majority of the stockholders or otherwise.—*Id.*

4. Where a shareholder and creditor of a savings bank brought action to set aside an assignment for benefit of creditors, made by it four years before, during which time the assignee had been engaged in its administration, *held*, that he was guilty of laches, in the absence of any proof of disability or want of knowledge.—*Id.*

Bill of Lading.

Stipulations limiting liability, see *Carriers*, 10-16.

Blackmail.

See *Larceny*, 15.

BOND.

See *Appeal*, 4; *Attachment*, 6; *Executors and Administrators*, 1; *Guardian and Ward*, 1, 2, 4-6; *Municipal Corporations*, 4-8; *Principal and Surety*.

Bond for title, see *Deed*, 2; *Public Lands*, 13.

Official.

1. The fact that the county judge approved an official bond in open commissioners' court does not make the approval the act of that court, and not the act of the judge. — *Wilson v. County of Wichita*, (Tex.) 67.

2. A condition in a bond that the treasurer "will safely keep and faithfully disburse" a fund according to law is broken by his refusal to pay over the balance of the fund remaining in his hands to his successor, such payment being a disbursement. — *Id.*

Action on.

3. In an action against a county treasurer and his bondsmen for failure to pay over public moneys, it is not necessary that the account should be passed upon by the court before the bringing of the suit. If he has any credits, he can plead them. — *Id.*

4. In an action on a bond, or on any unsealed instrument which by statute imports a consideration, it is not necessary to set out the consideration. — *County of Montgomery v. Auchley*, (Mo.) 425.

5. In an action on a county treasurer's bond, the petition sufficiently alleges, by reasonable intendment, that the treasurer's successor had qualified, when it avers that he failed to pay over to his successor in office the money sued for. — *Wilson v. County of Wichita*, (Tex.) 67.

Damages.

6. In actions upon penal bonds with collateral conditions, the plaintiff can never recover more in the shape of damages than the penalty; and this is true, not only of official bonds, but of other bonds also. — *Turner v. Lord*, (Mo.) 420.

7. Where a tax collector, elected for a second term, gave a new bond, with sureties other than those on his first bond, *he d.* that such sureties on the second bond were not liable for their principal's delinquencies during his first term. — *State v. Alsop*, (Mo.) 81.

8. A sheriff held liable with the attaching creditor in a suit for a wrongful attach-

ment, if entitled to a judgment in that suit against his co-defendant upon the indemnity bond, is, at least, not entitled to have an attorney's fee included in such judgment in the first instance. — *Kellogg v. Muller*, (Tex.) 861.

BOUNDARIES.

See, also, *Surveys and Surveyors*.

Agreement for boundary, see *Estoppel*, 2. Courses and distances, see *Vendor and Vendee*, 7.

Weight of surveyor's report, see *Evidence*, 28.

Conflicting surveys.

1. In a controversy concerning the true boundary of a tract of land which had been surveyed at different times and by different methods, the rule that marked lines shall control in establishing the boundary does not prevail, unless it is shown that they were made upon the original survey. — *Moore v. Whitcomb*, (Tex.) 873.*

2. So long as the monuments erected by the government surveyors can be identified, or the places where they were planted known, they must govern in making boundaries. Subsequent surveys may aid in finding such monuments, but the latter must prevail in determining courses and distances. — *Jacobs v. Moseley*, (Mo.) 135.

3. In arriving at the bounds of a survey, courses and distances yield to natural or artificial objects of demarkation; but the former will not be made subordinate to an unmarked prairie line, which could not itself be ascertained except by running the boundaries of another survey according to course and distance. — *Gerald v. Freeman*, (Tex.) 256.

4. Where the defendant's title to a certain tract of land depended upon whether the land was included in plaintiff's survey or not, and it appeared that, if the boundaries of plaintiff's land were determined according to the course and distance called for in plaintiff's patent, the tract would not be therein included, while it would if the boundaries were determined according to certain marked corners called for, *held*, that the marked corners called for should be taken as the true corners, and the course of the lines thence run as designated in the field-notes without regard to distance. — *McAnninch v. Freeman*, (Tex.) 869.*

5. In an action to settle the boundary line between two adjoining patents, if there are conflicting calls indicating two distinct lines of survey, that actually run by the surveyor will always prevail, provided it can be proved. Upon the same principle the call for a marked line of an older survey will prevail over a call for distance. It is to be presumed that the surveyor

identified the line called for by the marks upon the ground; and hence that the mistake occurred in the measurement or the calculation of the distance. But if there be no objects, natural or artificial, to show the line, the presumption does not obtain, and the rule no longer applies.—*Duff v. Moore*, (Tex.) 530.

Call for natural object.

6. When there is involved in a suit the question whether a certain river or a slough is the true boundary of a land grant, and the field-notes of the survey of said grant call for the river, but the courses and distances very nearly correspond to the configuration of the slough, and not to the meanders of the river, and it appears that if the survey were made at a time when the water was high the slough might have been mistaken for the river, and the call for the river might have been the result of such mistake, it is error for the court to withdraw from the jury the question whether said boundary extended to the river or to the slough.—*Koepsel v. Allen*, (Tex.) 856.*

Supposed line.

7. Where two adjoining proprietors of land are divided by a fence which they suppose to be the true line, each claiming only to the true line, they are not bound by the supposed line, but must conform to the true line, when ascertained.—*Jacobs v. Moseley*, (Mo.) 185.

8. Where there is a dispute as to the true division line, or the line is uncertain, and both proprietors are ignorant as to its true location, and agree on a permanent line, and take possession accordingly, the agreement is binding on them, and on those claiming under them, and is not within the statute of frauds.—*Id.*

Adverse possession.

9. An agreement fixing a boundary line need not be shown by direct evidence. The agreement may be inferred from the acts, conduct, and especially from the long acquiescence, of the parties.—*Id.*

10. While, in the case of concurrent possession of land under two adjoining surveys, the true location of the line of the elder patent must govern, still the actual possession under a junior patent may ripen into a perfect title, in the absence of such possession and claim under the elder patent.—*Swope v. Schafer*, (Ky.) 800.

BRIDGES.

Exclusive franchise.

1. The Texas act of April 23, 1874, § 79, which provides that, whenever any persons shall file with the secretary of state articles of incorporation for the purpose of erecting and maintaining a bridge or ferry,

it shall not be lawful for any other toll bridge or toll ferry to be established on the same stream within three miles above or below such bridge or ferry, does not prohibit the establishment of a free bridge within the limit named.—*Victoria Co. v. Victoria Bridge Co.*, (Tex.) 140.

2. The incorporators, having established their bridge, subsequently applied for and obtained from the county court a grant of the right to use the site and approaches from the public road for a term of 10 years. *Held*, that this was a mere license, and not a contract between the county and bridge company, which would not prevent the county from afterwards establishing a free bridge at the same point, with the same right of approach from the public road.—*Id.*

Building and Loan Associations.

See *Usury*, 1, 2, 4.

BURGLARY.

House-breaking.

1. Gen. St. Ky. c. 29, art. 5, § 4, provides a punishment for any one who shall feloniously break into any dwelling-house, and feloniously take away anything of value, although the owner or any other person may not be there. *Held*, that it does not make any difference, under this section, how great or how little may be the value of the thing taken, and an allegation that the article taken was of the value of five dollars need not be proved.—*Duncan v. Commonwealth*, (Ky.) 821.

2. Where the felonious breaking is established, the presence of the owner or other person at the time of the taking, and his failure to object or protest, will not reduce the crime from burglary to mere larceny.—*Id.*

Warehouses.

3. On a trial for feloniously breaking into a mill-house in the night-time, wherein corn, flour, and meal were stored for sale, the court charged the jury that they could inflict the punishment for burglary, viz., confinement from two to ten years. *Held* error; that the facts charged do not constitute burglary, nor the crime of house-breaking, under Gen. St. Ky. c. 29, art. 5, § 4, but come within Gen. St. Ky. c. 29, art. 6, § 4, relating to the breaking of warehouses, etc., the punishment of which is fixed by confinement between one and five years, at the discretion of the jury.—*Daniels v. Commonwealth*, (Ky.) 812.

Defense of purchase.

4. The defense interposed on a trial for burglary and larceny was that the appel-

lant's co defendant, in appellant's presence, claimed to have purchased the alleged stolen property. There being evidence to support the co-defendant's claim of purchase, the trial court should have charged both the law of opportune explanation of the possession of recently stolen property and of the defense of purchase.—*Shuler v. State*, (Tex.) 681.

Punishment.

5. Where the crime of felonious breaking and taking away is charged and proved, the punishment cannot be for mere larceny.—*Duncan v. Commonwealth*, (Ky.) 321.

CARRIERS.

See, also, *Railroad Companies*.

Of passengers, see, also, *Negligence*, 5, 7-10, 15-17.

— tickets, see *Evidence*, 6.

Discrimination.

1. In an action brought against a railroad company by a shipper charging defendant with discriminating against plaintiff in rates, *held*, that upon the meager evidence the trial court might well find that plaintiff did not ship his cattle over the road of defendant corporation, or its predecessor, or, if he did, that such corporation was not shown to be a party to the discriminating arrangement.—*Rothschild v. Wabash R. Co.*, (Mo.) 418.*

Carriers of passengers.

2. Where one railroad company, without due statutory authority, conferred either by a general or private act, leases and surrenders the control of its line to another, it becomes liable for injuries to passengers caused by the negligence of the lessee company which occur upon its line.—*International & G. N. R. Co. v. Underwood*, (Tex.) 216.

3. In an action to recover damages for injuries received by plaintiff, through the negligence of defendant, though it is not specifically alleged in plaintiff's petition that the point at which the accident occurred was between the place of departure and destination, yet, if it appears by the petition that plaintiff was injured while he was being carried by defendant under its agreement, the allegation is sufficient.—*Id.*

4. In an action for damages against a railroad company for injuries caused to the plaintiff by the train starting up while she was attempting to get on, an instruction to the jury that if the averments of the plaintiff were true, including an averment that she had been promised 10 minutes by the conductor in which to check her baggage and the train started before that time expired, then they should find for the plain-

tiff, is not erroneous as laying too much stress on the time promised her by the conductor.—*Texas Pac. Ry. Co. v. Davidson*, (Tex.) 686.

5. The fact that the train in fault was a freight train, on which, under the rules of the company, passengers were not permitted to ride, does not render the person injured any the less a passenger, when, at the time he bought his ticket, he had no knowledge of such rules, and took the train under the instructions of an agent of the company, whose duty it was to direct passengers as to what trains they should enter.—*McGee v. Missouri Pac. Ry. Co.*, (Mo.) 789.

Ejection of passenger.

6. A passenger got on a train, and went into the ladies' car, where he was unable to find a seat, and refused to surrender his ticket until he was given a seat. The conductor told him that there would soon be seats vacant, or that he could find a seat in the gentlemen's car, but he refused to go into that car, on the ground that the smoking there would make him sick. When his ticket was again demanded of him, he refused to give it up, and was ejected from the train, for which he sued the railroad company for damages. *Held*, that he was not entitled to recover.—*Memphis & C. R. Co. v. Benson*, (Tenn.) 5.*

7. Plaintiff, a mulatto woman, purchased a ticket on defendant's railroad for a 10-mile journey. She passed through the front car, and attempted to enter the rear car, which, by a regulation of the company, was set apart for white people. She was stopped on the platform, and told to ride in the front car, which she refused to do, and refused to give up her ticket unless allowed to ride in the rear car. She was ejected from the train. It appeared on the trial that persons of both sexes were allowed to ride on the front car without regard to color or race, and the two cars were alike in every respect as to comfort, convenience, safety, and equipment. There was conflicting evidence as to smoking going on at the time in the front car. *Held* that, as plaintiff's purpose evidently was to harass the defendant with a view to bringing this action, and her persistence was not in good faith, with a view to obtain a comfortable seat for the short ride, the judgment in her favor in the court below should be reversed.—*Chesapeake, O. & S. R. Co. v. Wells*, (Tenn.) 5.

Carriers of live-stock.

8. In an action against a common carrier to recover the value of a car-load of mules destroyed by fire through defendant's negligence, the petition alleged the delivery and loss of the property while in defendant's possession as a common carrier, and

charged negligence in managing and operating the train, whereby the car containing the mules was set on fire, and the mules destroyed. *Held* that, even without the last allegation of negligence, the petition stated facts sufficient to constitute a cause of action.—*McFadden v. Missouri Pac. Ry. Co.*, (Mo.) 689.

9. The placing of a car bedded with straw, containing valuable live-stock, so near the engine that sparks therefrom could easily ignite the straw, and thus burn up and consume the car and its contents, is negligence.—*Id.*

Limiting liability.

10. A stipulation in a bill of lading or contract of shipment of live-stock, whereby the shipper assumed "the risk of loss or injury to the mules by fire or any account whatever," does not relieve the common carrier from his common-law liability for negligence.—*Id.**

11. Rev. St. Tex. art. 278, provides that railroad companies and other common carriers shall not limit or restrict their liability, as it exists at common law, by any general or special notice, or in any other manner whatever, and that no special agreement in contravention of its terms shall be valid. *Held*, that under this statute that part of a contract between a railroad company and a shipper of live-stock which attempted to relieve the company of liability for all loss or damage, except such as arose from the willful negligence of its servants, and provided that, as a condition precedent to the shipper's right to recover damages for any loss, he should give notice in writing of his claim at a certain place, and in a certain time, was not valid.—*Gulf, C. & S. F. Ry. Co. v. Trawick*, (Tex.) 587.*

12. A clause of a contract between a shipper and a railroad company, which limits the time within which a suit may be brought by the shipper, for any claim for damage arising under the contract, to less than the time prescribed by the statute of limitations, does not limit or restrict the liability of the railroad company, within the meaning of the statute, and, if reasonable, will be enforced.—*Id.**

13. In an action by a shipper against a railroad company for injuries to live-stock shipped, the refusal of the court to instruct the jury as to the effect of the failure of the shipper to institute suit within the time prescribed by the shipping contract is error.—*Id.*

Consideration.

14. Whether a stipulation in a bill of lading or contract of shipment, whereby a common carrier limits his liability to a certain fixed sum for each head of stock to be transported, shall limit the shipper to such

sum in case the goods are destroyed by the carrier's negligence, depends on the fact whether the shipper has received adequate consideration for the concession. If obtained from the shipper by a false representation that his goods are to be carried at a special and reduced rate in consequence thereof, such a stipulation is not binding upon him, in the absence of bad faith on his part towards the carrier.—*McFadden v. Missouri Pac. Ry. Co.*, (Mo.) 689.*

15. Parol evidence is admissible between the parties to show the falsity of a representation contained in a bill of lading to the effect that the shipper's goods are being carried at a reduced rate, in consideration whereof the carrier limits his liability for loss.—*Id.*

16. The failure of defendant to object on the trial to the admissibility of parol evidence to show the falsity of the consideration clause contained in the bill of lading, limiting the carrier's liability, precludes him from afterwards making the objection.—*Id.*

CARRYING WEAPONS.

Public place.

Under Mansf. Dig. Ark. § 1907, making the carrying of weapons a misdemeanor, except upon the defendant's "own premises," the common stairway of a building, on the upper floor of which defendant and other persons rented and occupied offices for business purposes, is a public place and cannot be claimed by defendant to be his own premises.—*Clark v. State*, (Ark.) 658.

CHAMPERTY AND MAINTENANCE.

Performance of prior contract.

The law against champerty does not apply to deeds made to carry into effect a contract for the sale of land of which there was no adverse possession at the time the contract was entered into, although the land be held adversely when the deed is made.—*Greer v. Wintersmith*, (Ky.) 232.

Charities.

Property held for charitable uses, see *Taxation*, 4.

CHATTEL MORTGAGE.

See, also, *Fraudulent Conveyances*.

Action by trustee, parties, see *Replevin*.

After-acquired property.

1. A mortgage of property to be acquired *in futuro* is void as against creditors.—*Loth v. Carty*, (Ky.) 814.*

Recording.

2. Under the Texas chattel mortgage act, which avoids unrecorded mortgages and conveyances as against creditors with or without notice, "creditors," as used in the act, means those who have acquired some lien on the property by attachment or otherwise.—*Overstreet v. Manning*, (Tex.) 248.

3. One who buys at a voluntary sale from his debtor, and pays no money, but merely credits the amount of the purchase money upon a pre-existing debt, is not a *bona fide* purchaser for value, as against the owner of a prior unrecorded chattel mortgage.—*Id.*

4. A foreign corporation doing business in Clay county, Arkansas, executed a mortgage on its real and personal property to secure payment of certain promissory notes, and the mortgage was recorded in Clay county. Subsequently certain creditors obtained judgments against the corporation, and seized the personal property under execution. The mortgagee afterwards sought to foreclose the mortgage, joining the judgment creditors as defendants. *Held* that, as the corporation has no residence in Arkansas, the recording of the mortgage did not give the mortgagee a lien as against the creditors who had sued upon the foreclosure proceedings, as, under *Manuf. Dig. Ark. § 4742*, a mortgage of personalty, to be valid as against third parties, must be recorded in the county in which the mortgagor resides.—*Watson v. Thompson Lumber Co.*, (Ark.) 63.

Clerk of Court.

Duties, see *Indictment and Information*, 6.

Collector.

Of taxes, see *Bond*, 7; *Taxation*, 8, 9.

Compromise.

See, also, *Accord and Satisfaction; Payment*.

Power of, see *Executors and Administrators*, 8, 9.

Confederate Money.

Payment in, see *Judicial Sales*, 8.

CONFLICT OF LAWS.**Extra-territorial operation.**

A statute of one state, by which a right of action for personal injuries survives, will not be enforced by the courts of another state, where the common law, by which such cause of action dies with the

person, is unchanged.—*Texas & P. Ry. Co. v. Richards*, (Tex.) 627.*

CONSTITUTIONAL LAW.

Equality before the law, see *Railroad Companies*, 20.

Judicial powers, see *Qui Tam and Penal Actions*, 8.

Legislative powers, see, also, *Indictment and Information*, 10; *Schools and School-Districts*, 18.

Local and special laws, see *Public Lands*, 14, 15.

Police powers, see *Municipal Corporation*, 9. Retrospective laws, see *Schools and School-Districts*, 11-13.

Right to process for witnesses, see *Criminal Practice*, 6-8.

Legislative power.

1. It is competent for the legislature of a state to require one of its municipal subdivisions, viz., a county, to pay a just debt after the lapse of such time as would bar it by limitation.—*County of Caldwell v. Crockett*, (Tex.) 807.

2. The legislative and judicial departments of the state government being, in the line of their several duties, independent of each other, the former has not authority, under the constitution, to require the latter to give the reasons of its decisions in writing. *Houston v. Williams*, 18 Cal. 25, approved and followed.—*Vaughan v. Harp*, (Ark.) 751.

3. It was claimed that the state legislature (Texas) had no power to reserve the public lands in Greer county, as it did by the act of February 25, 1879, (Gen. Laws Tex.) for educational purposes and the payment of the public debt, inasmuch as the constitution had already made certain reservations, which were all it was intended should be made. The constitution, however, contains no express prohibition of further reservations. *Held*, that the legislature was entitled to exercise any power not expressly denied to it by the constitution of the United States, or its own, and therefore such further reservations were valid.—*Day Land & Cattle Co. v. State*, (Tex.) 865.

Title of acts.

4. Kentucky act of April 21, 1883, entitled "An act providing for the improvement of the Fountain Ferry road at the cost of the property benefited thereby," provides for the assessment of adjoining property within 800 feet of either side of the road, the same being an ordinary county road running through the country. *Held*, that the act is not unconstitutional, on the ground that the title is misleading.—*Graham v. Conger*, (Ky.) 337.

5. The act of February 25, 1879, (Gen. Laws Tex.), setting aside lands for educa-

tional purposes and the payment of the public debt, is not in conflict with section 85, art. 8, Const. Tex., providing that no bill shall contain more than one subject, which shall be expressed in its title. The subject of the former act is essentially single, although the ends intended to be reached are various.—*Day Land & Cattle Co. v. State*, (Tex.) 865.

Exclusive privileges.

6. An ordinance which grants a water company exclusive right to sell water to a community, for public and private uses, affects all the inhabitants in their common rights directly, and in their individual rights indirectly, and is in conflict with that clause of the Texas constitution which provides that perpetuities and monopolies shall not be allowed.—*City of Brenham v. Brenham Water Co.*, (Tex.) 143.*

Eminent domain.

7. The legislature has the constitutional right to authorize the construction of a steam railroad along a public street in a city, and it is immaterial whether the fee in the street is owned by the city, or by the abutting lot-owners. The latter have no claim for compensation against the railroad, unless it is so constructed or operated as to deprive them of the reasonable use of the street.—*Bulton v. Short-Route Ry. Transfer Co.*, (Ky.) 832.

Equal and uniform taxation.

8. Kentucky act of April 21, 1863, provides for macadamizing an ordinary county road, and imposes for that purpose a tax on those owning land adjacent to the road to a depth of 800 feet on either side of the road. *Held*, that as no peculiar benefits accrued to such owners, as distinct from the other residents of the county, the tax is unjust and unequal, and the act unconstitutional. No rule or principle of taxation authorizes the taxing of agricultural lands by the square foot, or compelling those owning land fronting on an ordinary county road to bear the expense of maintaining or repairing it.—*Graham v. Conger*, (Ky.) 827.

Contempt.

Failure to produce witness, see *Criminal Practice*, 7.

CONTINUANCE.

See, also, *Criminal Practice*, 2-4.

When granted.

In an action to try title, when there is no written agreement by counsel in regard to notice of filing deeds, if plaintiff's counsel is misled by a verbal agreement, or what

he understood to be such, the court may postpone the trial to allow further time for giving the notice; but this will not give defendant a right to demand a continuance when the case is called a second time.—*Capt v. Stubbs*, (Tex.) 467.

CONTRACTS.

See, also, *Carriers; Champerty and Maintenance; Chattel Mortgage; Covenant; Deed; Fraud; Frauds, Statute of; Mortgages; Negotiable Instruments; Sale; Specific Performance; Vendor and Vendee.*

Contracts, consideration, see *Carriers*, 14-16.

Performance, time of the essence, see *Mines and Mining*.

Public policy, see, also, *Carriers*, 11-13; *Gaming*, 2-7; *Insurance*, 1.

Waiver of, see *Deed*, 6.

Public policy.

1. Defendant subscribed to a fund for reclaiming and protecting the lands embraced within the Sny Island levee drainage district. The fund was to be used to enforce the prompt payment of taxes on lands located within the district by purchasing the lands assessed at delinquent tax sales. *Held*, that there was nothing in the contract from which it could be inferred that the subscribers harbored any intention of combining together to depress bidding at the tax sales, or in any other reprehensible manner to take any unlawful advantage, and the contract was therefore a valid one.—*Stillwell v. Glasscock*, (Mo.) 438.

Consideration.

2. An agent's agreement with his principal to take certain bonds, in which he has invested the principal's money, and which have depreciated, at their par value, paying the same when the bonds should be collected, and, meanwhile, to pay the principal a certain rate of interest on the bonds, less than the rate which they bear, is supported by a sufficient consideration and is binding on him, although his authority justified him in making the investment as agent.—*Denny v. Campbell's Ex'r*, (Ky.) 801.

Interpretation.

3. A., being entitled to an interest in a trust fund, transferred that interest to B. in exchange for a tract of land. A. agreed to make up whatever the interest might lack of being \$3,000. B. sued the trustee of the fund to recover A.'s interest, but the court determined that the fund was subject to a life-estate in the trustee, and B. could not recover any part of it until the termination of that estate. It was also adjudged that A.'s interest was worth \$1,700 less than \$3,000. *Held*, that B. was entitled to

recover this deficit of A. at once, without waiting for the termination of the trustee's life-estate.—*Trabue v. Reynolds*, (Ky.) 33.

Interpretation—Conditions.

4. In an action upon an agreement by an agent to take off the principal's hands, at a certain price, bonds in which the agent had invested the principal's money, the price to be paid when the bonds should be collected, *held*, that it was no defense that the bonds had not yet been collected; the defendant having neglected to sue upon them, as he should have done.—*Denny v. Campbell's Ex'r*, (Ky.) 301.

5. The defendants purchased cotton at L., under price limits designated by plaintiff, and shipped it to the latter at H., it being orally agreed that the plaintiff should report the classification of the cotton at H., if there was any falling off either in grade or weight. *Held*, in a suit to recover an alleged balance of an account, that said oral stipulation not being a condition precedent to the plaintiff's right to recover under the agreement, and it not being stated that the report should be made immediately, or within from three to five days after classification, that time was not of the essence of the agreement, and that it was error for the court to instruct the jury to the effect that the plaintiff could not recover if he did not make the reports within a reasonable time, and if such failure on his part induced the defendants to continue their shipments to him.—*Watson v. Walker*, (Tex.) 576.

Actions on—Defense.

6. A contractor was employed by a city to supply material and labor in making a railroad embankment, for which he was to be paid, not for the job, but for the contents of the embankment, at a certain rate per cubic yard. In an action by the contractor against the city to recover on the contract, he showed the quantity of dirt hauled and placed on the embankment, but the city claimed that much of the dirt slid off and was of no use. *Held*, that as this was matter of defense, and as the city engineer was present superintending the work, the city was bound to prove by reliable estimates how much dirt was lost in this way; otherwise the contractor was entitled to recover the full amount hauled.—*Henderson v. City of Louisville*, (Ky.) 187.

Conversion.

Equitable, extent of rule, see *Dower*, 1.

CORPORATIONS.

See, also, *Banks and Banking*; *Insurance*; *Municipal Corporations*; *Railroad Companies*.

Dissolutions, see *Railroad Companies*, 6, 23.
Foreign mortgage, see *Chattel Mortgage*, 4.
Reorganization, see *Insurance*, 4-6.
Stock, see *Taxation*, 6, 7.

By-laws.

1. Where a by-law of a corporation provides that a majority vote of the directors shall determine the action of the body, a majority of the whole number of the directors must be present; but, if a majority of those present concur in a resolution, it is binding.—*Foster v. Mullanphy Planing-Mill Co.*, (Mo.) 290.

Sale of franchises.

2. Where an old-established corporation sells out to a newly-organized one, and turns over all its property, the new company becomes liable upon the debts and contracts of the old.—*Slattery v. St. Louis & New Orleans Transp. Co.*, (Mo.) 79.

Erroneous issue of stock.

3. A gas-light company which issues certificates of stock in obedience to an order of court is bound to take notice of the title of those to whom the certificates are issued, as shown by the record of the cause in which the order was made, and where a certificate is so issued to W. "as devisee under the will of R.," and the company subsequently, on instructions from W., who had only a life-estate in the stock, cancels it, and issues others in place of it, to those to whom W. had sold it, the company is liable for the amount to the remainderman.—*Caulkins v. Memphis Gas-Light Co.*, (Tenn.) 287.

4. The fact that the company consulted counsel before making the transfer to the purchasers does not protect it from liability; there being no evidence as to what facts were communicated, or what records exhibited, to the attorney upon which he based his opinion, and it appearing that the company had examined the will.—*Id.*

Actions by and against.

5. The St. Louis Dispatch Company having a right of action against the St. Louis Transportation Company, the stockholders instructed the directors to bring suit thereon; but the directors fraudulently conspired with the transportation company, and refused to bring suit. The plaintiffs, a minority of the stockholders of the dispatch company, thereupon brought action in their own name against the T. Co., without making the directors defendants. *Held*, that the action could not be maintained.—*Slattery v. St. Louis & New Orleans Transp. Co.*, (Mo.) 79.

6. In an action against the incorporators of a so-called "Produce Exchange," to recover moneys deposited as wagers upon the rise and fall of prices of grain, etc., it is no defense to claim that, the corpora-

tion having been legally chartered for an apparently lawful purpose, the incorporators cannot be held individually liable for the illegal acts of its managers or officers, where the evidence shows that the incorporation was but a cloak used to cover illegal acts, which were contemplated in the organization, and afterwards done as a business.—*McGrew v. City Produce Exchange*, (Tenn.) 88.

COSTS.

See, also, *Garnishment*, 5.

Taxation.

1. Plaintiff sued on a note not yet due, and his attachment was dismissed. In the mean time the note fell due, and he was allowed to sue thereon upon an amended petition. *Held*, that the plaintiff, suing out the attachment, should be taxed with all the costs of the suit accruing, down to the filing of the amended petition, and not merely with the costs of the attachment.—*Arnold v. Willis*, (Tex.) 485.

2. In an action to try title, a defendant who disclaims any interest in the land, and alleges that he is a tenant, and asks that his landlord be made a party, is relieved from costs incurred after his disclaimer, but not from those previously incurred, if he was in possession, or set up claim, when the suit was brought.—*Capt v. Stubbs*, (Tex.) 467.

Execution for costs.

3. Rev. St. Tex. §§ 1420a, b, c, providing for the issuing of costs bills, upon which execution may be levied, do not apply to cases in which suit has terminated and judgment been rendered for costs, and a sale effected under a bill of costs issued in such a case is absolutely void.—*Wilson v. Simpson*, (Tex.) 839.

Costs in criminal cases.

4. The provision of Gen. St. Ky. c. 26, § 2, that "the laws of costs are not penal," and of Crim. Code Ky. § 287, that, if the punishment of an offense be a fine, the judgment may direct imprisonment until it be paid, the extent of imprisonment, however, not to exceed one day for each two dollars of the fine,—apply to costs and fines in commonwealth cases, and are not inconsistent with a provision of a city charter, and of a municipal ordinance enacted under the authority thereof, making the costs a part of the penalty, in prosecutions for the violations of by-laws and ordinances of the city, and empowering the court to require them to be discharged by labor at the rate of 50 cents per day, if not paid.—*Berry v. Brislan*, (Ky.) 794.

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COUNTIES.

See, also, *Bridges; Highways; Poor and Poor Laws*.

Location of county-seat, see *Elections*, 11. Obligations, see *Constitutional Law*, 1; *Limitation of Actions*, 10; *Schools and School-Districts*, 2-7.

Treasurer, see *Bond*, 2, 3, 5.

Liability of officers.

1. An officer who has custody of public money does not occupy the relation of a mere bailee for hire, who is responsible for such care only as a prudent man would take of his own; he is bound to account for and pay over the public money, less his commissions, or his sureties must do it for him.—*Wilson v. County of Wichita*, (Tex.) 67.

County surveyor.

2. If a county surveyor of one county makes surveys in another county without authority of law, he will not thereby become the *de facto* surveyor of the latter county, even if his acts receive the sanction of the general land-office.—*Cox v. Houston & T. C. R. Co.*, (Tex.) 455.

3. Texas act of 1866, which provides that Young and other counties shall be attached to Jack county for judicial and other purposes, and Hardeman and other counties shall be similarly attached to Montague county, did not have the effect to attach Hardeman county to Jack county, for surveying or other purposes, even though by Young county the legislature meant Young land-district, and Hardeman county was a part of that land-district.—*Id.*

4. The Texas act of 1858 requires that the surveyor of a county not previously a separate land-district shall not receive any certificate before procuring a certified copy of all files, applications, and locations from the surveyor's office of the land-district to which said county belongs, and filing the same in his office. *Held*, that this act is intended to apply to an organized county newly formed into a land-district which had before formed part of a larger district, and not to a county transferred from one district to another. But, to whatever case the act is applicable, the presumption is that the surveyor had complied with the law, and procured the proper papers, and the burden is on the party objecting to the survey to show the contrary.—*Id.*

Actions on warrants.

5. A county commissioner's court passed an order that all warrants not registered under a certain act of the legislature should not be paid. *Held*, in an action brought more than four years after such order on a warrant issued before the order, that, in the absence of any knowledge on the part

of the plaintiff from any source of the order, the statute of limitations was not set in operation against him.—*Leach v. County of Wilson*, (Tex.) 613.

6. The plaintiff sued a county on a warrant issued in pursuance of an order of the county commissioners reciting that it was in payment of a balance due certain contractors for building a court-house. The warrant was indorsed in blank by one of the contractors, but he testified that he had no recollection whatever of the warrant, and that his firm had been paid for the court-house from other sources, by the conveyance of land from a judgment debtor of the county. There was other evidence strongly suggestive of fraud in the issuance of the warrant. The plaintiff's theory was that there was a balance coming to the judgment debtor of the county on the conveyance of his land to the contractor, and that the warrant was issued in settlement of that balance. *Held*, that an instruction to the jury to the effect that, if the contractors had been paid for the court-house outside of the warrant, they should find for the defendant, leaving out of view the theory of plaintiff, was erroneous.—*Id.*

COURTS.

Civil jurisdiction, see *Qui Tam and Penal Action*, 1.

Judicial power of mayor, see *Municipal Corporations*, 15, 16.

Probate, see *Executors and Administrators; Guardian and Ward*.

—jurisdiction, see *Equity*, 1.

—order, see *Judgment*, 8.

Jurisdictional amount.

1. Const. Tex. art. 5, § 8, provides that the district courts shall have jurisdiction of "all suits, complaints, or pleas whatever, without regard to any distinction between law and equity, where the matter in controversy shall be valued at or amount to \$500, exclusive of interest." Section 16 of the same article, in defining the jurisdiction of the county courts, provides "that they shall have exclusive original jurisdiction in all civil cases when the matter in controversy shall exceed \$200, and not exceed \$500, exclusive of interest; and concurrent jurisdiction with the district courts when the matter in controversy shall exceed \$500." *Held* that, the two sections being repugnant, the more general must yield to the more specific, and that, therefore, in accordance with the provision of section 16, the district courts did not have jurisdiction of suits for the recovery of money of the exact amount of \$500.—*Gulf, C. & S. F. Ry. Co. v. Rainbolt*, (Tex.) 356.

Adjournment in absence of judge.

2. The Arkansas constitution (article 7, § 21) provides that, where the regular judge of the circuit court fails to appear on the first day of the term, the practicing lawyers may meet at 10 A. M. on the second day, and elect a special judge, and thus preserve the term until the regular judge shall appear. The judge failed to appear on the first day of the November term, 1886, but did appear on the third day, and opened court, the practicing lawyers not having elected a special judge on the second day. A statute passed February 21, 1887, in order to validate these proceedings, provided that, (section 17.) "if any court shall not be held on the first day of the term, such court shall stand adjourned, from day to day, until the evening of the third day." Section 18: "If at that time the court shall not be opened, such court shall stand adjourned until the next regular term," etc. *Held*, that the act is constitutional, and the action of the judge in opening court on the third day was regular and proper.—*Neal v. Shinn*, (Ark.) 771.

COVENANT.

Against incumbrances.

1. Where A. conveys land to B., with a general covenant against incumbrances, and B., on the same day, executed to A. a deed of trust to secure part of the purchase price, in which B., in express terms, agrees to pay all taxes then existing against the land, the conveyance and the deed of trust are to be construed together, as parts of the same transaction, and, so construed, B. is bound to pay taxes upon the lands existing at the time of the conveyance, and cannot recover them from A. under the general covenant against incumbrances.—*Greer v. Redman*, (Mo.) 745.

Warranty.

2. A covenant of warranty runs with the land, and is available by a subsequent grantee, claiming title through a quitclaim or a sheriff's deed.—*Flanniken v. Neal*, (Tex.) 212.

Deficiency in land.

3. A deed was made, with general warranty, of a tract of land "granted to the heirs of M." The deed referred to the patent, which was for a designated number of acres, by metes and bounds. The artificial objects mentioned in the field-notes, however, were never found. The price agreed upon was at the rate of two dollars per acre. The purchaser paid half in cash, and gave a note for the balance. Before the land was located, other surveys were made on elder and superior patents which embraced a large quantity of the land re-

ferred to in the deed. The purchaser brought suit to cancel the outstanding note, and to recover the money paid, allowing credit for the portion of the land not in conflict with the elder titles. *Held*, that he was entitled to the relief sought.—*Doyle v. Hord*, (Tex.) 241.*

4. It is not necessary for such a purchaser to offer to surrender the deed made to him and also the land, before he can have relief. He is entitled to hold so much of the land as the deed gives title to, and be protected as to the part the title to which proves defective.—*Id.*

5. There is nothing under such circumstances to call for the application of the rule that an express warranty does not cover an open or known defect with reference to which the parties have contracted.—*Id.*

CRIMINAL PRACTICE.

See, also, *Arson; Assault and Battery; Burglary; Carrying Weapons; Disorderly House; Embezzlement; False Pretenses; Forgery; Gaming, 1; Habeas Corpus; Homicide; Indictment and Information; Intoxicating Liquors, 4-7; Jury; Larceny; Perjury; Rape; Robbery; Seduction; Threats and Threatening Letters; Trespass, 2.*

Arraignment.

1. When the accused voluntarily pleads to the indictment, without formal arraignment, and the court accepts the plea, he impliedly waives the right to hear the indictment read.—*Ransom v. State*, (Ark.) 658.

Continuance.

2. A continuance was applied for on account of the absence of two witnesses, one of whom was actually present on the trial, and the testimony of the other would, if admissible, have been merely cumulative. *Held* no error to deny the application.—*Smith v. Commonwealth*, (Ky.) 718.

3. A motion for a continuance by defendant on the ground of the absence of witnesses is properly denied when the affidavits fail to disclose the materiality and relevancy of the proposed testimony, or that due diligence was used.—*State v. Pagels*, (Mo.) 931.

4. The wrongful refusal of a continuance to secure absent evidence is cause for new trial, but a continuance cannot be held to have been wrongfully refused when part of the absent evidence was secured from another source, and the remainder was immaterial.—*Brown v. State*, (Tex.) 588.

Right to process for witnesses.

5. The right to compulsory process for witnesses does not extend to non-resident witnesses.—*State v. Pagels*, (Mo.) 931.

6. The Texas constitution (Bill of Rights, § 10) guarantees to any one accused of crime the right to have compulsory process for his witnesses, and of this right it is not in the power of the legislature to deprive him. In so far, therefore, as the act of the eighteenth legislature, "to provide for the payment of attached witnesses in felony cases," deprives a defendant of his right to an attachment for his absent witnesses, that act is unconstitutional and void.—*Homan v. State*, (Tex.) 575.

7. Rev. St. Mo. § 4081, provides that "courts of record, etc., shall have power, upon application of any party to a suit, etc., civil or criminal, pending in any court of record, etc., to issue a writ of *habeas corpus* for the purpose of bringing before such court, etc., any person who may be detained in prison within the state, for any cause except a sentence for felony, to be examined as a witness in such suit on behalf of the applicant." *Held*, that such section does not conflict with Const. 1875, art. 2, § 23, providing that "in all criminal prosecutions the accused shall have the right * * * to have process to compel the attendance of witnesses in his behalf," and a jailer is not guilty of contempt in refusing to produce such felon. *SHERWOOD, J.*, dissents.—*Ex parte Marmaduke*, (Mo.) 91.

8. Rev. St. Mo. § 1886, providing that when, in a criminal case, the adverse party will consent that the facts set out in the affidavit for continuance, as the facts which the party asking the continuance expects to prove by the absent witness, shall be taken as and for the testimony of such witness, the trial shall not be postponed, is void, as against an accused showing due diligence, since it violates his constitutional right to have process to compel the attendance of witnesses in his behalf. *NORTON, C. J.*, and *RAY, J.*, dissent.—*State v. Berkley*, (Mo.) 24.

Motion to quash.

9. Under Rev. St. Mo. § 1809, providing that the state, pending an indictment, may file a new indictment for the same offense, and that the first indictment shall be deemed to be suspended and shall be quashed, a motion to dismiss the second indictment on the ground that the first indictment is pending is properly denied, whether or not the first indictment has been quashed.—*State v. Vincent*, (Mo.) 430.

Plea of former jeopardy.

10. Neither jeopardy nor former acquittal are such pleas as can be interposed by an accused at a subsequent trial, upon a showing that his conviction on his former trial was set aside because of an illegal verdict.—*Robinson v. State*, (Tex.) 904.*

11. The award of a new trial, because of

an informal or illegal verdict, places the case in the same condition as if no trial had been had, and a plea of former jeopardy cannot be sustained.—Id.

12. The failure of the jury to pass upon the pleas of jeopardy and former acquittal, in the absence of any supporting proof, cannot operate to the prejudice of the accused, and therefore becomes immaterial.—Id.

Conduct of trial.

13. A trial judge has the right to interrogate a witness to supply some omitted and legitimate question, or to fully develop the facts bearing on the case.—State v. Pagels, (Mo.) 931.

14. Whether or not the official stenographer shall attend upon a trial in the St. Louis criminal court is discretionary with the trial judge. The action of said judge in that respect is not reviewable on appeal.—Id.

Evidence.

15. A defendant is not entitled to the exclusion from evidence of an answer prejudicial to his interests, if the same was elicited by him from the witness.—May v. State, (Tex.) 591.

16. A petition of defendant's bail to the governor for remission of the penalty incurred by defendant's failure to appear, is inadmissible to corroborate defendant's explanation of such failure; and such petition acquires no probative force from its filing with the secretary of state,—the remitter by the governor being recorded in the trial court, and offered to and refused by the defendant as evidence.—State v. Beauchleigh, (Mo.) 666.

Indorsement of names on indictment.

17. Witnesses other than those whose names are indorsed on the indictment may, by the express provision of Rev. St. Mo. § 1802, be examined by the state at the trial.—State v. Phelps, (Mo.) 119.

18. Under Rev. St. Mo. § 1802, the evidence of an officer is competent for the state on the trial of a criminal offense, although the name of such witness is not indorsed on the indictment.—State v. Pagels, (Mo.) 931.

Character of accused.

19. When a defendant has testified on his own behalf, testimony of other witnesses as to his general reputation is properly admitted.—State v. Beauchleigh, (Mo.) 666.

20. While the general rule prevails that the state cannot place the character of the accused in issue unless the latter shall have first attempted to establish his character by proof, yet, where the accused offers himself as a witness, his general char-

acter for truth and veracity may be impeached by the state, like that of any other witness.—McDonald v. Commonwealth, (Ky.) 687.

Acts and declarations of accused.

21. The acts and declarations of a defendant, after the commission of the crime, are competent evidence against himself, though not against his co-defendants.—State v. Beauchleigh, (Mo.) 666.

22. Evidence of the flight of the accused after the return of indictment against him, and of his effort to obtain false testimony to be used on his trial, is always admissible for the state, and especially when the inculpatory evidence is circumstantial.—Williams v. State, (Tex.) 64.

Hearsay.

23. A state's witness was permitted to testify that, after the commission of the offense, and in the absence of the accused, certain persons came to witness, and made overtures for a compromise, inquiring how much money it would take, etc. There was no proof these overtures were made by the authority or with the knowledge of the accused. *Held*, that the evidence was hearsay, and inadmissible, and was calculated to prejudice the accused.—Barbee v. State, (Tex.) 584.

Evidence on former trial.

24. The state may, in rebuttal, read in evidence the testimony of defendant given on a former trial for the same offense.—State v. Rose, (Mo.) 788.

25. Defendant offered in evidence a transcript containing the testimony of a witness on a former trial. *Held* properly rejected, in the absence of a showing that said witness was dead, or beyond the jurisdiction of the court.—Id.

Accomplices.

26. A detective who permits a swindle to be committed in his presence is not such a co-conspirator as to be incompetent to testify against the swindler on his trial for that offense.—State v. Beauchleigh, (Mo.) 666.

27. A joint defendant in an indictment for swindling, as to whom a *nolle prosequi* has been entered, is a competent witness against another of the joint defendants, his credibility only being affected.—Id.

28. In a trial for murder, a person jointly indicted with the defendant, but as to whom a *nolle prosequi* had been entered, is a competent witness against the defendant. NORRIS, C. J., dissenting.—State v. Chyo Goom, (Mo.) 712.

29. In a trial for murder it is error to permit one who is jointly indicted with the defendant and others to testify on behalf of the state, when the case against himself

is not disposed of by conviction, acquittal, or *nolle prosequi*, though he is not put upon his trial.—*State v. Chyo Chiagk*, (Mo.) 704.

30. Under Rev. St. Mo. 1879, § 1918, which provides that "no person shall be incompetent to testify as a witness in any criminal cause or prosecution by reason of being the person on trial or examination, * * * provided that no person on trial or examination * * * shall be required to testify, but any such person may, at the option of the defendant, testify in his behalf, or on behalf of a co-defendant," it is error to refuse to permit the co-defendants of the accused, jointly indicted with him, but not put on trial, to testify in his behalf. *NORTON, C. J.*, dissenting.—Id.

31. The testimony of an accomplice in a trial for murder in Missouri must be corroborated by other evidence in respect to the identity of the accused. Hence an instruction: "The testimony of an accomplice is admissible, yet, when not corroborated by the testimony of some person not implicated in the crime as to matters material to the issue, ought to be received with great caution by the jury,"—is erroneous, because it does not show that the words "matters material to the issue" include the identity of the accused. *NORTON, C. J.*, dissenting.—Id.

—Convicts.

32. The provision—Code Civil Proc. Ark. (Mansf. Dig. § 2659)—declaring persons convicted of larceny, and other enumerated crimes, incompetent to testify, unless by consent of the parties, does not apply to criminal trials. The disqualification is removed in such cases by act of March 24, 1885, enabling accused persons to testify at their own request. It is reversible error, therefore, to exclude the testimony of accused persons on the ground of infamy.—*Ransom v. State*, (Ark.) 658.

33. To sustain an objection that a witness for the state named R. W. had been hitherto convicted of grand larceny, defendant offered the record of the conviction of one R. B. Said W. testified that he had never been known by the name of B. Another witness testified that he was not certain that W. ever went by the name of B., but that witness had heard him called B. several times. *Held*, that the objection was properly overruled.—*State v. Rose*, (Mo.) 783.

Variance.

34. The prosecution being for the larceny of a "horse," the state was permitted to prove that the animal stolen was a mare. *Held* no variance.—*Davis v. State*, (Tex.) 590.

Instructions.

35. It is not necessary to instruct the jury that they are the sole judges of the

weight of the evidence and of the credibility of witnesses.—*Smith v. Commonwealth*, (Ky.) 798.

36. A jury in a felony case should always be instructed that they are the exclusive judges of the facts proved, and of the weight to be given to the testimony.—*Barbee v. State*, (Tex.) 584.

37. There is no error in refusing to give an instruction, the principle embraced in which has already been fully and more properly stated by the court of its own motion.—*State v. Partlow*, (Mo.) 14.

38. Defendant in a criminal case has the right to have an instruction given based on his own testimony, and that of his witnesses, although contradicted by the testimony of the prosecution.—Id.

39. In a trial for murder, an instruction, "to authorize an acquittal on the ground of reasonable doubt alone, such doubt should be a real, substantial, well-founded doubt, arising out of the evidence in the cause, and not a mere possibility that the defendant is innocent," *held* not ground for reversal.—*State v. Blunt*, (Mo.) 394.

Custody of jury.

40. In the absence of evidence to the contrary, it will be presumed that the principal sheriff, as well as his deputy, were in fact sworn, according to law, before taking charge of the jury, even though the fact of swearing may not appear affirmatively in the record.—*Smith v. Commonwealth*, (Ky.) 798.

41. A juror on a jury which was out, who was to be a witness in a subsequent case, was brought into the court-room and questioned about the former case, in order to determine whether the prosecuting attorney could go on with the latter case. *Held*, that such proceeding was not ground for setting aside the verdict in the former case.—*State v. Washburn*, (Mo.) 274.*

42. Rev. St. Mo. § 1910 provides that the jury may retire to deliberate on their verdict in charge of an officer, who, in felony cases, shall be sworn to keep them together in some private room, and not permit any person to speak or communicate with them, unless by order of court. *Held*, that the mere separation of a juror from his fellows, to answer a call of nature, after the jury have retired to consider their verdict, the juror being in charge of an officer, is not violative of this section; especially where it appears that the separation was by permission of court. Nor is it material that the officer procured a glass of beer for the juror while he was out, it not appearing that the juror's mind was affected thereby, or that intoxication resulted.—Id.

Verdict.

43. Trial courts have the power to reject an informal or illegal verdict, and such a

verdict cannot operate to acquit unless the jury's intention to acquit is apparent. Likewise, informal verdicts may be amended, under the direction of the court.—*Robinson v. State*, (Tex.) 904.

44. A verdict assessed a fine of \$10. The judgment recited that the fine assessed was five dollars. Such recital being clearly a clerical error, the judgment was reformed to conform to the verdict of the jury.—*Short v. State*, (Tex.) 908.

45. M. being on trial for grand larceny, and the jury offering to return a verdict of petit larceny, the judge, conceiving that the jury did not understand that their verdict was equal to an acquittal, refused to receive the same, charged them over again, and, on their failure to agree, discharged them. Thereafter, against defendant's motion for his discharge, he was tried and convicted of grand larceny for the same offense before another jury. *Held*, that the conviction was proper: that the court may refuse to receive a verdict which it is plain the jury do not intend to render; and while the more regular course would have been for the court to have explained to the jury the effect of the first verdict, and polled them, adhering to the verdict in case of acquiescence, and sending them back for further deliberation in case of disagreement, yet the course followed was substantially the same.—*McRae v. State*, (Ark.) 758.

Appeal.

46. The record on appeal must show affirmatively that the jury trying the case was sworn in the manner prescribed by the statute; otherwise a conviction cannot stand.—*Biles v. State*, (Tex.) 902.

47. The Kentucky court of appeals can reverse a conviction only for errors of law occurring at the trial, substantially prejudicing the rights of the appellant, and not because the evidence may, in the opinion of the court, fail to sustain the verdict.—*Smith v. Commonwealth*, (Ky.) 798.

— Rulings on evidence.

48. That the state was allowed, in the cross-examination of the defendant's wife, to elicit testimony not germane to her evidence in chief, is not reversible error, unless the objectionable testimony was calculated to prejudice the defendant's rights.—*Davis v. State*, (Tex.) 590.

49. Upon a murder trial, the fact of the killing being established both by the testimony and the admissions of the accused, *held* immaterial that dying declarations of deceased were admitted improperly in evidence, since such declarations only went to prove an admitted fact, to-wit, the homicide.—*State v. Pagels*, (Mo.) 931.

Appeal — Objections not raised below.

50. The appellate court will not consider objectionable remarks charged to have been made by the prosecuting attorney in his closing speech to the jury, when no exception thereto had been saved at the trial.—*State v. Hicks*, (Mo.) 742.

51. The attorney for the commonwealth in his argument denounced the defendant as a vagrant and scoundrel. *Held* that, while this was improper, yet as no objection was made at the time, and the trial court was not asked to stop him, the appellate court would not order a reversal.—*Smith v. Commonwealth*, (Ky.) 798.

52. The circuit attorney in his concluding remarks misstated the testimony of one of the witnesses, and thrice his attention was called to the impropriety. *Held*, without deciding whether the remarks would have been error had an exception been saved thereto, in the absence of such exception the appellate court would not rule on the point.—*State v. Pagels*, (Mo.) 931.

— Matters not apparent of record.

53. A motion to dismiss an indictment on the ground that another indictment was pending for the same cause must be made part of the record by a bill of exceptions, or the action of the lower court in overruling it will not be reviewed on appeal.—*State v. Vincent*, (Mo.) 430.

54. Charge of the court, in the absence of a statement of facts, can be considered on appeal only with reference to fundamental errors. If it conforms to the indictment, it must be presumed that it responded to the evidence.—*Wade v. State*, (Tex.) 896.

55. Instructions in a trial for murder which substantially state the law in the usual manner as to declarations made by the defendant, against and for himself, after the fatal act, and as to the credibility of witnesses and the weight of testimony, will not be reviewed when the brief of counsel does not attempt to point out error in the same. *SHERWOOD and BRACE, JJ.*, dissenting.—*State v. Hicks*, (Mo.) 742.

Custom and Usage.

See *Evidence*, 26, 27.

DAMAGES.

Land damages, see *Railroad Companies*, 7, 8.

Measure, breach of contract, see *Bonds*, 6-7; *Guardian and Ward*, 6.

— personal injuries, see *Appeal*, 28; *Negligence*, 23.

Punitive damages.

1. In an action against a railroad company to recover for the death of a fireman caused by an insufficient culvert, and consequent washing away of the track, where there was neither allegation nor proof of malicious, wanton, or gross negligence, or of any aggravating circumstances, *held*, that the jury were not at liberty to award vindictive or exemplary damages; and an instruction inviting them to consider any aggravating circumstances in the evidence was erroneous.—*Stoher v. St. Louis, I. M. & S. Ry. Co.*, (Mo.) 389.

2. In an action against a railroad company to recover for its willful negligence causing the death of plaintiff's intestate, the evidence showed that the deceased was a watchman in the company's employ; that his duty was to look after the cars in the station yard; that the accident happened at night, when an engine was moving south at a speed but little faster than one walking, and deceased was walking north on the track towards the engine; that the engine bell was ringing, and its head-light burning; that the deceased must have seen the engine, and have known that it would run over him if he did not leave the track; that the engineer did not see deceased, though he might have done so had he been on the lookout, as deceased was carrying a lighted lantern at the time. *Held*, that the evidence was not sufficient to charge the railroad with willful negligence in causing the death of the deceased, and thereby make it liable, under the statute, to his widow, for punitive damages.—*Lingenfelter v. Louisville & N. R. Co.*, (Ky.) 185.

Proximate and remote cause.

3. In an action for damages caused by the improper building of defendant's railway, whereby plaintiff's house was, September 15, 1888, greatly damaged and weakened by a flow of water, so that on April 30, 1884, the house, with furniture and stores therein, was destroyed by storm, the destruction of the house, furniture, and stores is not a proximate result of the injury, and there can be no recovery therefor, and the measure of damage is the cost of the repairs rendered necessary by the overflow, and the inconvenience the necessity for them caused.—*Galveston, H. & S. A. Ry. Co. v. Ware*, (Tex.) 18.

Measure of damages — Personal injuries.

4. In an action for personal injuries, an instruction, on the measure of damages, that it is the jury's duty to consider the plaintiff's physical condition before and since the injuries, the physical and mental pain suffered on account of the injuries during the same time, the amount of future

pain to arise therefrom, *together with all other circumstances shown in evidence, and considering all the circumstances aforesaid*, is proper.—*Sidekum v. Wabash, St. L. & P. Ry. Co.*, (Mo.) 701.

— Injury to land.

5. The true measure of damages, in case of permanent injury to the soil, is the difference between the value of the land immediately before the injury and its value immediately after.—*Fort Worth & D. C. Ry. Co. v. Hogsett*, (Tex.) 385.

6. In an action against a railroad company to recover damages for injuries to plaintiff's land alleged to have been caused by an embankment erected by the defendant, it is not error to instruct the jury that the measure of damages is "the difference between the value of the plaintiff's land before the construction of said embankment and the value of the same immediately after said damage, if any was caused by said defendant."—*Owens v. Missouri Pac. Ry. Co.*, (Tex.) 593.

Excessive damages.

7. A verdict of \$5,000 damages to a lady 57 years old, who has lost the free use of one of her arms, has had her shoulder and spine injured so as to produce great pain, and whose general health has been rendered bad, will not be set aside as excessive.—*Texas P. Ry. Co. v. Davidson*, (Tex.) 636.*

8. Deceased, a skillful locomotive engineer, was killed by the derailment of his engine caused by a collision with a bull on the track. The engine was in good order, and the accident was unavoidable, and not the fault of the company. A verdict of \$500 having been found by the jury in favor of deceased's widow, she procured it to be set aside on the ground of inadequacy of damages. On a new trial, the verdict was \$5,000, from the judgment entered upon which the company appealed. *Held*, that the judgment appealed from should be reversed, and judgment rendered for the amount of the first verdict, with interest from the date of its rendition, the company to pay costs accruing up to that date, and the plaintiff all subsequent costs.—*Chesapeake, O. & S. W. R. Co. v. Higgins*, (Tenn.) 47.

Pleading and proof.

9. A suitor is not entitled to recover a larger sum than he has claimed in his petition, although he might recover more if he had claimed it.—*Willis v. Whitesitt*, (Tex.) 253.

10. Where, in an action for obstruction of drainage of surface water, the petition avers the value of the crops at the time of their destruction in detail, it is sufficient in that regard, on general demurrer, although

some of the allegations of damage should properly have been stricken out.—*Sabine & E. T. Ry. Co. v. Hadnot*, (Tex.) 188.

11. The denial of defendant's motion for a physical examination of a female plaintiff by physicians, in an action against a railroad company for damages for personal injuries, is discretionary with the trial court.—*Sidekum v. Wabash, St. L. & P. Ry. Co.*, (Mo.) 701.

DEED.

See, also, *Executors and Administrators*, 21-29; *Fraud; Fraudulent Conveyances; Guardian and Ward*, 8; *Homestead*, 7, 8; *Mortgages; Public Lands; Vendor and Vendee*.

Cancellation, see *Quieting Title*, 8.

Contract to execute, see *Specific Performance*, 8-5.

Description, see *Boundaries; Homestead*, 8; *Surveys and Surveyors*.

Consideration, see *Evidence*, 8; *Trusts*, 1, 5.

Construction and effect, see *Dower*, 2; *Limitation of Actions*, 18.

Married women, see *Acknowledgment; Husband and Wife*, 6-9, 15.

Pending adverse possession, see *Champerly and Maintenance*.

Recording, see *Evidence*, 22.

Reformation, see *Equity*, 12; *Trusts*, 8.

Sheriff's deed, see *Execution*, 10-14.

Tax deeds, see *Taxation*, 11-18.

Description.

1. A. executed and delivered to B. an instrument in form a deed, by which he purported to convey to B. 320 acres of a certain tract of land, to be taken in a rectangular shape out of any of its four corners which B. should select. *Held*, that the instrument does not convey legal title. B. acquired under the instrument an equity to a tract of 320 acres to be designated by him, and, until designation was made, he had no title to any specific tract. Having failed to make such designation for 20 years, his right is barred by limitation.—*Dull v. Blum*, (Tex.) 489.

Recording.

2. A title bond executed in 1887, and proved for record in 1845, is sufficiently authenticated for registration by the affidavit of one witness.—*Wilson v. Simpson*, (Tex.) 839.

3. Under Pasch. Dig. Tex. art. 4988, which declares void as to creditors all conveyances of lands unless they are lodged with the clerk of the county court, to be recorded, an assignment of two land certificates, which operates as an equitable transfer of the lands located under them, is void as against a judgment creditor without actual notice, when such assignment was never recorded in the county in

which the lands are situated, but was filed in the general land-office.—*Lewis v. Johnson*, (Tex.) 644.

Reservations and restrictions.

4. The grant of a tract of land excepting parcels previously conveyed in said tract will not pass the minerals, timber, and mill-site on said parcels, where same were reserved by the grantor in the original conveyance of such parcels.—*Kincaid v. McGowan*, (Ky.) 802.

5. J. sold two lots to A., stipulating in the deed that no building other than a dwelling should be erected on the land. A. afterwards sold to a street-railway company without inserting in the deed the restriction as to building. *Held*, as the deed from J. to A. was of record, the railway company was charged with notice of the restriction, and could occupy no better position than A. did.—*Duncan v. Central Passenger R. Co.*, (Ky.) 228.

6. The evidence showed that the restriction in the deed to A. was inserted in pursuance of a plan on J.'s part to confine building on his entire tract to residences, but he afterwards sold or mortgaged the other lots without inserting any such restriction. *Held*, this constituted an abandonment or waiver of the plan, and he could not afterwards enforce the restriction in A.'s deed, or have an injunction to restrain the railway from erecting stables on the lots purchased of A.—*Id.*

Abandonment.

7. A. conveyed his interest in his mother's estate to his brother G., who, being administrator of the estate, brought suit to sell the land to pay off debts, and, as A. had sold his interest, he was *not made a party* to the suit. G. became the purchaser of the lots sold. Being improperly described in the commissioner's deed to him, he brought this suit to correct the mistake, and clear up his title, and *made A. a party*. *Held*, that this was no abandonment of the deed from A., or of his rights thereunder, so as to authorize A. to claim a share in his mother's estate.—*Johnson v. Johnson*, (Ky.) 2.

DEPOSITION.

Admissibility, see *Equity*, 6.

Witness present at trial.

In Texas, the deposition of a witness present at the trial cannot be read over the objection of the adverse party.—*McClure v. Heirs of Sheek*, (Tex.) 532.

DESCENT AND DISTRIBUTION.

See, also, *Adoption; Executors and Administrators; Will*.

Rights of heirs, see *Abatement and Reversion*, 2.

Rights of relict, see *Husband and Wife*, 11.

Leasehold estate.

Under Dig. Ark. § 2540, defining real estate as including every estate in lands, "except such as are determined or extinguished by the death of the intestate seized or possessed thereof in any manner other than by lease for years and estate for the life of another person," a lease for years is, as at common law, personal property for all purposes of descent and distribution; and this construction is not affected by other statutory provisions treating leases as real estate for certain purposes.—*Lenow v. Fones*, (Ark.) 56.

DISORDERLY HOUSE.

City ordinance.

A municipal corporation cannot punish, as a criminal offense, the return to the town or city of a prostitute. The mere presence within the town limits of an objectionable person is not a crime. *Buell v. State*, 45 Ark. 336, followed.—*Paralee v. State*, (Ark.) 654.

District and Prosecuting Attorney.

Suits by, see *States and State Officers*, 2.

DIVORCE.

Alimony.

1. Where a wife who had a young son and daughter by a former marriage, on going to her husband's home, found there two daughters of the husband, each the mother of a bastard child, and living, openly, the lives of lewd women; and where the husband also, by his lewd conduct and cruelty, made her home unendurable, and unfit for the occupancy of her children: *held*, on appeal from a judgment of divorce in the husband's favor, on the ground of abandonment, that she was justified in abandoning his home, and was entitled to alimony, notwithstanding the statute, literally construed, only gives alimony where the divorce is obtained by the wife, (Gen. St. Ky. c. 52, art. 3, § 6:) it being clear that the husband was in fault, and that the decree should have been in the wife's favor.—*Davis v. Davis*, (Ky.) 822.

Review on appeal.

2. A petition in a suit, the main object of which is to set aside a decree of divorce rendered against petitioner at a term of court prior to that at which said suit was brought, is prohibited by Rev. St. Mo. § 2185, which provides that "no petition for

review of any judgment for divorce rendered in any case arising under this chapter shall be allowed, any law or statute to the contrary notwithstanding." *Sherwood, C. J.*, dissenting.—*Salisbury v. Salisbury*, (Mo.) 717.

3. Although the court of appeals of Kentucky has not power to reverse a judgment for divorce, still, where, in the husband's action, the court below erroneously strikes out from the wife's answer a good and valid defense, and erroneously denies her leave to file an amended answer setting up a valid affirmative ground for divorce and alimony, and grants a divorce to the husband, denying alimony to the wife, the appellate court will reverse the judgment, and remand the case, in order that a proper provision for alimony be made to the wife.—*Davis v. Davis*, (Ky.) 822.

4. A decree depriving a married woman of her full share in the community property, obtained in her absence through willfully false evidence given and introduced by the husband on the trial of an action for divorce, will on the petition of the wife, be vacated by a court of equity after the term in which it was rendered, when it appears that the falsity of such evidence was not discovered until after the close of the term, and that the husband, by reason of the marital relation, had means of knowledge not accessible to the wife; and that she was thereby prevented from presenting all of her case at the time the decree was entered, without any want of diligence on the part or herself or counsel.—*McMurry v. McMurry*, (Tex.) 357.

DOWER.

Assignment, see *Judicial Sales*, 2.

In partnership realty.

1. The doctrine of equitable conversion of realty held for partnership purposes will not be carried further than the interests of the partners and the creditors of the partnership require; and, in the division of the land between the widow and heirs of a deceased partner, the property will resume its original character, and the widow be entitled to her dower or share in it as realty only.—*Lenow v. Fones*, (Ark.) 56.*

Deed of dowress.

2. The deed of a dowress, made before dower has been assigned to her, passes only a right or interest which may be enforced in equity, and not the legal title; except, only, where she releases her dower to the terre-tenant, or one in possession of the lands, or to whom she stands in privity of estate.—*Moore v. Harris*, (Mo.) 489.

Devises and jointures.

3. Under Gen. St. Ky. c. 52, art. 4, § 6, which provides that a conveyance or de-

wise of real or personal property by way of *jointure* may bar the wife's dower. "jointure" means such an estate as may be conveyed or devised to the wife in lieu of dower. It must be in satisfaction of dower, and must be, so intended to operate by the husband.—*Pepper v. Thomas*, (Ky.) 297.

4. The husband had assigned his property for the benefit of creditors, expressly reserving the wife's dower, and subsequently devised valuable property to her; *he d.*, that the devise was not to be taken as in lieu of the dower right; the purchaser at the judicial sale did not pay for the dower interest; and it is not to be presumed, from the subsequent devise, that the husband intended to take it away from his wife, and give it to the purchaser.—*Id.*

Recovery from purchaser.

5. Gen. St. Ky. c. 52, art. 4, § 9, provides that, where the land is to be recovered of a purchaser from the husband, the widow shall be endowed according to the value of the estate when received by the purchaser. *Held*, that the commissioner should have been directed to ascertain the value of the land when it was purchased by the present holder, and to deduct from such value the amount still due on it for purchase money, and then to allot the widow one third of the interest of her husband in the balance.—*Id.*

Drainage.

Assessment, see *Contract*, 1.

Obstruction, railroad dam, see *Surface Water*.

Duress.

What constitutes, see *Payment*.

EJECTMENT.

Defenses, see *Limitation of Actions*, 27-29; *Public Lands*, 5, 6.

— Adverse possession, see *Boundaries*, 9, 10; *Limitation of Actions*, 5-8.

Title to support, see, also, *Bankruptcy*; *Estoppel*, 1; *Executors and Administrators*, 30.

Title to support.

1. As against a railroad company which entered upon land, and laid its tracks under a deed of purchase purporting to convey the fee, but passing only the curtesy of the husband of the owner, the wife or her heirs are not estopped from bringing ejectment to recover the land after the death of the husband.—*Bradley v. Missouri Pac. Ry. Co.*, (Mo.) 427.*

2. Nor are they estopped from maintaining the action by the fact that the land sued for has been foreclosed under a mortgage

given by the original owner, and has passed into the hands of a corporation formed by the consolidation of several companies, and has been mortgaged for large sums of money to its entire value; it appearing that, while those proceedings were going on, the plaintiffs in ejectment were living in a distant state, and it not being shown that they encouraged or knew of what was being done.—*Id.*

Parties.

3. A personal representative is entitled to the possession of lands belonging to his decedent for the purposes of administration, and may maintain ejectment to recover such possession. But he is not concerned with title except in so far as it affects his possessory rights, and is not authorized to represent the heirs, or to stand for them, when the title is in question. So where, in ejectment by an administrator, defendant files a cross-bill, claiming that the decedent held the legal title in trust for him, and praying that the trust be declared, and his title be perfected, the heirs are necessary parties.—*Chowning v. Stanfield*, (Ark.) 276.

Pleading and proof.

4. In an action of ejectment, title to lands described in the pleadings only is to be considered in issue. Evidence of title to other lands is not admissible.—*Ramsey v. Henderson*, (Mo.) 408.

5. An executed parol agreement fixing a boundary line may be put in evidence, in an action of ejectment, as a defense under the general denial. It need not be specially pleaded.—*Jacobs v. Moseley*, (Mo.) 185.

Improvements.

6. The only way for a defendant in ejectment, in Missouri, to obtain the value of improvements made by him in good faith, is to proceed by petition as provided in Rev. St. 1879, §§ 2259, 2260, after judgment against him for possession.—*County of Jasper v. Mickey*, (Mo.) 424.

ELECTIONS.

See, also, *Schools and School-Districts*, 8, 9.

Invalidity, curative statute, see *Taxation*, 2, 3.

Local option, see *Intoxicating Liquors*, 1-3.

Manner of voting.

1. Two persons who were qualified voters appeared at the polls very early in the morning, while one of the judges of election was absent, and before the judge who was present and the clerk had been sworn. The two voters cast their votes with the understanding that when the absent judge arrived, and all had been sworn, they

would ratify the act. This the two judges and the clerk afterwards did. *Held*, that the votes were valid, and were properly counted.—*Anderson v. Winfree*, (Ky.) 351.

Ballots.

2. M., a republican, was an independent candidate for circuit judge, and his candidacy was indorsed by the Republican committee, and by a mass convention composed of persons of different parties, which met to nominate county officers. At the election ballots were used headed "Democratic State, Congressional, and Senatorial, and Independent Judicial and County, Ticket," and which contained the names of the regular Democratic nominees for state and senatorial offices, of M., and of the nominees of the mass convention. Another form of ballot used was identical with this one, except that it contained the words "Greenback-Labor" in place of "Democratic," and the names of the Greenback-Labor nominees in place of the Democratic nominees. *Held*, in a contest over M.'s election, that these ballots did not violate Rev. St. Mo. § 5493, providing that the caption of every ballot shall express its political character, and shall not be designed to mislead.—*Shields v. McGregor*, (Mo.) 266.

3. The facts herein stated being admitted, or appearing in evidence, *held*, that a counting of the ballots, under such circumstances, was useless, and a refusal of the court below to order it was not error.—*Id.*

4. A charge of illegality as to a number of ballots too small to affect the result, although not investigated by the court below, will not be ground for remanding the case for further proofs.—*Id.*

Contested cases.

5. Under Rev. St. Mo. § 5554, requiring all contested elections for judge of the circuit court to be heard and determined "before the circuit judge of an adjoining circuit," and section 5555, providing that the provisions of preceding sections, relating to the supreme court, "shall govern contests for the office of circuit judge, and proceedings therein in the circuit courts, and before the judges thereof," a circuit judge can hear such a contest when sitting as a court; and the contestant's petition, if presented to the court, must be presented, as prescribed by section 5550 in reference to supreme court contests, at the first term held in the circuit after the election.—*Higbee v. Ellison*, (Mo.) 258.

6. Under the provision of the Missouri statute requiring the petition to set forth the points on which the contestor will contest the election, and the facts which he will prove in support of such points, an allegation that the contestee received only 110 legal votes, while 784 were counted for

him, will be considered as referring to the preceding specifications of illegality.—*Shields v. McGregor*, (Mo.) 266.

Evidence.

7. Where an election, for sheriff, is contested on the ground of the suppression of the vote of one of the townships of the county, and the non-return of such township's vote to the county clerk, while it is true that the poll-books and tally-sheets made out and properly certified by the election officers, and the ballots themselves, are the primary evidence of the result of the election, still, if these are lost, destroyed, or stolen, secondary evidence is admissible.—*Dixon v. Orr*, (Ark.) 774.

8. In such a case the voters themselves may, if they choose, testify as to how they voted, but they cannot be compelled to do so, and thus violate the secrecy of the ballot.—*Id.*

9. So, also, the judges and clerks who canvass the vote may, in the absence of the returns and papers, testify as to the number of votes given to each person voted for; and even spectators who were present at the count, heard the result announced, and inspected the papers prepared and signed by the officers recording the result, are competent witnesses in such a case.—*Id.*

10. Where the election is held by ballot, and a ballot is cast which is so defective that it cannot be counted, an elector cannot testify that he cast that ballot, and intended it for a particular candidate.—*Anderson v. Winfree*, (Ky.) 351.

Bribery.

11. An offer by persons interested to build a court-house and jail in a certain town, and donate them to the county in case the county-seat be changed to said town, is not the offer of a bribe to the electors, and will not invalidate an election at which such change is made. Such a case is distinguishable from the offer of a candidate for public office to take less than the regular salary, if elected.—*Neal v. Shinn*, (Ark.) 771.

EMBEZZLEMENT.

See, also, *Indictment and Information*, 12, 18.

What may be embezzled.

"Property," as defined in article 732, Pen. Code Tex., includes any and every article commonly known and designated as personal property. "Money" is "property," within the meaning of article 219 of the Texas Code of Criminal Procedure, by which the venue of prosecutions for embezzlement is regulated.—*Brown v. State*, (Tex.) 4 S. W. 583.

EQUITY.

See, also, *Fraud; Fraudulent Conveyances; Injunction; Mortgages; Partition; Partnership; Specific Performance.*

Jurisdiction, see, also, *Husband and Wife*, 9. Laches, see *Banks and Banking*, 4; *Judgment*, 18.

Mistake, see, also, *Mortgages*, 3, 5. Pleading, original bill, see *Judgment*, 15. Reformation of contracts, see *Trusts*, 8. Settlement of conflicting liens, see *Mortgages*, 9, 10.

Jurisdiction.

1. A judgment creditor who seeks to subject to the payment of his claim land belonging to a decedent, which has been sold upon execution against the decedent's husband, (the husband having a life-estate therein, and having bought up the interest of the only surviving heir,) and which is occupied adversely by the husband's judgment creditor under said sale, cannot have relief in equity, as, in such case, the probate court has ample power in the premises.—*Turner v. Rogers*, (Ark.) 193.

Mistake.

2. Where land was described in a conveyance by metes and bounds, and by mutual mistake the description covered more than the grantor owned, but the consideration was sufficient to cover all the land described, *held*, that the grantor was entitled to relief for the mistake.—*Moore v. Hazelwood*, (Tex.) 215.*

Marshaling assets.

3. A third mortgagee asked to have the first mortgagee forced to subject a lot of land to his debt, on which the third mortgagee had no lien, but which would be to the prejudice of the fifth mortgagee, whose mortgage covered the lot in question. *Held*, that the rule that where one creditor has a mortgage lien on two funds, and another has a mortgage lien on one of those funds only, the former must exhaust the fund on which the latter has no lien, before he can attach the other fund, will not be applied where there are a large number of mortgage creditors, none of whom have exclusive liens on any particular fund, and the application of the rule as to marshaling securities must necessarily work injustice to some one of the creditors. In such a case the several mortgage debts should be paid *pro rata*, in the order of priority, out of the proceeds of the funds covered by each.—*Gilliam v. McCormack*, (Tenn.) 521.

4. The inchoate right to have a marshaling of securities is a mere equity, and not a lien, and depends upon the situation of things at the time the equitable action of the court is invoked. It may be disturbed

or defeated by subsequent alienation by the common debtor or mortgagor.—*Id.*

Issues for jury.

5. In a suit in equity, where complainant tenders a long list of issues to be submitted to a jury, and the court allows only part of them to be submitted, it will not be held error, where complainant's exceptions fail to specify in what particular the court erred in its action, and its attention was not called thereto at the time.—*Pearce v. Pettit*, (Tenn.) 526.

6. Where complainant in an equity cause took the depositions of the defendants, and issues were afterwards framed and tried before a jury, *held*, that it was not error for the court to refuse to allow complainant, after closing his evidence, and upon the cross-examination of defendants, who testified in their own behalf, to read their depositions "as evidence," or for any purpose other than for the purpose of contradicting them.—*Id.*

Parties.

7. In an action by the holder of one of two notes given for the purchase money of land to collect the note, and enforce a vendor's lien upon the land, the holder of the other note, against which an outstanding equity in favor of the vendee should rightly be charged, is properly made a party.—*Wallace v. Arnold*, (Ky.) 840.

Pleading.

8. In an action against a devisee of certain land the bill prayed for relief in the alternative either for the enforcement of a lien or a recovery of the land. The court, upon the idea that there was a misjoinder of actions, compelled plaintiff to elect whether she would proceed to recover the land, or to enforce the lien against it. *Held*, that this was erroneous, as there is no rule which forbids a party to ask for specific relief in the alternative.—*Peck's Ex'r v. Price*, (Ky.) 306.

Amendment.

9. When a complainant has declined to amend upon a demurrer to his bill being sustained, and the bill has then been dismissed, the suit is at an end, and no leave to amend can be granted.—*Bomar v. Parker*, (Tex.) 599.

Evidence.

10. If a bill in equity is one that, under the rules of chancery pleading, is not required to be sworn to, but does not waive defendants' oath, the sworn answer is admissible in evidence, but the bill not.—*Pearce v. Pettit*, (Tenn.) 526.

Practice.

11. When a demurrer to the bill has been sustained, and the court is about to dismiss the suit because the complainant declines

to amend, a motion for a dismissal without prejudice is then in order; but such a motion comes too late after the decree of absolute dismissal has been entered.—*Bomar v. Parker*, (Tex.) 599.

12. In Arkansas, pending ejectment, where the deed offered in evidence by defendant contains a misdescription of a part of the land, he cannot proceed by suit in equity against the plaintiff to have the deed reformed, but should have the issue thus raised as a defense to the ejectment suit transferred to the equity docket so that all matters in litigation could be settled in the one suit, and after rendition of judgment in the ejectment suit the bill should be dismissed under *Manuf. Dig. Ark. § 4982*, as such judgment could not be annulled or modified by a decree in equity.—*Nichols v. Shearon*, (Ark.) 167.

Decree.

13. Under the practice in Missouri, if sufficient facts are stated to entitle the party to relief, the conclusions of law the pleader may draw from them, and the particular relief he may ask, may, if necessary, be disregarded, and in such cases the court may grant any relief consistent with the case made by the plaintiff and embraced within the issues.—*Sharkey v. McDermott*, (Mo.) 107.

14. Although, as a general rule, a decree for the payment of money by complainant in an equity suit, is irregular, in the absence of a cross-bill claiming such decree, yet where, in a bill to prevent the foreclosure of a mortgage, the complainant prays for an account, and offers to pay what may be found to be justly due by him, he must abide the result of the account, and a decree against him is valid, though no cross-bill is filed.—*Polk v. Mitchell*, (Tenn.) 221.

Estates.

See *Deed; Descent and Distribution; Dower; Homestead; Husband and Wife; Mines and Mining; Partnership*, 1, 2; *Will*.

Life-tenancy and remainder, see *Quieting Title*, 1, 6.

ESTOPPEL.

By deed, see *Ejectment*, 1; *Evidence*, 8; *Guardian and Ward*, 4, 5; *Trusts*, 1.

By record, see, also, *Judgment*, 8-7.

In pais, see, also, *Ejectment*, 2; *Fraudulent Conveyances*, 7; *Public Lands*, 18, 19.

By record.

1. Where a county is not a party to a suit to foreclose the lien of the state for taxes on swamp land patented by it to the county, and by the county sold, with a reservation of the title until the purchase money is paid in full, a decree in that suit

works no estoppel, as against the county, to bring ejectment against the purchaser at the sale, where the price has not been paid in full. Neither the vendee of the county, nor the purchaser at the tax sale, takes, under such circumstances, more than a right to a deed.—*County of Jasper v. Mickey*, (Mo.) 424.

In pais—To dispute title.

2. Although an estoppel *in pais* operates upon existing rights only, yet where plaintiff had been in possession of land seven or eight years, under an agreement for it with his father, and while in possession agreed with an adjoining owner as to the boundary line, he has sufficient interest to estop him from afterwards repudiating the agreement when he becomes owner of the land.—*Jacobs v. Moseley*, (Mo.) 185.

3. A., who had made some improvements on land belonging to a railroad company, relinquished his right to purchase and his interest in the improvements, by verbal contract to B., promising B. not to purchase the land from the company. B. entered and built a house on the land. Subsequently, A. purchased the land from the company, took a deed therefor, and brought ejectment against B. for the land. The trial court held that A. and those claiming under him were estopped from setting up the title acquired from the railroad company, as against B., and that they held the same subject to a trust in B.'s favor. *Held* error; the evidence indicating that A. had no preferred right of purchase or claim to the lot at the time of the alleged relinquishment and promise, which could be transferred by him, or acquired by B., the title being at that time, with full power of disposal, in the railroad company.—*McLain v. Buliner*, (Ark.) 768.

4. In the absence of any fraudulent intent or concealment, mere advice to buy land, accompanied with a promise on the part of the speaker not to purchase it himself, is not sufficient to induce a prudent person to rely upon it to the extent of erecting valuable buildings upon the property, to which it was known that the adviser had no title. There is no equitable estoppel in such a case.—*Id.*

EVIDENCE.

See, also, *Criminal Practice*, 15-84; *Damages*, 11; *Deposition*; *Elections*, 7-10; *Equity*, 10; *Fraudulent Conveyances*, 5-7; *Negligence*, 8-11; *Seduction*; *Trespass*, 6, 7; *Trial*, 1, 2; *Trusts*, 2; *Will*, 5; *Witness*.

Best and secondary proof, see, also, *Elections*, 7-9; *Will*, 5.

Burden of proof, see *Contracts*, 6; *Gaming*, 7; *Husband and Wife*, 10; *Negligence*, 16; *Railroad Companies*, 19.

Competency and relevancy, see, also, *Exclusion*, 4, 5; *Equity*, 6, 10; *False Pretenses*, 8; *Fraud*, 4; *Fraudulent Conveyances*, 6; *Larceny*, 8-10, 12; *Negligence*, 9-11; *Perjury*, 2; *Public Lands*, 5, 6; *Railroad Companies*, 18; *Trespass*, 7.

Declarations, see, also, *Homicide*, 8-11; *Seclusion*, 4; *Vendor and Vendee*, 4.

Dying declarations, see *Homicide*, 12.

Documents, see, also, *Animals*; *Public Lands*, 12.

Judicial notice, foreign statute, see, also, *Appeal*, 19.

Opinion, see, also, *Intoxicating Liquors*, 4; *Larceny*, 10.

Parol, see, also, *Carriers*, 15, 16; *Elections*, 10; *Homestead*, 8.

Rebuttal, see *Fraud*, 4.

Variance, see, also, *Criminal Practice*, 34; *Indictment and Information*, 16, 17; *Pleading*, 5.

Weight and sufficiency, see, also, *Appeal*, 30-35; *Attachment*, 12; *Burglary*, 4; *False Pretenses*, 2; *Homestead*, 5; *Homicide*, 13-15, 40; *Intoxicating Liquors*, 6; *Larceny*, 11; *Nonsuit*; *Railroad Companies*, 8, 21; *Rape*; *Sale*, 1; *Specific Performance*, 2, 3; *Trusts*, 8; *Vendor and Vendee*, 8; *Will*, 2.

Judicial notice.

1. In Tennessee the trial court cannot take judicial notice of the statute law of another state. — *Bagwell v. McTigue*, (Tenn.) 46.*

Burden of proof.

2. Where one sues on a bond for title to land, the production of the bond, and proof of failure to execute the deed, makes out a *prima facie* case for plaintiff, and where defendant sets up as a defense that the consideration for the bond was plaintiff's undertaking to secure the assignment to defendant of a certain patent-right, but that the assignment tendered was not valid, because executed by an agent without authority, *held*, that the burden of proof, as to such failure of consideration and want of authority of the agent, was on defendant. — *Turner v. Lord*, (Mo.) 420.

Presumption.

3. At the trial of an action against an executrix upon a promissory note, the court admitted in evidence a judgment rendered against the plaintiff in favor of the defendant in her representative capacity, long after the note in issue was alleged to be due. *Held*, that the fact that the plaintiff, if he had had an existing demand against the defendant while her suit as executrix against him to recover debts alleged to be due her testator was pending, could have pleaded it in offset in that suit, and the fact that he did not do this, were circumstances tending to show that no such demand existed, and that the court did not err in ad-

mitting evidence of the judgment. — *Smith v. Caswell*, (Tex.) 843.

Best and secondary evidence.

4. It is error to admit the testimony of a witness as to the contents of a telegram, in the absence of proof that the telegram has been lost or destroyed. — *Prather v. Wilkins*, (Tex.) 252.

5. Oral proof of the contents of a written document cannot be received if the original document is accessible. The original document being in the court-room upon the trial, it is error to admit oral proof of its contents. — *Huff v. State*, (Tex.) 890.

6. In action by a passenger to recover damages for being ejected from a railroad train for refusal to give up his ticket when demanded, the best evidence of his right to be on the train is the ticket itself, and until the non-production of the ticket is explained parol evidence of what such ticket entitled him to cannot be admitted. — *Memphis & C. R. Co. v. Benson*, (Tenn.) 5.

7. To prove that a witness for the defense had heretofore been convicted of larceny before a justice of the peace, parol testimony, and a document which purported to be not an exemplification of the docket entries of the justice, but a report of convictions in his court, required to be filed by law in the clerk's office, were introduced. *Held*, error, as not being the best evidence available under the circumstances. — *Scott v. State*, (Ark.) 750.

Parol to vary writing.

8. A want of consideration cannot be shown, against the recital in a deed, for the purpose of defeating the operative words of the deed, as for the purpose of showing a resulting trust in the grantor. — *Bobb v. Bobb*, (Mo.) 511.

9. An execution creditor levied on the homestead. *Held*, in an action between him and the lessor, that parol evidence was admissible to prove that the lessor stipulated with the lessee, at the time of making the lease, that he should have the right to return to the land thereafter. As the suit was not between the lessor and lessee who were parties to the written instrument, the rule prohibiting parol evidence to contradict a writing does not apply. — *Gates v. Steele*, (Ark.) 18.

Hearsay.

10. In an action involving the title to certain cattle, plaintiff offered in evidence the declaration of a person who had charge of the cattle, to the effect that they belonged to S., through whom plaintiff claimed. *Held*, that the evidence was strictly hearsay, and properly excluded. — *McClure v. Heirs of Sheek*, (Tex.) 552.

11. In a contest involving the identity of the grantee in a land certificate, issued by a

board of land commissioners, where one of the claimants testifies that the certificate remained in his possession until the year 1867, when he sent it to a land agent in Austin, Texas, *held*, that a letter from the land agent acknowledging the receipt of the certificate is admissible as corroborative of such testimony.—*Baker v. Maloney*, (Tex.) 469.

Admissions.

13. Admissions in derogation of title to property, made by a former owner, who has parted with his interest, are not competent evidence against third parties.—*Wilson v. Simpson*, (Tex.) 839.

18. In an action between chattel mortgagees, each claiming a prior lien upon the mortgaged property, admissions of the mortgagor, made to one of the mortgagees, are not admissible to affect the rights of the other, who was not present when such admissions were made.—*Overstreet v. Manning*, (Tex.) 248.

Opinion.

14. The testimony of an administrator that certain papers of his intestate, which came into his possession, and were afterwards destroyed by fire, and whose contents he could not remember, in his opinion vested a good title to land in said intestate, *held* inadmissible, as a legal conclusion based on imperfect recollection.—*Shifflet v. Morelle*, (Tex.) 843.

15. The commissioner of the general land-office having knowledge of the manner in which the records of that office are kept, *held* a competent witness to explain what was the understood official meaning of certain entries in that office relating to a bounty certificate, and surveys under it. *Shinn v. Hicks*, (Tex.) 486.

—Proof of handwriting.

16. While expert testimony is competent to prove the genuineness of a signature to a promissory note, it is not giving undue prominence to such testimony for the court to instruct the jury that they could look to this evidence in determining the issue before them.—*Smith v. Caswell*, (Tex.) 848.

17. Where, in an action upon a promissory note, the signature to which is denied, the plaintiff has introduced certain papers, which contain genuine signatures of the alleged maker of the note, and has called witnesses to prove that they are genuine, it is competent for an expert called by the defendant to testify as to whether, in his opinion, the name on the note and that to the other instruments were written by the same person.—*Id.*

18. In an action upon a promissory note, the signature to which was denied, the court instructed the jury that, "as no witness has been called by the plaintiff to

testify directly to the execution of the note, you will turn your attention and inquiry strictly to the evidence as to whether the signature to this note has been shown to be genuine or not," and also that "the genuineness of a signature may be shown by the testimony of witnesses, who, though they did not see the person sign the instrument in question, may qualify themselves to testify their opinion of its genuineness in two ways: *First*, by showing that they have seen the person sign his name before, and the witness or witnesses are familiar with his signature, and can swear to the same as being genuine, or by experts," etc. *Held*, that it was sufficiently clear from the instructions that when the court said a signature could be proved by a witness who swore to its genuineness, it was meant that it might be established by his testimony as to his opinion upon the question, and that, by the clause "can swear to the same as being genuine," the court meant he could swear to his opinion of its genuineness.—*Id.*

19. In an action upon a promissory note a witness for the defendant testified that he showed the note in question, together with other papers, to a certain expert, (who was also a witness,) and that the latter picked the note out as a forgery. Counsel for the plaintiff at once objected to this evidence, and it was immediately ruled out by the court, who instructed the jury that they were not to consider it. *Held*, that the facts were not sufficient to warrant a setting aside of a verdict for the defendant, and the granting of a new trial. *Held*, also, that it was not error for the court not to instruct the jury in the written charge that they were to disregard the statements of the witness in this connection; the counsel for the plaintiff not having requested such instruction.—*Id.*

Documents—Public records.

20. A certificate from the superintendent of a poor-house in the form of a private letter that a person has been confined there as an insane patient, does not fall within Rev. St. Mo. § 2285, as evidence to prove the insanity of such person; such document being neither a record, nor exemplification of office books kept in any public office of the United States, nor of a sister state.—*State v. Pagels*, (Mo.) 931.

21. To render certified copies of the records of hospitals for the insane situated in another state admissible in evidence in Missouri, it is necessary, under Rev. St. Mo. § 2285, to show that such institutions are "public offices of a sister state."—*Id.*

22. In Texas, certified copies from county records of bonds for title and powers of attorney, relating to an unlocated right to land, such records being made in 1837,

were offered in evidence. *Held* that, under the registration laws then in force, being the act of December 20, 1886, §§ 35, 37, 40, (Pasch. Dig. arts. 4978, 4980,) the only instruments entitled to record were those affecting the title to real estate; and that such right to land, before location, being merely personal property, evidence of records affecting it was not admissible. — *Shifflet v. Morelle*, (Tex.) 848.

23. In such a case it makes no difference that the certified copy and illegal record were made by the clerk who took the acknowledgment, he and all the parties to the instrument being deceased; although, had he been living, he would have been a competent witness of the contents of the instrument. — *Id.*

Ancient documents.

24. Where a Texas bounty certificate is shown to be 46 years old, comes from the proper custody, and is free from suspicion on account of anything apparent on its face, it is admissible as an ancient document, and the party offering it need not first prove that certain words appearing therein, alleged by affidavit to have been fraudulently inserted, were in the certificate when signed by the secretary of war. — *Shinn v. Hicks*, (Tex.) 486.*

Documents—Books of account.

25. Plaintiff sued for balance of account. He offered in evidence an account taken from his books as a liquor and billiard saloon keeper, before the books were destroyed by fire. Some of the charges were, "To bar, for billiards and drinks;" some, "To billiards, games, and drinks,"—without further specification; others for cash, one for one bushel corn, and others for "balance." He testified that his books were correctly kept, and two persons who had served him for a short time stated that they made some of the entries, and that the articles embraced in the entries made by them were delivered to defendant. The other entries were in the handwriting of plaintiff, but there was no evidence that such entries were contemporaneous with the transactions to which they related, nor that the articles entered by him were ever delivered. *Held*, that the account was improperly admitted, (1) because, as to the items for "games," "corn, and money," the transactions are not a part of the business of a saloon keeper; (2) as to the other items, they fail to show with sufficient certainty what thing was made the basis of each charge; (3) the plaintiff's testimony alone was not sufficient to prove that his books were correctly kept. — *Baldrige v. Penland*, (Tex.) 566.

Relevancy.

26. In a suit by a cotton merchant at H. against a firm of buyers on a balance of

account, where the defense was set up that plaintiff had failed to report the classification at H. of the cotton consigned by defendants, as he had agreed, evidence of one of the defendants that his firm had had dealings with other firms in H. previous to their dealings with plaintiff, and that the former had always reported classifications immediately, or from four to five days after classification, *held* inadmissible. — *Watson v. Walker*, (Tex.) 576.

Rebuttal.

27. Where a party shows, as a circumstance tending to prove title to cattle in the person through whom he claims, that the property was assessed in the name of such person, opposing evidence is admissible of a custom of the country for persons having charge of cattle, belonging to other persons, to render the property for assessment in their own names. For this purpose it does not become material whether the custom is lawful or otherwise. — *McClure v. Heirs of Sheek*, (Tex.) 552.

Weight.

28. The report of a surveyor appointed by the court is entitled to no more weight, as evidence, than the testimony of a witness who knows the facts. — *McAnninch v. Freeman*, (Tex.) 869.

EXCEPTIONS, BILL OF.

Sufficiency, see, also, *Appeal*, 37; *Equity*, 5. When and how taken, see *Appeal*, 28.

Sufficiency.

1. A bill of exceptions, which assails generally the entire charge of the court, specifying no particular errors, is entitled to no consideration at the hands of the appellate court. — *Williams v. State*, (Tex.) 64.

2. A skeleton bill of exceptions, attached to the evidence, depositions, and exhibits, so arranged that the matter may be easily identified; the evidence of the witnesses sworn, in open court, written out and before the judge, actually attached to the skeleton bill, is in compliance with the Missouri practice. — *Crawford v. Spencer*, (Mo.) 718.

EXECUTION.

Exemptions, see, also, *Homestead*.
Form and validity, see *Attachment*, 10.
Sale, see, also, *Judgment*, 11.

Exemptions.

1. An action cannot be maintained against an officer for levying upon property claimed as exempt under Const. Ark. art. 9, § 2, exempting, in certain cases, \$500 worth of personal property to be selected

by the debtor, unless the debtor first proceeds, in the manner prescribed by Dig. Ark. § 8006, viz., by filing a schedule of all his property in the court from which the execution has issued, specifying what property he claims as exempt, and asking for a *superadeas*.—*Settles v. Bond*, (Ark.) 286.

2. A debtor who is a widower having two daughters, both of whom are married, and one of whom, with her husband and child, board with him, cannot be considered as having a family, within the meaning of Gen. St. Ky. c. 88, art. 18, § 6, which exempts certain personal property of a debtor who is a *bona fide* housekeeper with a family from sale under execution or attachment.—*Carter v. Adams*, (Ky.) 86.

Levy.

8. An execution defendant may waive a levy upon property to be sold thereunder, and an advertisement of the sale, and, in such case, the sale will pass title as effectually as if made in the usual way.—*Greer v. Wintersmith*, (Ky.) 282.

4. Where the sheriff has sold land under execution, the law presumes that, with the execution in his hands, he did his duty by levying it while it was still in full force, unless his return shows that he did not. The silence of his return upon that subject is not sufficient to rebut this presumption.—*Id.*

Liens — Priority — Rights of third parties.

5. Under the Tennessee statute, an execution may not be levied on a growing crop "until the fifteenth day of November, after such crop is mature." Where, therefore, in December, a levy was made under an execution tested as of the July preceding, *held*, that the rights of one who purchased the crop in September, before its maturity, were paramount to those of the execution creditor; the effect of the statute being to postpone the lien of the execution.—*Edwards v. Thompson*, (Tenn.) 918.

6. Under Mansf. Dig. Ark. § 8018, providing, with reference to partnership property levied on upon an execution against an individual partner, that "the execution creditor shall have a lien upon the property levied on such as is given by law to executions in the hands of the officer," the lien of such an execution will not attach until actual seizure of the property, although ordinarily, under Arkansas law, (Mansf. Dig. § 2991,) an execution is a lien upon personal property from the time it is delivered to the officer.—*Harris v. Phillips*, (Ark.) 196.

Sale.

7. Equity will not entertain a bill to enjoin an execution sale at the suit of the judgment debtor who lived 18 miles from

the county-seat, and who was not apprised of the levy until it was too late to give the five-days notice of filing his schedule and claim of exemptions required by Mansf. Dig. Ark. § 8006. Such a claimant has ample remedy at law, under section 2988, by petition to the circuit judge setting forth the circumstances.—*Driggs & Co.'s Bank v. Norwood*, (Ark.) 448.

8. Defendants purchased at execution sale the interest of L., one of six judgment debtors, in a portion of the land held by them in common, equal to one-sixth of the whole. Plaintiffs claimed through the other five. *Held*, that defendants were not entitled to have the entire portion so purchased by them allotted them as vendees of L., since this was not a case of sale by L. of the whole interest, which might create certain equities. The defendants bought only L.'s interest in the portion sold.—*Flanniken v. Neal*, (Tex.) 212.

9. A sale under special executions issued upon special judgments rendered upon special tax bills as provided by section 4 of the Kansas City charter, although the executions came to the hands of the sheriff on the first day of April, and were returnable to the next April term, which began on the second Monday in April, and nothing was done under them till the twenty-eighth day of April, when the property was advertised for sale, *held* not void, when the property to be sold for the payment of the judgments has been seized, set apart, and designated by the judgment of the court.—*Karnes v. Alexander*, (Mo.) 518.

Sheriff's deed.

10. A purchaser at an execution sale not only acquires by his purchase the lien created by virtue of the execution, but an inchoate or equitable title to the land, and the deed subsequently made to him by the sheriff relates back to the time of the creation of the lien by virtue of the execution, and perfects his title from that date.—*Greer v. Wintersmith*, (Ky.) 282.

11. In Missouri, a sheriff's deed reciting that he gave notice that certain property would be sold between the "lawful hours" of the day specified, and further reciting that the property was sold "between the hours of 9 o'clock in the forenoon and 5 o'clock in the afternoon of that day," shows that the sale was proper and valid as to time of day when made.—*Evans v. Robberson*, (Mo.) 941.

12. A sheriff's sale under Gen. St. 1866, p. 541, § 44, is so far presumed to be valid that if the deed should fail to state that the notice of sale was put up "at the front door of the court-house," nothing appearing to negative the presumption, it is presumed that this was done according to law; and under the same section, should it even ap-

pear that this ministerial act was omitted, such omission could not affect the title of an innocent purchaser, without notice, in a collateral proceeding.—*Id.*

18. Land was levied on under execution, and sold in 1863, but a deed was not made to the purchaser until 1877. In the mean time the land had been levied on again and sold under another execution, and a deed made to the purchaser in 1872. *Held*, that the purchaser at the sale in 1863 is entitled to hold the land as against the purchaser at the sale in 1872, although the latter obtained his deed first.—*Greer v. Winter-smith*, (Ky.) 232.

14. In 1858, Hensley and wife owned 10 acres of land in jointure. He, without the knowledge of his wife, sold the land to Starnes, and gave a bond to convey upon payment of the balance of the purchase money, which was subsequently paid, but the deed provided for was never executed. The wife, although at first expressing her dissatisfaction, accepted the purchase money. Starnes died in 1866, and in 1868 his administrator sold the land to plaintiff for payment of debts of the estate. In 1860 the land was sold by the sheriff under execution against Starnes, and bought in by Fisher. In 1867, Hensley and wife jointly conveyed the land by deed to Fisher's heirs. The evidence showed that Fisher bought the land at the sheriff's sale to befriend Starnes; that the sum paid by him at the sale was never refunded by Starnes; that Fisher never received a sheriff's deed; and that the deed from Hensley and wife to the heirs of Fisher was not given for any new consideration, but on the mutual understanding that they had already acquired the interest of Starnes through the sheriff's sale. The deed last mentioned was on record at the time plaintiff purchased at the administrator's sale, and he also had actual notice of it. *Held*, that the Fishers had a right to and did acquire by the deed all the title of Hensley and wife, and that the plaintiff took nothing under the sale.—*Atchison v. Henry*, (Mo.) 497.

EXECUTORS AND ADMINISTRATORS.

See, also, *Insolvency*; *Will*.

Actions by and against, see *Judgment*, 6; *Negligence*, 19, 20.

Assets, see *Husband and Wife*, 11.

Insolvent estates, see *Insolvency*.

Sales by order of courts, see, also, *Judgment*, 9.

Bond.

1. Rev. St. Tex. art. 1869, requiring the bond of an administrator to be double the

estimated value of the estate, means double the value estimated by the court, and it will be presumed, from the order of the court fixing the penalty of a bond, that it estimated the estate at half that amount.—*Ullman v. Verne*, (Tex.) 548.

Temporary administrator.

2. Under Texas probate law, a temporary administrator has only such powers as are expressly granted him by the county judge at the date of his appointment.—*Dull v. Drake*, (Tex.) 864.

Administrator de bonis non.

3. Under article 1959, Rev. St. Tex., which provides that "when the administrator of the estate not administered has been, or shall be hereafter, appointed, he shall succeed to all rights," etc., it is sufficient, in an application for letters as administrator *de bonis non*, merely to represent to the court that the estate is not fully administered, and the necessity for administration need not appear therein.—*Ullman v. Verne*, (Tex.) 548.

4. The omission in the oath by an administrator *de bonis non* of the statutory words, "died without leaving any lawful will," is unimportant; the question of a will being presumed to be set at rest by the oath of the former administrator.—*Id.*

Action by.

5. An administrator *de bonis non* has power to bring an action to recover the proceeds of a note which has been fraudulently disposed of by the first administrator; following *Todd v. Willis*, 1 S. W. 808.—*Id.*

6. In an action by an administrator *de bonis non* against appellants to recover the proceeds of a note belonging to the estate, which had been fraudulently transferred to them by a former administrator, in satisfaction of his personal debt, *Held*, that the defendants were liable, and that, though the bondsmen of the former administrator, and the makers of the note, who had paid it to the wrong party, might also be liable, they were not necessary parties, the action being in tort for the wrongful conversion of property.—*Id.*

7. In such a case the claim by the defendant that there should have been deducted from the judgment the share of the former administrator, as an heir of the deceased, can only be sustained upon pleading and proof that there would have been a surplus of the estate after payment of the debts.—*Id.*

Power of compromise.

8. Mansf. Dig. Ark. § 74, authorizing an administrator to compound debts due the estate in certain cases, on obtaining leave of the probate court, did not abrogate the administrator's common-law power to com-

round debts, but merely relieved him of the peril of being charged with the amount released if the estate was prejudiced through his negligence or bad faith, and of the burden of proving that he acted judiciously.—*Wilkes v. Black*, (Ark.) 766.

9. An acceptance by an administrator of a sum of money less than the debt due the estate from a third person, under an agreement to discharge the debtor, is a valid settlement by way of compromise of the debt.—*Id.*

Allowance of claims.

10. The provision of Gen. St. Ky. c. 89, art. 2, §§ 85, 89, that no demand against a decedent's estate shall be allowed or paid by the personal representative, unless it be verified, does not preclude, in a suit to open an executor's account, the allowance of an unverified demand allowed on the original settlement 13 years before; the executor and the testator having been partners, and the executor cognizant of the debt of the partnership, and having paid, in good faith, not only deceased's share, but his own; especially when the executor's deposition, stating the fact, is of record in the suit to open the account; such deposition being more satisfactory than an *ex parte* affidavit and properly operating, *nunc pro tunc*, as such affidavit. Nor does the rule apply, that a surviving partner cannot, by settling a claim against the partnership, bind the estate of the deceased partner.—*Terrell v. Rowland*, (Ky.) 826.

Settlement and accountings.

11. In a suit in equity to set aside a probate sale of land and subsequent conveyance to the administrator, no allowance can be made for expenditures made by the administrator as guardian of the plaintiffs, while his wards, for their nurture and education, as that is a matter exclusively within the jurisdiction of the probate court and does not affect the merits of the controversy in the equity court.—*Nichols v. Shearon*, (Ark.) 167.

12. An executor cannot properly make a final settlement of his accounts with the probate court while litigation is still pending against the estate; and, where he makes such a settlement for the purpose of thwarting the recovery of a judgment against the estate in a suit then pending, the settlement is in fraud of the court, and the pending suit may proceed and judgment be rendered against him notwithstanding the settlement.—*Smiley v. Smiley's Ex rs*, (Mo.) 448.

Interest.

13. Where there is a contest over the will, the executor should not be charged interest on moneys retained by him to meet the

expenses of the contest, when the amount so retained is reasonable and proper.—*Booker v. Armstrong*, (Mo.) 727.

14. When, by excluding from the executor's credits those unwarranted, it appears that there was no necessity for the executor's advancing money to the estate, he will not be allowed interest on the amount so advanced.—*Id.*

Compensation.

15. An executor who has been allowed the regular commissions, and a fair compensation for leasing property of the estate and similar work, is not entitled to a *per diem* for general services.—*Id.*

16. A partner is not, in the absence of an agreement, entitled to compensation for winding up the business of the firm after its dissolution; and, if he is executor of the estate of his deceased copartner, he cannot make such compensation a charge against the estate.—*Terrell v. Rowland*, (Ky.) 826.

Falsification.

17. Where, in a proceeding to surcharge and falsify an executor's account once settled, the averments of the pleadings are so general as to be open to objection, if no objection is made, and the parties go to trial, the appellate court will consider the accountant's right to certain credits relied on by him as made out by the pleadings.—*Id.*

Liabilities and misconduct.

18. An administrator has no right to pay debts which his decedent owed to wards for whom he had been guardian in his lifetime, without such debts being proved against the estate like other claims.—*Nichols v. Shearon*, (Ark.) 167.

19. Where it appears that the creditor of an estate had been dead for two years at the time the administrator alleged in his account that he paid his claim; that the claim had not been assigned; that the claimant had not been through bankruptcy; and that no letters had, prior to the alleged date of payment, been taken out on his estate,—the administrator, and the surety on his bond, are liable to the personal representatives of the claimant for the full amount, with interest, although the administrator had been allowed credit for the claim in the final settlement of the estate.—*Williamson v. Whittington*, (Ark.) 449.

20. Among the assets which came to the hands of B., executor of G., was a note secured by deed of trust. B. qualified in 1867, and at that date, and for 5 years thereafter, the land conveyed by the deed of trust was worth the full amount of the note, but it then depreciated 50 per cent.

B. paid taxes on the land for several years, but took no steps to foreclose, and suffered the note to be barred by limitation. The maker of the note was insolvent during the whole period, and the land was unoccupied. *Held*, in an accounting between the administrator of B. and the administrator *de bonis non*, etc., of G., that B. was negligent in failing to foreclose, and that his estate should account to the estate of G. for the loss that it had sustained by reason of the depreciation of the land; that he should not be allowed credit for the taxes paid on the land, because, if he had done his duty, and foreclosed the mortgage, it would not have been necessary to pay the taxes, and that his estate could not be held accountable for the whole of the note by reason of the fact that his delay had not, under the law of Missouri, barred the right to sell under the deed of trust.—Booker v. Armstrong, (Mo.) 727.

Sales under order of court.

21. In an action of trespass to try title, when plaintiff claims through an administrator's sale, an answer that alleges that the court had no power to order such sale, but states no fact showing the want of power or jurisdiction, is insufficient.—Capt v. Stubbs, (Tex.) 467.

22. Inadequacy of price will not render an administrator's sale in Texas void, but only voidable, and it will remain good as to all parties until set aside, at the instance of some one or more of the heirs or creditors, in a direct proceeding instituted for that purpose.—*Id.**

23. There was no formal entry of approval by the probate court, but the deed acknowledged before the probate court contained a recital of approval. The administrator in his settlement charged himself with the purchase money, and the judge's minutes contained this entry: "Report of sale of real estate of W. C. approved. Deed ordered, and deed acknowledged." *Held*, that it was sufficient if the approval could be thus gathered from the record.—Camden v. Plain, (Mo.) 86.

24. A homestead is exempt from sale for the payment of debts of a deceased person during the minority of his children; and when an administrator, with full knowledge of its character, procures a sale of such property by the probate court, buys the land from the purchaser at such sale, and makes valuable improvements on it, a court of equity may, after the majority of the children, set aside such sale and conveyance as void, subrogate the administrator to the rights of creditors whose claims he has paid, charge him with the rents and profits of the land from the time of sale, and allow him for the value of his improvements.—Nichols v. Shearon, (Ark.) 167.

Sales under order of court — Presumptions.

25. In Missouri, an administrator's deed properly executed and acknowledged, which contains the recitals required by law, is evidence of the facts therein stated.—Camden v. Plain, (Mo.) 86.

26. The purchaser at the sale having given his note, which the administrator returned on his inventory, and which was afterwards paid, after the lapse of 25 years, the records being destroyed, it will be presumed that the court and its officers did their duty.—White v. Jones, (Tex.) 161.

27. An administrator's sale of land, in Texas, will not be held void on the ground that the order of confirmation does not show that proof was heard upon the question of the sufficiency of the price for which the land sold when the order was made, as the statute does not require that the minutes of the court shall show affirmatively that this was done, and it is to be presumed that the court did its duty in that respect.—Capt v. Stubbs, (Tex.) 467.

28. In Missouri, the proceedings of probate courts in matters within their jurisdiction will be presumed to be regular, and cannot be collaterally attacked; and, where the files and papers belonging to an estate have been lost, it will be presumed that the appointment of an administrator *de bonis non*, the order of sale of real estate, and everything connected therewith, were regularly made and in proper form.—Rowden v. Brown, (Mo.) 129.

29. Though the recitals in an administrator's deed are not ordinarily sufficient to show an order for the sale of the land of the estate; yet in a case where the records of the probate court and the papers in the proceedings were destroyed, the administrator was dead, and 25 years had elapsed since the sale, it will be presumed that the orders were made as the deed set forth, from the failure of the heirs to set up their claim against the deed for so long a time.—White v. Jones, (Tex.) 161.

Foreign administration.

30. A personal representative, invested, by the provisions of his testator's will, with title to land in Kentucky, may maintain ejectment to recover such lands, although he may have been appointed in another state; it appearing in evidence that the will of the testator was admitted to probate in that state in the county of his residence, and there proved so as to pass the title to land in accordance with the laws of Kentucky.—Chapman v. Headley's Ex'x, (Ky.) 189.

Factors and Brokers.

Option deals, see *Gaming*, 2-9.

FALSE IMPRISONMENT.

Instructions.

Where, in an action against a city marshal for false imprisonment, it was proved for the defense that the marshal arrested one B., who was drunk; that his companion, C., attempted to release him, and, on defendant's refusal of his bail, attempted force, and was locked up,—a charge asked that if B. was drunk, and disturbing the peace, it was defendant's duty to lock him up without warrant, and that C. had no right to compel his release on bail while so drunk; and that if, while B. was being conveyed to the calaboose, C. attempted to release him by force, then defendant had a right to arrest and imprison C., *held* improperly refused. — *Moseley v. State*, (Tex.) 907.

FALSE PRETENSES.

What constitutes, see, also, *Larceny*, 2.

What constitutes the crime.

1. In order to sustain a prosecution for theft when the taking was originally lawful, (Pen. Code Tex. art. 727,) the proof must show either that the taker obtained the lawful possession of the property by some false pretext, which induced or deceived the owner to surrender the possession of the property to him, or that, at the time he obtained the possession of the property with the consent of the owner, he intended to deprive the owner of the value of the same, and to appropriate it to his own use. — *Porter v. State*, (Tex.) 889.

2. Evidence showing that defendant induced the prosecuting witness to enter a gambling-room with him, and to lend him money to play with, on his promise and that of the other players that the money should be returned to him at the close of the game, and, the game being finished, the lights were put out, and defendant refused to return the money, *held* sufficient to sustain a conviction of theft, under Pen. Code Tex. art. 727, relating to the obtaining of property by false pretenses. — *Id.*

Evidence—Intent.

3. In a trial for swindling on a train, where it was shown that defendant's colleagues had got off, after the commission of the crime, but defendant remained with their victim, the evidence of one of such colleagues, who had just testified, without objection, as to the gang's operations for 10 days previous to and up to the day of crime, describing their procedure in their prior operations, is admissible to prove defendant's intent in so remaining. — *State v. Beaucleigh*, (Mo.) 66.

Instructions.

4. An instruction under Pen. Code Tex. art. 729, relating to false pretenses, in substance that if defendant, with three others, conspired to fraudulently obtain money belonging to the prosecuting witness, and in pursuance of such conspiracy they obtained such money for an alleged temporary use, and that he, relying on such representations, delivered it to them, and that they appropriated it without his consent and refused to return it as agreed, defendant was guilty of the crime of theft, *held* correct. — *Porter v. State*, (Tex.) 889.

5. In a trial for swindling, an instruction asked, that the jury disregard all evidence tending to prove a conspiracy between the parties to swindle the public generally or any individual, *held* properly refused. — *State v. Beaucleigh*, (Mo.) 666.

Punishment.

6. An indictment for swindling being strictly drawn under Rev. St. Mo. 1879, § 1561, and the proof fully supporting the same, *held*, that an instruction to the jury to assess a punishment under said section, excluding from their consideration sections 1563, 1564, relating to similar offenses, but prescribing different penalties, was correct. — *Id.*

7. In a trial for swindling, an instruction asked, that, if the jury found the offense charged was committed on a railroad train, they should assess the punishment as for a misdemeanor under Rev. St. Mo. 1879, § 1564, relating to confidence games on trains, the indictment being drawn, and the proof warranting a conviction of felony, under section 1561, *held* properly refused. — *Id.*

8. Gen. St. Ky. c. 29, art. 18, § 2, provided: "If any person, by any false pretense, statement, or token, with intention to commit a fraud, obtain from another money, property, or other thing which may be the subject of *larceny*, or if he obtains, by any false pretense, statement, or token, with like intention, the signature of another to a writing, the false making whereof would be forgery, he shall be confined in the penitentiary not less than one nor more than five years." Under section 1, art. 1, c. 29, all offenses are either felonies or misdemeanors; felonies being offenses punishable with death, or imprisonment in the penitentiary. Under section 1, art. 11, c. 29, the larceny of goods and chattels of the value of *ten dollars* or more constituted grand larceny, punishable as a felony; but, if worth *less than ten dollars*, petit larceny, punishable as a misdemeanor. Appellant was indicted, under the statute above cited, for obtaining *eight* dollars by false pretenses, and, pleading guilty, was sentenced to one year in the

penitentiary. *Held*, sustaining the conviction, that the word "larceny," as used in the statute, did not necessarily mean *grand larceny*, and that the legislature did not intend that said word should be so restricted. —*Jackson v. Commonwealth*, (Ky.) 685.

Ferry.

Exclusive privilege, see *Bridges*, 1, 2.

FORGERY.

Indictment.

1. An indictment of a defendant under Rev. St. Mo. § 1888, for having in his possession a forged check knowing it to be forged, with intent to pass it as true and genuine, that describes the instrument as follows:

"No. 56,094 UNION NATIONAL BANK,

"NEW ORLEANS, February 23, 1884.

"*The National Park Bank, New York:*
Pay to the order of George Vincent, sixty-five hundred dollars, (\$6,500.)

"S. CHALARON, Cashier."

—Is sufficient, as such an instrument is in effect a check, although purporting to be drawn by one bank upon another.—*State v. Vincent*, (Mo.) 430.

2. An indictment under Rev. St. Mo. § 1888, charging defendant with having in his possession a forged check with intent to pass it as true and genuine, knowing it to be false, need not allege that he indorsed the check, which is described as payable to his order.—*Id.*

FRAUD.

See, also, *Assignment for Benefit of Creditors*, 9, 10; *Carriers*, 14-16; *Executors and Administrators*, 12; *Fraudulent Conveyances*; *Garnishment*, 3; *Guardian and Ward*, 6; *Pardon*, 8; *Rape*; *Robbery*, 4; *Sale*, 3, 5; *Will*, 2.

Fiduciary and confidential relations.

1. In an action to set aside a deed for fraud, evidence showed that the plaintiff's father had purchased the land at a tax sale, and had disposed of the entire tract by will. The defendant represented to plaintiff that the land had been bought by his father in trust for himself and four others, of whom defendant was one, and that plaintiff was only entitled to one-fifth interest in the land. He procured the deed to the land within a few days after the plaintiff came of age, for a consideration of \$400, the lands being worth \$2,000 or \$2,500. It appeared that neither the defendant nor any of the other alleged beneficiaries had attempted to prove the trust during the father's life-time, and had, after his death, acquiesced in his title. The de-

fendant was plaintiff's uncle, and had stood *in loco parentis* to the plaintiff for many years. *Held* that, in view of the relationship of the parties, the deed should be set aside.—*Clutter v. Clutter*, (Ky.) 182.*

2. A son-in-law obtained from his mother-in-law a conveyance to a trustee of all her property in consideration of certain life annuities; said property at her death to be turned over to him, and, in case of his death in the mean time, giving him an unconditional power of appointment by will. It appears that such property was represented to her by her son-in-law as worth \$50,000, when it was in fact worth more than double that sum; that said son-in-law had exclusive management and control of the entire estate from the time of his marriage into the family to the date of the deed; that grantor had implicit confidence in him; that though the deed stated that a settlement and accounting had been made to grantor, such in fact had not been made; and that the deed operated to disinherit a son of the grantor. *Held*, the deed should be set aside as made upon a grossly inadequate consideration, and as obtained by the undue influence and fraud of the beneficiary.—*McHarry v. Irvin's Ex'rs*, (Ky.) 800.*

3. Such a conveyance is a deed of bargain and sale, and is not such a family settlement, nor is the relationship of the parties such, as to overcome the presumption of undue influence arising from the agency of the beneficiary.—*Id.*

Evidence.

4. In an action to set aside a conveyance for fraud and undue influence, where testimony has been given tending to show that a deed was executed by the grantor willingly, and with full knowledge of its contents, the testimony of the grantor that she was ignorant of its contents, but signed it at the instance of her son-in-law, the beneficiary thereunder, because she had perfect confidence in him, is competent.—*Id.*

FRAUDS, STATUTE OF.

Parol settling boundary, see *Boundaries*, 8.

Sufficiency of memorandum.

1. Letters from a vendor to his agent may constitute the "memorandum or note" of agreement to convey land which the statute of frauds requires, and if, from such letters, the terms and proposal of sale, the description of the property, and the affirmation of a sale made by the agent can be gathered, the vendee may compel specific performance on the strength of his oral acceptance of the terms offered.—*Lee v. Cherry*, (Tenn.) 835.* Digitized by Google

Part performance.

2. A parol contract by an attorney to remove a cloud from the title to lands, and receive, when the title is cleared, one-half of the land as his compensation, is within the Texas statute of frauds; and a conveyance of the land in pursuance thereof cannot be enforced, though a recovery of the value of such services, and of the money expended by the attorney in the suit to clear the title, may be had.—*Sprague v. Haines*, (Tex.) 871.*

3. A man and his wife agreed to adopt a child, and leave her their property at their death. They died without formally adopting her. In an action against the heirs for specific performance, *held* that, although such an agreement was not to be performed within a year, and was not in writing, the statute of frauds is no defense to an action upon it; it appearing that it had been partly performed during the lifetime of the parties by the child living with the man and wife, obeying them as parents, and paying them her wages, and by their supporting the child.—*Sharkey v. McDermott*, (Mo.) 107.

Pleading—Presumption.

4. In an action upon a contract or agreement, in which it is not alleged whether the contract or agreement was in writing, it is presumed to have been in writing.—*Id.*

FRAUDULENT CONVEYANCES.

See, also, *Assignment for Benefit of Creditors*, 11, 12; *Deed*, 3; *Fraud*.

What amounts to.

1. The fact that a creditor may have threatened to attach a firm's property in order to force an assignment, does not invalidate such assignment to him of assets to pay his claim.—*Johnson v. Robinson*, (Tex.) 625.

2. Where a transfer of property is made for a valuable consideration, it will not be presumed to be fraudulent as to creditors, from the mere fact that the grantor was indebted to another person at the time.—*Willis v. Whitsitt*, (Tex.) 253.

3. If a creditor, with the knowledge of his debtor's insolvency, takes the latter's stock in trade in satisfaction of his debt, and pays a sum of money in addition, the transaction will be fraudulent and void as to other creditors, in case the stock was worth more than the amount of the debt, if the design of the transaction was not only to pay the debt, but to protect the residue of the stock against attachment; but not otherwise.—*Oppenheimer v. Halff*, (Tex.) 563.*

4. A bank made an assignment for the benefit of its creditors, February 16, 1882.

On March 2, 1880, it had conveyed a tract of land to W., one of its directors, and on February 11, 1883, another tract. The consideration of both of the deeds was the surrender to the bank by W. of certain shares of its capital stock held by him, the market value of which was more than the fair price of the land. At the time of these transfers the bank was insolvent, and W. had heard rumors as to its unsoundness. W. had held his office as director since 1874. *Held*, that the transfers were void, as in fraud of the creditors of the bank, the position occupied by W. being that of a trustee, and the rumors about the bank's condition which had come to him being sufficient to put him on inquiry.—*Roan v. Winn*, (Mo.) 786.*

Evidence.

5. Upon an issue of fraudulent transfer the question whether a certain appropriation by the grantor A. of a portion of the consideration received for the sale was legal or not, cannot affect the grantee, the latter not being shown to have had any connection with it.—*McClure v. Heirs of Sheek*, (Tex.) 552.

6. Where a creditor bought out his debtor's stock in trade for his debt and something more, and the transfer was afterwards attacked as fraudulent by other creditors, *held*, that the purchasing creditor could not show the price which he got for the goods upon a sale made by him after the other creditors had attached them.—*Oppenheimer v. Halff*, (Tex.) 563.

7. An insolvent, in destitute circumstances, conveyed certain real estate in trust for his wife and children, and subsequently sold the same to his brother, who took possession of and used the land as his own for more than 27 years, when an action was instituted by the heirs of both the trustee and vendor to recover the same. *Held*, assuming that the brother knew of the trust, and disregarding the statute of limitations, that the circumstances of the insolvent, his failure and that of the *cestui que trust* to take or lay claim to the land, and the fact that the brother treated it in every way as his own for so long a time, raised a conclusive presumption that all parties regarded the trust deed as in fraud of creditors and inoperative, and that the sale to the brother was therefore valid.—*Bates v. Bates*, (Ky.) 812.

Action to set aside.

8. A conveyance executed by a debtor in fraud of his creditors can be set aside only at the instance of a creditor who has obtained a return of *nulla bona* on an execution or an attachment upon the property conveyed.—*Turner v. Short*, (Ky.) 347.

9. Where the specific property conveyed, in fraud of creditors, to one participating

in the fraud, cannot be recovered, a decree for its value may be rendered: overruling *dictum* in *Tubb v. Williams*, 7 Humph. 387. —*Solinsky v. Lincoln Sav. Bank*, (Tenn.) 886.

10. There being no fraud in fact, a partnership creditor cannot impeach, as fraudulent in law, a conveyance of partnership property in trust to secure an individual debt of the partners.—*Carver Gin & Machine Co. v. Bannon*, (Tenn.) 881.*

Instructions.

11. Judgment creditors of A. levied upon certain cattle standing in the name of B. The issue tendered by plaintiffs presented two phases: (1) That the bill of sale was made to B. for A.'s benefit, and that, while the former was the ostensible owner, the latter was the actual owner; (2) that, though it was intended to convey the absolute title to B., yet the transfer was made in fraud of the creditors of A. *Held*, that an instruction that, in order to subject the property levied upon to plaintiff's debt, the jury "must believe from the evidence that A. was the actual owner of the property," evidently applied only to the first phase of the issue, and could not have misled the jury as to the question of fraud.—*McClure v. Heirs of Sheek*, (Tex.) 552.*

12. Upon an issue of fraudulent transfer, the court charged that if B. "bought the cattle with intent to hinder, delay, or defraud the creditors" of A., the jury should find for the plaintiffs, and refused to charge that "if A. sold the cattle to B. with intent to defraud his creditors, and the latter knew the intent, or could have known it by reasonable inquiry, then the jury should find for plaintiffs." *Held*, that the latter clause was unnecessary, because, from the circumstances of the case, B. must have known of the fraudulent intent, if any in fact existed. *Held, further*, that even if such refusal were error, it did not prejudice plaintiffs; an examination of the evidence showing that there was no fraudulent intent.—*Id.*

13. Upon an issue of fraudulent transfer of a stock of goods, an instruction evidently intended to prevent the jury from estimating the goods at their retail price in determining whether the transfer was for an adequate consideration is not erroneous, although there is no explicit evidence of what was the market value of the goods.—*Willis v. Whitsitt*, (Tex.) 253.

GAMING.

Gambling contracts, see *Corporations*, 6; *Negotiable Instruments*, 6, 7.

Recovery of money lost, see *Limitation of Actions*, 11, 17.

Indictment.

1. Indictment charged that appellant bet and wagered at "a certain faro-bank." *Held* sufficient, inasmuch as faro is one of the games specially denounced by statute.—*Short v. State*, (Tex.) 908.

Option deals.

2. A contract for the delivery of goods in the future is valid, though there is an option as to the time of delivery; but if the real purpose of both parties is merely to speculate in the rise or fall of prices, and to adjust the differences between the contract and market prices, and no goods are to be delivered, such transaction becomes a wager and void.—*Crawford v. Spencer*, (Mo.) 713.*

3. Contracts purporting on their face to be contracts of purchase or sale of grain, stock, or other property, to be delivered at a future day, but under which neither of the parties intends to buy or sell real products, but both intend at the time of making the contracts to close them by a settlement of differences merely, are gambling or wagering contracts, and are illegal and void.—*Dunn v. Bell*, (Tenn.) 41.*

4. The fact that wagering contracts, such as dealings in "futures," are made with reference to markets in foreign cities, and beyond the control of the parties to such wagers, does not affect the validity or invalidity of such contracts.—*Id.*

5. Where several confederate together for an unlawful purpose, *e. g.*, stock gambling or dealing in "futures," the acts of one selected to transact the unlawful business are the acts of all, and each confederate is severally and jointly liable therefor.—*Id.*

6. The effect of the Tennessee act of 1888, c. 251, was to declare the dealing in futures, where *either* party intended a mere speculation on the rise and fall of prices, gaming; but a contract for the dealing in futures, entered into by parties *neither* of whom intended actual sale or delivery, was gambling at common law.—*McGrew v. City Produce Exchange*, (Tenn.) 83.*

Evidence.

7. The burden of showing that a contract between speculating brokers and their customer, apparently valid on its face, is in reality a gambling contract, and invalid, rests upon the party asserting the invalidity.—*Crawford v. Spencer*, (Mo.) 713.

Right of recovery.

8. The provision of New Code Tenn. § 2440, that "any person who has paid any money or delivered anything of value, lost upon any game or wager, may recover," etc., is not to be limited to wagers made upon games, but covers all forms of wagers, including wagers upon the rise and

fall of grain, etc.—*McGrew v. City Produce Exchange*, (Tenn.) 88.

9. It is no defense to an action to recover deposits for dealing in futures that the money was not paid to the defendants, if the evidence shows that it was paid to their agent in another city.—*Id.*

GARNISHMENT.

Of pledgee.

1. A., a cotton buyer for eastern purchasers, agreed with E. that the latter should cash his (A.'s) drafts, drawn on the eastern purchasers, and hold the cotton purchased as security. A judgment creditor of A. garnished E. *Held*, that the most that the creditor could claim from E. was the excess of the proceeds of the sale of the cotton over and above the amount paid on account of A.'s drafts.—*Mensing v. Engelke*, (Tex.) 202.

2. Under contract of pledge of cotton, the pledgee had a lien on the cotton for advancements made by him, and the right to ship it east for sale subject to his lien; and the fact that the cotton might have sold for a higher price in the local (Texas) market than it realized in the east does not render the pledgee liable to the garnishing creditor for the difference.—*Id.*

3. A pledgee of cotton failed to preserve the weights and grades of cotton shipped by him, by which he might have shown that it was sold for a fair price, and that none of its proceeds belonged to his pledgee or on a settlement. In garnishment against the pledgee by a creditor of the pledgee, *Held*, that such failure was no evidence of an intention to assist the pledgee to defraud his creditors.—*Id.*

Costs—Attorney's fees.

4. Where a contract, pledging cotton for advancements, made attorney's fees incurred by the pledgee, on account of the transaction, a charge against the cotton, no objection could be made to the payment by the pledgee of \$100 to his attorney for defending him in an action of garnishment by a creditor of the pledgee.—*Id.*

5. Under Rev. St. Tex. art. 219, providing that, "where the garnishee is discharged upon his answer, the costs of the proceeding, including a reasonable compensation to the garnishee, shall be taxed against the plaintiff," an attorney's fee of \$10 is properly allowed to a garnishee so discharged, who has employed an attorney to draw his answer denying indebtedness, and the court need not take testimony to determine the value of the attorney's services.—*Johnston v. Blanks*, (Tex.) 557.

Gift.

Inter vivos, see *Limitation of Actions*, 7.

Guaranty.

See, also, *Principal and Surety*.

Construction, see *Negotiable Instruments*, 9.

GUARDIAN AND WARD.

See, also, *Infancy*.

Allowance to executor as guardian, see *Executors and Administrators*, 11.

Proof of ward's claim, see *Executors and Administrators*, 18.

Action against guardian.

1. An infant may maintain an action by his *prochein ami* against his guardian and sureties, where the guardian has failed to make a settlement, and pay over money due the infant, is insolvent, and has left the state; and, as the chancellor is charged *ex officio* with the care of infants, the action is properly brought in equity. But the court should not direct the amount recovered of the guardian to be paid to the infant, or to the next friend, but to be paid into court.—*Clements v. Ramsey*, (Ky.) 811.

2. While an action against a guardian on his bond, in the name of a next friend, was pending, and when ready for trial, the infant came of age, and that fact was suggested of record, and he was allowed to prosecute the action thereafter in his own name. *Held*, that this was proper. It was not necessary to file an amended pleading making the infant a party.—*Id.*

Sale of ward's realty.

3. The sale of a ward's land being decreed, the guardian purchased the land for himself individually; and, as the purchase money was to go to him as guardian, no bonds were required of him, but the commissioner made a deed directly to him. *Held*, that the sale to him was not void, and one who purchased from him was entitled to hold the land as against the ward.—*Id.*

Breach of bond.

4. In an action on a guardian's bond for the sale of ward's realty, the plaintiff introduced evidence showing that a sale had been made in accordance with the statute regulating the mode of selling infants' lands, and that the proceeds had been received by the guardian. *Held*, that a *prima facie* case had thereby been made out, and the defendant's demurrer to the evidence was properly overruled.—*State v. Weaver*, (Mo.) 697.

5. The sureties on the bond of a guardian to sell his ward's real estate cannot be heard, as a defense to an action by the ward for breach by failing to faithfully account, etc., to set up that the report filed by the guardian on the sale, which has been confirmed by the court, was untrue, and that there was only a colorable sale,

by which other lands were conveyed to the ward as an offset for the lands falsely represented to have been sold.—*Id.*

6. Where, instead of actually selling the lands of his ward, the guardian received in trade other lands, which were subsequently conveyed to the ward, and by him sold at a loss, *held*, in an action against the sureties and the personal representatives of the principal on the guardian's bond, that the defendants should be charged with the sum falsely represented by the guardian in his report to have been received in cash, with interest thereon, less the amount actually obtained by the ward, with interest, deducting incumbrances and taxes and the legitimate expenses of the sale.—*Id.*

HABEAS CORPUS.

Ad testificandum, see *Criminal Practice*, 7.

Issue of writ.

1. Where a statute establishing two judicial districts in a county is void *in toto* for the repugnancy of its provisions, a person indicted for murder in that part of such county for which there is no court provided, is entitled to a writ of *habeas corpus*, there being no forum for his trial.—*Ex parte Jones*, (Ark.) 689.

Review.

2. Where the judgment exhibited with the petition for a writ of *habeas corpus* shows a conviction of an offense of which the mayor's court had unquestioned jurisdiction, the court will not consider the question whether the petitioner, who was charged with the violation of the ordinance of an Arkansas city of the second class was entitled to a trial by jury. The application cannot be made to perform the function of an appeal or writ of error, in correcting errors and irregularities at the trial.—*Ex parte Brandon*, (Ark.) 452.

HIGHWAYS.

Establishment—Injunction.

1. In Missouri, the orders of the county court, in proceedings to appropriate property for the purpose of laying out a county road, are subject to remedy by appeal, and an injunction will not lie to restrain the execution of such orders on account of errors in the proceedings.—*Chicago & A. R. Co. v. Maddox*, (Mo.) 417.

Obstruction—Evidence.

2. The *gravamen* of the offense of obstructing a public road is that the act was willfully done by the accused. Evidence which leaves the true location of the road in doubt will not support a conviction for willfully obstructing it.—*Murphy v. State*, (Tex.) 906.

3. Evidence that the accused, by direction of the owner of land traversed by a public road, placed a gate across the road, but, on being told that he had thereby obstructed a public road, stated that he was ignorant of the fact that the road was a public road, and forthwith removed the gate, fails to show that the obstruction was willful, and, on the contrary, tends to show that it was not willful; wherefore a conviction is not supported by such proof.—*Guthrie v. State*, (Tex.) 906.

Holiday.

Filing complaint, see *Pleading*, 6.

HOMESTEAD.

Sale, see *Executors and Administrators*, 24.

Head of family.

1. A man is the head of a family, and entitled to homestead, although his family consist only of a wife, who has deserted him.—*Gates v. Steele*, (Ark.) 63.*

Abandonment.

2. The abandonment of a homestead after it has been once in good faith established, is always a question of intention.—*Id.**

3. A lease of land for life, made by an old man whose old age and ill health compelled him to go and live with his daughter, he reserving the right to return to the place and make it his home, *held* not to be an abandonment of homestead.—*Id.**

4. Where a married woman, having acquired a homestead right in certain land in Texas, removed with her husband and changed her domicile to another state, where, upon the death of her husband, she remarried, and remained for several years with no fixed intention of returning, *held*, that her acts constituted an abandonment of the homestead.—*McElroy v. Magoffin*, (Tex.) 547.*

5. Evidence that the appellees had for a long time occupied three lots as a homestead; that, with a desire to sell, they temporarily rented the houses on one of said lots, but continued to use the lot for home purposes; and that the intention to sell had been subsequently abandoned,—justifies the finding that such renting was not inconsistent with the uses for which the homestead is protected, and that said lot continued to be part of the homestead of the family.—*Newton v. Calhoun*, (Tex.) 645.

6. Husband and wife, owning a homestead in Texas, removed to another state, and lived there for seven years, giving by their acts every indication of an intent to stay away, though the wife had been unwilling to leave, and frequently expressed an intention of returning and reclaiming

the homestead. Upon returning to Texas they failed to reclaim the property, which had meanwhile been sold, but rented it from the parties then in possession. *Held*, that their acts constituted an abandonment of the homestead.—*Reece v. Renfro*, (Tex.) 545.*

— Rights of purchaser.

7. Appellees became purchasers of part of a homestead during the time that appellants were acting in such a manner as to induce the belief that they had abandoned all claim to it. *Held*, that if appellants could, under the law, change their minds, and resume their former homestead, under any state of case, they could do so only up to the time that the title under which the appellees claimed had taken effect.—*Id*.

— Parol evidence.

8. On an issue whether appellants had abandoned their homestead, it appeared that W., the brother of the appellant D., under appellants' instructions deeded the southern half of the homestead, of which W. and appellants were joint owners, to a third party; appellants receiving the consideration money. The deed was not made part of the bill of exceptions or statement of facts, but the general testimony established that D.'s share had been conveyed. Appellants excepted to the admission of parol evidence to show what the deed purported to convey. *Held*, that if the deed was in general terms, without stating whose interest was conveyed, it was proper to prove this by parol.—*Id*.

Purchase-money lien.

9. Under Gen. St. Ky. c. 88, art. 18, § 9, the debtor has no right of homestead in land as against the vendor's claim for the purchase money; and, although the vendor upon the sale of the land waives his lien for the purchase money, he can, in a suit on the purchase-money note, levy his execution on the land.—*Reynolds v. Williams*, (Ky.) 178.

10. Under Gen. St. Ky. c. 88, § 16, which provides that the homestead exemption shall not apply as against a debt of liability existing at the time of the purchase of the land, the vendor's claim for the purchase money is to be considered as existing prior to the accrual of the homestead right.—*Id*.

Vendor's lien.

11. Under Rev. St. Mo. § 2695, providing that a homestead shall be subject to claims existing at the time of acquiring it, the date of recording the deed to be considered such time, and section 2696, providing, in substance, that, when a new homestead is acquired in place of a former one, such new one shall not be subject to claims to

which the original homestead was not subject, a homestead obtained by exchange for a former one is not subject to claims arising between the time of the execution of the deed of such new homestead and the recording of it.—*Smith v. Enos*, (Mo.) 269.

HOMICIDE.

- I. MURDER, 1-26.
- II. JUSTIFIABLE HOMICIDE, 27-36.
- III. INSANITY AS A DEFENSE, 37.
- IV. ASSAULT WITH INTENT TO KILL, 38-42.

I. MURDER.

Degrees.

1. The evidence of the state characterized the crime committed as murder in the first degree, and that of the defendant as murder in the second degree or justifiable homicide. *Held*, that the trial court committed no error in not instructing as to any other grade of homicide than murder in the first and second degrees.—*State v. Rose*, (Mo.) 788.

2. In Missouri, those cases of murder at common law in which there was no specific intent to kill, but in which the law presumes the intent to kill, which are not declared manslaughter, or specifically made murder in the first degree by statute, are cases of murder in the second degree, and, where there is evidence in the case tending to show that the killing was with malice aforethought, but without deliberation, an instruction for murder in the second degree ought to be given.—*State v. O'Hara*, (Mo.) 422.

3. If one provokes a combat, and in the affray has to kill his adversary in order to save his own life, the killing is not murder, but manslaughter only, if the intent with which the combat was provoked was not a felonious one.—*State v. Partlow*, (Mo.) 14.

4. On a trial for murder, where the evidence for the state tended to prove murder in the first degree, but the defendant testified in his own behalf that he and his wife (the deceased) had been quarreling, and that, when they entered his house, she threatened him, and cut at him with a razor which he took from her and cut her with three times, causing her death, an instruction that, if the jury believed his evidence, they should find him guilty of manslaughter in the second degree, *held* proper.—*State v. Blunt*, (Mo.) 894.

5. A homicide committed in mutual combat would not be reduced to manslaughter, under the Texas Code, unless it was committed under the influence of sudden passion arising from an adequate cause; and therefore, if death did not ensue, the offense would not be mitigated from an as-

assault with intent to murder to aggravated assault.—*Spearman v. State*, (Tex.) 586.

Indictment.

6. An indictment conforming to Willson, Crim. Forms, § 357, is sufficient to charge the offense of murder.—*Williams v. State*, (Tex.) 64.

7. Indictment for murder, if it alleges the name of the person killed, need not allege that he was a "reasonable creature in being," which fact is a matter of proof, and not pleading. That the alleged name of the deceased is an unprecedented one is immaterial.—*Wade v. State*, (Tex.) 896.

Evidence—Threats.

8. On a murder trial a witness was permitted to testify that defendant, while drunk and alone, talked to himself and threatened to kill the deceased. *Held* properly admissible, as tending to show the state of defendant's feelings towards the deceased.—*Smith v. Commonwealth*, (Ky.) 798.

9. On the trial of defendant for the murder of his wife, a witness was asked by defendant's counsel if he ever heard any one speak to deceased "about her having acted foolishly in marrying a cripple" like defendant. *Held* that, if the question was intended to prove threats by the deceased against defendant, it was not in the proper form, and should be excluded; and, if it was not intended to show threats, it was irrelevant and inadmissible.—*State v. Blunt*, (Mo.) 394.

10. On a trial for murder there was evidence that defendant commenced or provoked the affray, and it was claimed by the prosecution that he went to the house of the deceased where the homicide was committed in order to make trouble at a wedding which was about to occur there. *Held*, that evidence of threats previously made by him against the groom were admissible, as well as declarations of his intention to go to the house on the day of the wedding.—*State v. Partlow*, (Mo.) 14.

11. In a trial for murder, a witness was permitted, against defendant's objection, to testify that while the witness was in a front room, and the accused was, with deceased and several other persons, in a back room, immediately before the affray, he heard a conversation containing insults and threats, and that soon thereafter the deceased and the accused, with the other persons, passed through the room where witness was, out into the scene of the crime. *Held*, that said testimony was admissible, though the witness could not, while in the front room, see any of the parties, nor recognize the voices; that the accused was sufficiently connected with the conversation by the portion of the testimony in italics.—*Short v. Commonwealth*, (Ky.) 810.

Evidence—Dying declarations.

12. On a trial for murder the declaration of deceased is not admissible merely because made after being told that his wound was necessarily fatal. It must be shown that the declaration was made under a sense of impending death, or with the expectation of immediate dissolution.—*State v. Partlow*, (Mo.) 48. W. 14.*

— Weight and sufficiency.

13. Evidence establishing homicide in the perpetration of robbery sustains a verdict of murder in the first degree.—*Giles v. State*, (Tex.) 886.

14. In a trial for murder, the fact that a butcher knife is found near the deceased, under such circumstances that it might well have been dropped by somebody else, coupled with the evidence of several witnesses that when deceased was killed he was unarmed, and that directly afterwards the defendant, in speaking of the killing, said nothing about the knife, but forthwith fled the country, *held* not to support the plea of self-defense, so as to vitiate a conviction of murder in the second degree.—*Rowlett v. State*, (Tex.) 582.

15. The evidence showed that at the time of her death deceased was heavy with child; that her body showed marks of a severe beating; that her husband, the defendant, was jealous of her, refused to employ a physician for her, swore at her on her death-bed, and expressed suspicions of her fidelity. No testimony was produced to prove overt acts of cruelty or threats, or that the death was produced by other than natural causes. *Held* insufficient to sustain a conviction of murder in the second degree.—*Olivares v. State*, (Tex.) 903.

Instructions.

16. Upon trial for murder it is error to instruct the jury that they must find the defendant guilty of murder, or acquit him altogether, if there is evidence upon which they would be justified in finding him guilty of a lower degree of crime.—*State v. Partlow*, (Mo.) 14.

17. Where the evidence tends to show that the killing was the result of a sudden quarrel, it is error to refuse to give an instruction in relation to a lower grade of homicide than murder in the second degree.—*Id.*

18. In a trial for murder, an instruction making no distinction between bringing on a quarrel with felonious intent, and bringing it on without felonious intent, is erroneous. *NORTON, C. J., and RAY, J., dissent.*—*Id.*

— On plea of guilty.

19. Where a defendant pleaded guilty to the charge of murder, a charge that the jury are to determine of what degree of

murder he is guilty, and to assess the proper penalty, *held* sufficient, without adding that it was their duty to find if the evidence showed the defendant to be guilty of the offense, outside his plea of guilty.—*Giles v. State*, (Tex.) 886.

—Provocation.

20. Upon a trial for homicide, it is the duty of the court to define what is lawful or just provocation only when there is evidence in the case of such provocation; and, if there is no such provocation, the court should tell the jury so.—*State v. Sneed*, (Mo.) 411.

21. The word "deliberately" was defined to the jury as signifying an act done in cold blood, and not in a sudden passion caused by a lawful or reasonable provocation. *Held* not erroneous.—*Id.*

22. An instruction in a trial for murder that "by the term 'deliberately' is meant done in a cool state of the blood; it does not mean brooded over or reflected upon for a week or a day or an hour, but it does mean an intent to kill, executed by a person not under the influence of a violent passion suddenly aroused; and the passion here referred to is that, and that only, which is produced by what the law recognizes as a just cause of provocation, or of a lawful provocation; and the court instructs the jury that in this case there is no evidence tending to show the existence of any such passion, or of a just cause of provocation, or of a lawful provocation,"—is erroneous, where the evidence shows that the deceased and defendant had been quarreling, and wishing each other evil, and that while defendant attacked deceased, he claimed to have struck the fatal blow not intending to kill her, and while both parties were fighting.—*State v. O'Harra*, (Mo.) 422.

—Self-defense.

23. Where, in criminal prosecutions for homicide, malicious wounding, or other offenses against the person, the facts raise any issue as to whether the accused acted in self-defense, the jury should be fully instructed how or under what circumstances the accused could exercise the right of self-defense, and the whole of the law on the subject should be given to them.—*Lancaster v. Commonwealth*, (Ky.) 320.

24. Where the trial court has neglected to instruct the jury on the law of self-defense, the conviction will not be reversed, where it appears that the accused sought a quarrel with the injured man, and attacked him when he was endeavoring to avoid the accused.—*Id.*

25. Where, upon an indictment for murder in the first degree, the plea of self-defense was interposed, and the court instructed the jury in a manner presenting

the law applicable to the case, the verdict will not be disturbed because the court refused to give certain instructions asked for defendant, when the latter were substantially embraced in other instructions that were submitted to the jury. *SHERWOOD and BRACE, JJ.*, dissenting.—*State v. Hicks*, (Mo.) 742.

26. A qualification to an instruction on self-defense by the court, in substance that the law of self-defense has no application if the jury believe that defendant voluntarily brought on the difficulty and the attack, *held* proper.—*State v. Rose*, (Mo.) 738.

II. JUSTIFIABLE HOMICIDE.

Apprehension of danger.

27. An instruction on a murder trial, making the right of self-defense dependent upon whether defendant believed, and had reasonable grounds to believe, that he was then in danger of death or *great* bodily harm at deceased's hands, is proper.—*Short v. Commonwealth*, (Ky.) 810.

28. The trial court instructed the jury to the effect that, to constitute justification on the ground of self-defense, the act must have been done "in fact in self-defense, and not merely colorably so." *Held* erroneous, because subversive of the right of self-defense resulting from reasonable expectation or fear of death, or serious bodily injury, and because it absolved the jury from their duty to view the circumstances from the stand-point of the defendant at the time.—*Spearman v. State*, (Tex.) 586.

29. By the charge of the court upon the issue of self-defense, the right of the accused to kill his assailant before resorting to other means than retreat to avoid the threatened injury, was restricted to the prevention of murder, maiming, or disfiguring, giving no such right until he had resorted to all other means except retreat, where the threatened injury might have been other serious bodily injury. *Held* erroneous.—*Williams v. State*, (Tex.) 64.

30. The court instructed, on the law of self-defense, that "if defendant, at the time of the homicide, had reasonable cause to apprehend from the deceased, and did apprehend, immediate danger of receiving some serious injury to his person from deceased," and, to avoid such danger, cut and stabbed him, they should acquit. *Held* a proper instruction, and that the court did not err in using the words in quotation instead of "danger of receiving some great personal injury," the language of the statute; that at most it was only a verbal change, and in fact in favor of the accused.—*State v. Rose*, (Mo.) 738.

—Protection of wife.

31. Defendant requested the following instruction: That if the jury "believe from the evidence that, at the time of the dif-

sculty, the wife of the deceased was making an assault upon the wife of the defendant, and that the deceased was present aiding and abetting his wife in making said assault, and the defendant believed, and had reasonable grounds to believe, that death or great bodily harm was then about to be inflicted upon his wife, he had a right to use all necessary means to protect his wife, even to slaying the deceased." *Held*, that a refusal to give the instruction was error.—*Estep v. Commonwealth*, (Ky.) 820.

Duty to retreat.

82. To defend his own wife and himself from a murderous assault, committed in defendant's house by deceased and his wife, defendant shot deceased with a pistol. On trial for murder, the court, in instructing on the law of self-defense, made it a condition of the right to take the life of deceased that defendant had no other safe means of escape from the danger. *Held* erroneous and misleading, as it implied a duty of defendant to leave his own dwelling-house. Defendant had a right to remain in his house, and defend himself and its inmates.—*Id.*

83. An instruction making defendant's right of self-defense depend on the fact that deceased had sought him out for the purpose and with the intent to kill him, or inflict great bodily harm, and was when the shot was fired manifesting an intention to commence the attack, is erroneous. A person, when assaulted in his own dwelling, is not in any case required to retreat therefrom to avoid his assailant; but if he believes, and has reasonable grounds to believe, that one is about to take his life, or inflict great bodily harm upon him, in his own dwelling-house, he has the right to defend himself then and there.—*Id.*

84. If one, after commencing an affray, attempts in good faith to withdraw from it, but is prevented from doing so by his adversary, he will then be justified in taking the life of the latter, if necessary in order to save his own.—*State v. Partlow*, (Mo.) 14.

85. Upon a murder trial, the court instructed the jury on the law of self-defense, in substance, that if defendant, at the time of the killing, had reasonable grounds to believe, and did believe, that deceased had sought him for the purpose of killing or doing him great bodily harm, and was then manifesting an intention to commence an attack upon him, then defendant was not bound to retreat, but had the right to stand his ground, and defend himself to the extent of taking deceased's life. *Held* correct.—*Marcum v. Commonwealth*, (Ky.) 786.

86. A person unlawfully attacked is not bound to retreat in order to avoid the ne-

cessity of killing his assailant, when the attack is such as produces a reasonable expectation or fear of death, or some serious bodily injury; and in many cases it is the imperative duty of the trial court to so instruct the jury. Such an instruction, however, was unnecessary, where the evidence showed that defendant was in full retreat when he fired the fatal shot.—*May v. State*, (Tex.) 591.

III. INSANITY AS A DEFENSE.

Instruction.

87. On a murder trial, the defense being insanity, the court charged, in substance, that the criterion of defendant's responsibility was whether, at the time of the killing, he knew said act to be wrong and a violation of law; that insanity must be established to the reasonable satisfaction of the jury; and that the burden of proving such defense rested with defendant. *Held* a proper instruction, and that a requested charge in substance that, if defendant obeyed an uncontrollable impulse springing from an insane delusion, the jury should acquit, was properly refused.—*State v. Pagels*, (Mo.) 931.

IV. ASSAULT WITH INTENT TO KILL.

Indictment.

88. Indictment for assault to murder charged that accused "did then and there make an assault upon F. S., with the intent to murder him, the said F. S." *Held* sufficient without the allegation of malice. *HURT, J.*, dissenting.—*Gordon v. State*, (Tex.) 883.

89. Indictment for assault with intent to murder will authorize a conviction for aggravated assault, notwithstanding it alleges no circumstance of aggravation. *HURT, J.*, dissents.—*Balding v. State*, (Tex.) 579.

Instructions—Intent.

40. To support an indictment for assault with intent to murder, alleged to have been committed on A., there must be evidence of the specific intent to injure such person. A charge to the jury to find the defendant guilty if they find from the evidence that he shot into the house of A. and into a crowd where A. was at the time situated, without provocation and "when all the circumstances of the shooting show an abandoned and wicked disposition and a reckless disregard of human life on the part of the defendant," is error, as likely to mislead the jury into the belief that proof of the particular intent alleged could be dispensed with.—*Scott v. State*, (Ark.) 750.

—Threats.

41. On the trial of an indictment for an assault to murder, where it was in proof

that prior to the alleged assault, and on the same day, G., the person assaulted, had threatened to kill the accused, and that the threat had, prior to the assault, been communicated to the accused, and that at the time of the difficulty, and before the commission of the assault, G. attempted to draw a pistol with which to shoot the accused, and thus execute his threat. It was material error for the trial court to omit to charge the law relating to threats.—*Williams v. State*, (Tex.) 64.

42. Complaining witness, being summoned by a constable to assist in the arrest of defendant, came up to him with a shotgun leveled at him, telling him to throw up his hands and that he had a warrant for him. Defendant thereupon drew his revolver, and attempted to shoot witness. It appearing that witness' mother-in-law had several days before threatened defendant that she would make witness kill him, *held*, that this fact should have been submitted to the jury, as tending to show defendant's grounds for belief that he was in danger of serious bodily harm.—*Roberts v. State*, (Tex.) 879.

HORSE AND STREET RAILROADS.

See, also, *Master and Servant*, 1; *Negligence*, 18, 19.

Use of streets.

1. An ordinance passed in 1874, by the city council of Fort Worth, authorized a street-railway company to construct one or more lines of street railway on either of certain streets designated in the ordinance, but reserved to the city council the right to determine when any further track than the one selected by the company should be necessary. *Held*, that the intentment of the ordinance was that one or more lines might be constructed on one only of the streets named, to be determined by the selection of the company, not that lines might be constructed on all the streets, and that the company was limited to the selection made.—*Fort Worth St. Ry. Co. v. Rosedale St. Ry. Co.*, (Tex.) 584.

2. Where by the same ordinance, it was provided that the city council should notify the company when new lines were desirable, said notice to be complied with within a fixed time, and the council passed two ordinances in May and November, 1882, allowing the company to construct lines in other streets, to be completed within 90 days from the date of the ordinances, which the company failed to do, *held*, that the two ordinances of 1882 were sufficient notices that the city desired a line to be placed upon the streets mentioned in said ordinances, and that the company lost its

right to use those streets by non-compliance with the ordinances.—*Id.*

8. Upon the company claiming the right to use Houston street under the ordinance of 1874, the right to use the center of which street was granted to another company by an ordinance of 1884, *held* that, even if the former had a general right, under the ordinance of 1874, to use Houston street, the city had power to permit both companies to construct lines on the same street; but that the express grant to the latter company of the right to use the center of the street would exclude the former from using that particular part of the street.—*Id.*

HUSBAND AND WIFE.

See, also, *Divorce*; *Dower*; *Homestead*.

Community property, see, also, *Divorce*, 4; *Mines and Mining*, 2; *Vendor and Vendee*, 10, 11.

Conveyance by wife, see, also, *Acknowledgment*.

Conveyances and gifts between, see *Judgment*, 6.

Judgment against wife, see, also, *Mortgages*, 7.

Marriage settlements, see, also, *Limitation of Actions*, 6.

Wife's power to contract, see *Negotiable Instruments*, 3.

Wife's separate property, see, also, *Ejectment*, 1, 2; *Limitation of Actions*, 18; *Trial*, 18.

Wife's separate property.

1. All that is necessary to charge the separate estate of a married woman with her contracts, whether oral or written, is that there should be an express promise or engagement to create such charge upon the separate estate, whether real or personal, and that the method in which such promise is expressed should be within the express or implied powers of the instrument creating the estate. *TURNER, C. J.*, dissents.—*Ekerly v. McGee*, (Tenn.) 388.

2. In an action to recover land claimed as the separate property of a married woman against a purchaser at execution sale under judgment against her husband, the court charged, in effect, that the testimony tracing the wife's property into the purchase of the land in controversy must be clear and conclusive. *Held*, that this was as favorable to the defendants as they had a right to ask.—*Yoe v. Montgomery*, (Tex.) 622.

3. It is the settled law of Texas that a creditor claiming a lien by virtue of the record of a judgment or levy of an execution against a husband having the apparent title to land cannot be protected against a resulting trust in favor of the wife, and a purchaser at the execution sale will take

nothing, as against the wife's equity, if he have notice of the same before making the purchase.—Id.

4. Section 8296, Rev. St. Mo. 1879, provides that the rents, issues, and products of the real estate of any married woman, and all moneys and obligations arising from the sale of such real estate, and the interests of her husband in her rights in any real estate which belonged to her before marriage, or which she may have acquired by gift, grant, devise, or inheritance during coverture, shall, during coverture, be exempt from attachment or levy of execution for the sole debts of her husband. *Held*, under this section, that property purchased by money derived from the rents, issues, and products of the separate estate of a married woman is exempt from attachment or levy of execution for the sole debts of the husband.—*Burnes v. Bangert*, (Miss.) 877.

Husband's rights in wife's property.

5. Even before the Arkansas constitution of 1868, marriage did not operate to transfer to the husband the wife's personal property absolutely. The gift was subject to the condition that the property should be reduced to possession, and if the wife died before the husband had recovered it, it descended to her next of kin, and not to him.—*Sorrells v. Trantham*, (Ark.) 281.

Conveyance of wife's separate property.

6. The signing, sealing, and acknowledgment, by a married woman, of a deed conveying land owned by her in her own right, will not operate to pass her estate, where her name does not appear in the body of the deed, and there is nothing in it to show that the husband, who is the sole grantor, is a married man.—*Bradley v. Missouri Pac. Ry. Co.*, (Mo.) 427.

7. A wife, being seized in her own right of land in Missouri, joined her husband in executing a note and mortgage thereof. *Held* that, though under the rule of *Musick v. Dodson*, 76 Mo. 624, her signing the note was a nullity, since she had no separate estate in the land, this did not avoid the mortgage, since it was competent for her thus to mortgage her land.—*Hagerman v. Sutton*, (Mo.) 78.

8. A married woman, being entitled to an interest, as separate estate, in the community real estate left by her mother, relinquished it to her brother by a writing which she signed, but did not acknowledge, and to which her husband was not a party. *Held*, that the interest inherited by a married woman from the community estate of her deceased father or mother is not an exception to the Texas statute that allows a married woman's separate estate to be conveyed only by the joint deed of

husband and wife, accompanied by a certificate of the privy examination and acknowledgment of the wife.—*Stephens v. Shaw*, (Tex.) 458.

9. Nor can such relinquishment be upheld as a family settlement. It is a rule of equity that, in the absence of fraud, a family settlement will be upheld; but such settlement must be made by one having the capacity in the manner prescribed by law. The rule cannot be applied where its effect would be to abrogate the statute which directs the manner in which a married woman can convey her title to real estate.—Id.

Marriage settlements.

10. The possession of the husband of the wife's property, secured to her by marriage contract, is the possession of the wife. He is her trustee, and can reap no benefit to himself from the use of the property; nor can he acquire title thereto by investing the same, or its proceeds, in his own name without her consent; and the burden of proof is on him, or those claiming under him, to show such consent.—*Gordon v. Eans*, (Mo.) 112.

11. Notwithstanding the marriage contract may, by its terms, exclude the husband's marital rights to the wife's separate estate, still the technical legal title thereto vests in the husband during coverture; but in equity he holds it, not as husband, but as her trustee, and upon his death, by operation of law, his marital and fiduciary relations, rights, and powers over the same terminate, and the property thus emancipated goes at once to the wife, and not to his administrator or heir.—Id.

Actions by and against.

12. The plaintiff, who had for many years lived separate from her husband, made him a co-plaintiff without his knowledge or consent. *Held* that, where the husband himself did not object to such joinder during the trial or by appeal, the defendant was not entitled to attack plaintiff's judgment on that ground. *Shawwood, J.*, dissents.—*Overspeck v. Thiemann*, (Mo.) 927.

13. In Kentucky, where husband and wife are sued upon a contract executed by her *dum sola*, it is not necessary to aver that the husband has received property by his wife; but, if a recovery is had against them, the judgment as to the husband must be to be levied only upon property that came to him by his wife, or might thereafter come.—*Medley v. Tandy*, (Ky.) 308.

Community property.

14. In Texas the interests of the husband and wife in community property are equal, whether the deed be taken in the name of either or of both. But, if the property be

in the name of the husband alone, a purchaser under him, who has paid value, without actual notice of the wife's interest, will be protected against her claim, or that of her heirs.—*Edwards v. Brown*, (Tex.) 880.

15. A husband obtained a divorce from his wife without having the community property divided, the title to which stood in his name. He afterwards married a second time, and at his death devised the property to his second wife. *Held*, that a purchaser from her for value, who had no notice of the existence of the first wife, was entitled to the property, as against the first wife, or those claiming under her.—*Id.*

16. A married woman sued for partition of mining land, in which she claimed an undivided one-fourth interest. It appeared that she, with three others, had bonded the land for one year to one C., upon certain conditions; C. agreeing within that period to develop its mineral resources. Defendants succeeded to C.'s rights, but did not carry out the terms of the agreement until nearly six months after its expiration, and, alleging that plaintiff's husband had agreed to waive the condition as to time, went on working the minerals. In a suit by the wife for an injunction and an account, she alleged that the land was her separate property, and not held in common, and that her husband had no authority to extend the time for completion of the contract. The agreement with C., although signed, was not acknowledged by her. She recovered a verdict. *Held*, on appeal, that the evidence showed that the land was purchased in her name with community money, and was therefore, *prima facie*, community land; and as the judge had wrongly instructed the jury, so as to lead them to the conclusion that the land was separate estate, the judgment must be reversed, and a new trial ordered.—*Presidio Min. Co. v. Bullis*, (Tex.) 860.

INDICTMENT AND INFORMATION.

See, also, *Forgery*; *Gaming*, 1; *Homicide*, 6, 7, 88, 89; *Larceny*, 3-6; *Robbery*, 1; *Threats and Threatening Letters*.

Motion to quash, see *Criminal Practice*, 9.

Finding and presentment.

1. Objection to the sufficiency of the presentment of an indictment comes too late when made for the first time in the appellate court.—*Rowlett v. State*, (Tex.) 582.

2. In Missouri the fact that the defendant has been wrongfully arrested and detained does not impair the validity of an indictment, otherwise valid, subsequently

found against him. *Norton, C. J.*, dissenting.—*State v. Chyo Chiagk*, (Mo.) 704.

3. Where the record on appeal shows that the grand jury, after being sworn and charged, retired, and, upon a subsequent date, returned to the bar, and through their foreman delivered an indictment, it sufficiently appears that the indictment was presented by the foreman in open court, and in compliance with Rev. St. Mo. § 1797, it is not necessary that the names of the jurors should be again repeated.—*State v. Vincent*, (Mo.) 480.

4. When an indictment, with the indorsement "a true bill" thereon, signed by the foreman, as required by Crim. Code Ky. § 119, and the names of all the witnesses purporting to have been examined written thereon, as required by section 120, is presented to the court by the foreman, in the presence of the grand jury, and filed with the clerk, as required by section 121, it must be taken as found and returned in due form of law. And the court has no authority to inquire whether the grand jury heard the evidence before finding it, or whether the evidence, as required by section 111, was such as, in their judgment, if unexplained, would warrant a conviction by the trial jury.—*McIntire v. Commonwealth*, (Ky.) 1.

Second indictment.

5. An indictment having been dismissed upon motion of the prosecuting attorney, and the case re-referred to the grand jury, a second indictment was found against the defendant for the same offense. *Held*, that it was not necessary, before finding the second indictment, for the grand jury to have recalled and re-examined all the witnesses.—*McIntire v. Commonwealth*, (Ky.) 1.

Clerk's entry.

6. The clerk of the trial court is not required to enter upon his minutes the name of the offense charged against an accused, and the fact that he misnamed the offense on his minute-book cannot vitiate the indictment.—*Rowlett v. State*, (Tex.) 582.

Form.

7. An indictment which concludes with the phrase, "against the peace and dignity of the state," is not vitiated by any words following that phrase, if they form no part of it.—*Rowlett v. State*, (Tex.) 582.

8. Where the first count of an indictment states that "the grand jurors of the state of Missouri within and for the body of the city of St. Louis now here in court, duly impaneled, sworn, and charged, upon their oath present," etc., and the third count recites "and the grand jurors aforesaid, upon their oath aforesaid," etc., the latter sufficiently refers to the first count, and shows on its face that the jurors were impaneled and sworn to inquire of offenses within

and for the city of St. Louis, although, if the indictment had failed to allege these facts, the indictment would have been valid under Rev. St. Mo. § 1821.—*State v. Vincent*, (Mo.) 430.

Verification.

9. A prosecution before a justice of the peace for assault and battery and disturbing the peace cannot be sustained when the information, though filed by the prosecuting attorney, is not verified by his oath or affidavit, as required by Rev. St. Mo. § 2028.—*State v. Calfer*, (Mo.) 418.

Venue.

10. The constitution of Missouri conferring no power on the legislature to authorize the prosecution of a crime in a county other than that in which it was committed, *held*, that Rev. St. § 1698, which authorizes an indictment to be found in either of two or more counties, where it is matter of doubt in which the offense was committed, and gives the court of the county where the indictment was found jurisdiction of the offense, is unconstitutional.—*State v. Hatch*, (Mo.) 502.

11. Where defendant commits an indictable offense in one county, and subsequently commits a similar offense in another county, *held*, that this does not change the venue of the offense first committed.—*Id.*

12. Embezzlement, like theft, may be prosecuted in any county through or into which the property was transported by the accused, and the fact of transportation may, like any other fact, be proved by circumstantial evidence.—*Brown v. State*, (Tex.) 588.

13. Appellant's principal lived in B. county, whence he directed his business throughout the state, and in that county employed appellant as traveling agent. Appellant sold goods in R. county, and received the money for the same in the said R. county. Thence he returned to B. county, and, in liquidating with his principal, his embezzlement of the money he received in R. county was disclosed. *Held*, that at common law, and without reference to the Texas Code, the proper court of B. county had jurisdiction of the offense, inasmuch as the Code, if it does not provide for such jurisdiction, does not exclude it.—*Id.*

Allegations of time and place.

14. Where the first count of an indictment shows that the city of St. Louis is within the state of Missouri, the words in another count charging that the crime was committed "at the city of St. Louis aforesaid," are sufficient to show that the offense was committed in the state of Missouri.—*State v. Vincent*, (Mo.) 430.

15. Rev. St. Mo. 1879, § 1813, provides

that the venue named in the margin of an indictment shall be taken as that of all the facts in the body of the same. The indictment herein laid the venue in a certain county in the margin and first three counts, and in the fourth and fifth laid the venue on a railroad train which passed through said county. The offense charged being both proved and admitted to have occurred in said county, *held*, that an instruction that but one offense is intended to be charged, and authorizing a verdict on any one of the counts, was correct.—*State v. Beauncleigh*, (Mo.) 666.

16. Variance as to the date of the alleged offense between the affidavit or complaint, and the information based upon it, is fatal, and a motion to quash the information should prevail.—*Huff v. State*, (Tex.) 890.

17. The date of the offense, as alleged in either the complaint or information, is matter of substance, and not form merely, and cannot be amended either upon motion or by order of court.—*Id.*

18. The only remedy in a case of mutilation of the complaint or information, by the fraudulent alteration of the date of the offense alleged in either, is by substitution of the complaint and information, as provided by Code Crim. Proc. Tex. art. 454.—*Id.*

INFANCY.

See, also, *Guardian and Ward*; *Limitation of Actions*, 18, 19; *Negligence*, 18.

Homestead exemption, see *Executors and Administrators*, 24.

Parties to actions.

1. Where infants are necessary parties to a suit, service of process on them is essential in order to confer jurisdiction on the court, and to authorize the appointment of a guardian *ad litem*.—*Sprague v. Haines*, (Tex.) 871.

2. No advantage can be taken of the failure of an infant to plead; but it is the duty of the chancellor to consider as formally pleaded every defense to an action against an infant which might have been made for him.—*Turner v. Short*, (Ky.) 347.

INJUNCTION.

When lies, see, also, *Execution*, 7; *Highways*, 1; *Taxation*, 20, 21.

When lies.

To authorize an injunction there must be a clear case of impending injury, and an urgent necessity for the writ. If the cause of action be continuous, and the nature of the impending damage such as not to be susceptible of proper assessment by a jury, an injunction will lie.—*Duncan v. Central Passenger R. Co.*, (Ky.) 228.

INSOLVENCY.

See, also, *Assignment for Benefit of Creditors; Bankruptcy; Banks and Banking; Receiver.*

Administration of insolvent estate.

Where an attachment issues, and is levied against the estate of a deceased non-resident, under subsection 7, § 4192, New Code Tenn., authorizing an attachment "where any person liable for any debt or demand, residing out of the state, dies leaving property in the state," and where, pending the suit, an administrator qualifies, answers, and suggests insolvency, plaintiff must share *pro rata* with other creditors of the deceased, under the statutes governing the administration of insolvent estates; the lien of the attachment, in such case, not being a fixed lien.—*Barchus v. Peters*, (Tenn.) 888.

INSURANCE.

Unlicensed agents, see *Statutes*, 8.

Assignment of policy.

1. In Texas the assignment by one of an insurance policy issued upon his own life to his cousin, who lives with him as an adult male member of his family, and is dependent on the insured for employment and support, upon an agreement by the assignee to pay the assessments necessary to keep the policy in force, is void as being to one who has no insurable interest in the life of the insured, and as being against public policy, and the insurance money should be paid to the original beneficiaries.—*Price v. Supreme Lodge Knights of Honor*, (Tex.) 633.*

2. Ordinary life insurance policies are not assignable, and cannot be placed upon the market as a promissory note or bank paper. But where a certificate of membership in a mutual benefit association in terms confers on the member the right to assign the benefit, and the member assigns it in exchange for a tract of land, *held*, that the assignee, after retaining it for 10 years, cannot sue to set aside the contract on the ground that there was no right to assign, and recover the land, especially where it appears that he has not tendered the certificate back to the member, but has allowed it to lapse by failing to pay the premiums.—*Jackson v. Anderson*, (Ky.) 326.

Accident insurance.

8. Defendant insurance company issued to plaintiff an accident policy for 12 months from January 10th. For the premiums plaintiff gave an order on his employer for \$20, payable in installments of \$5 each, to be deducted from wages for January, February, March, and April. The drawee of

the order did not accept it, but paid the January and February installments. He did not pay those of March and April, plaintiff not working during those months. May 1st, plaintiff resumed work. May 10th, there was due him more than \$10, and May 28th he met with the accident for which the action on the policy was brought. The company did not demand the balance of the order from the drawee, did not notify plaintiff of its non-payment, or return or offer to return it, or notify plaintiff that the contract was at an end. The policy, by its terms, divided the twelve months into four periods, of two, two, three, and five months, respectively, and provided that each of the four installments of the order should apply to the payment of the premium for a single period, and that no liability should be incurred by reason of an accident occurring within a period for which the installment should not have been actually paid. *Held*, that the action could not be maintained.—*Bane v. Travelers' Ins. Co.*, (Ky.) 787.

Mutual companies—Reorganization.

4. An insurance company being in embarrassed circumstances, a plan of reorganization was determined upon, and a new company was formed, which agreed to lend defendants, who were stockholders in the old company, \$10,000 to pay off its debts; and thereupon defendants executed a bond to indemnify the new company against loss on account of the liabilities of the old company, and bound themselves to pay off such losses to the extent of sums unpaid on their subscriptions to stock. *Held*, (1) that there was sufficient consideration to support the bond, and (2) that, although the company was organized on the mutual plan, yet, section 10 of the charter providing that, for the better security of policy holders, the company may add thereto a guaranty or stock capital, not exceeding \$200,000, this bond is to be considered as a guaranty, under this section, for the payment of the debts and liabilities of the old company by the defendants, to the extent of amounts unpaid on their subscriptions to stock.—*Planters' Ins. Co. v. Wicks*, (Tenn.) 172.

5. As the intention of the parties to the bond was that the new corporation should pay off the debts of the old, with the right to reimbursement from the defendants, the right of action on the bond vested in the new corporation, and not in its stockholders.—*Id.*

6. The defendants resist the enforcement of the bond upon the ground, also, that it was understood at the time they signed that the bond was not to become operative unless all the stockholders of the old company should sign, which they failed to do. *Held* that, as the new company was organ-

ized and conducted business for years under the contract, and defendants' bond executed in pursuance thereof, and many persons were induced to subscribe to stock in the new company upon the faith thereof, all of which defendants knew, they cannot now be allowed to make such a defense, as it would, under the circumstances, be inequitable.—*Id.*

INTEREST.

See, also, *Executors and Administrators*, 18, 14; *Guardian and Ward*, 6; *Trusts*, 7.

Legal rate—Place of contract.

A mortgagee, resident in Tennessee, who had accepted a draft in favor of the mortgagor as consideration for the mortgage, was compelled to pay a judgment on the draft which was rendered in New York. The rate of interest the mortgagee was entitled to be allowed was 7 per cent., the legal rate in New York from the time the draft was due till the date of judgment, and after that, 6 per cent., the legal rate of Tennessee.—*Cocke v. Hatcher*, (Tenn.) 170.

INTOXICATING LIQUORS.

Local option.

1. The statute requiring the order for election under the Texas local option law to be issued at the term of court succeeding the filing of the petition therefor is mandatory, and an election held under an order issued at any other term of court is absolutely void.—*Ex parte Sublett*, (Tex.) 894.

2. Under the Texas local option law as it existed in November, 1876, an election under its provisions could be ordered at a special session of the commissioners' court, if such was the first session after the filing of the petition.—*Id.*

3. Local option law, when adopted by vote, does not become operative until the order of court declaring the result of the election has been published for four successive weeks, and the sale of intoxicating liquors in the community is not, prior to such publication, a violation of the local option law. Where the order was published in the four successive issues of the newspaper of July 4th, 11th, 18th, and 25th, charge that the law became operative on the last-named date, *held* erroneous. The law contemplates that the order shall be published for four full consecutive weeks, or twenty-eight days, from the day of its first publication, and in refusing a special charge to that effect the trial court further erred.—*Phillips v. State*, (Tex.) 898.

Unlawful sales—To minor.

4. The issue being the defendant's knowledge of the minority of the purchaser of the intoxicating liquor, the state, over objection, was permitted to ask a witness if, at the time of the offense, the purchaser, by reason of his physical appearance, would be taken by a person of ordinary observation to be a minor; and the witness was permitted to answer in the affirmative. *Held* error.—*Koblenschlag v. State*, (Tex.) 888.*

5. The written consent of the father of a minor, as follows: "Please let my son John have anything in reason, or a drink when he wants it, and oblige a friend," signed and delivered to the defendant by the father, is a continuing authority to sell to such minor, and until revoked a complete defense to an indictment for selling liquor to such minor in ordinary retail quantities, without the consent of his parent or guardian.—*Maschwitz v. State*, (Ark.) 656.*

—Evidence.

6. In a prosecution for the sale of whisky on Sunday, where the witness was so drunk at the time of the alleged offense as to be unable to testify whether the whisky was sold or given to him, or whether or not he paid for it, *held*, that the evidence was insufficient to sustain a conviction.—*Keller v. State*, (Tex.) 886.

—Landlord's liability.

7. Under the Arkansas statutes, (Mansf. Dig. § 1926,) which make it a misdemeanor for any person owning, using, or controlling a house or tenement to sell or give away, or allow to be sold or given away, any ardent or vinous spirits, a landlord who leases a house for a lawful purpose is not bound to interfere, and invoke the law, when he subsequently finds that the tenant is using the premises for the sale of liquor.—*Crocker v. State*, (Ark.) 197.

JUDGE.

Absence at term-day, see *Courts*, 2.

Powers of special judge.

Rev. St. Mo. § 1879, authorizes the election of a special judge in certain criminal cases, and confers on him all the powers of the regular judge during the trial of the particular case for which he is elected, but provides that, upon the conclusion of that trial, his power shall instantly cease. *Held* that, if the judgment rendered by him is reversed on appeal, he still has authority to hear the case upon the new trial.—*State v. Sneed*, (Mo.) 411.

JUDGMENT.

Collateral attack, see, also, *Attachment*, 4, 5.
 Conclusiveness, see, also, *Estoppel*, 1.
 Judgment creditors, see *Assignment for Benefit of Creditors*, 11, 12.
 Lien, see *Mortgages*, 3, 5.
Non obstante veredicto, see *Appeal*, 85.
 Rendition and entry, see, also, *Principal and Surety*, 7.

Record.

1. Where a transcript from the county court fails to state that the judgment therein was rendered at a regular term, but states that the judgment was entered on May 6, 1885, it will be presumed, in the absence of contrary evidence in the record, that such judgment was rendered at a regular term, as fixed by the county commissioners.—*Baldrige v. Penland*, (Tex.) 565.
 2. Where a statute provides that, when any judgment has been recorded and indexed, it shall, from the date of such record and index, operate as a lien, *held*, that the record must show the names of the plaintiffs and defendants in the judgment. A judgment rendered against Joan and William *Bonthead*, and recorded and indexed as against Joan and William *Burthead*, confers no lien.—*Anthony v. Taylor*, (Tex.) 581.

Conclusiveness.

3. The ruling in *Hughes v. Lane*, 25 Tex. 856, that a judgment upon demurrer is not conclusive, was not necessary to the decision of that case, and cannot be maintained either upon principle or authority.—*Bomar v. Parker*, (Tex.) 599.
 4. Where a petition has been twice held bad, and two trial amendments have been filed, it must be presumed, upon the plaintiff's filing a third amended petition, that his counsel made good all former deficiencies pointed out by the court; and, where that petition has been dismissed on demurrer, it is reasonable to conclude that the judge did not dismiss it on account of the generality of the allegations, or other matter of form, but because he was of opinion that the facts stated did not show a meritorious cause of action. Such a dismissal, not set aside, is therefore *res adjudicata*.—*Id.*
 5. Matters put in issue on the trial of a plea in abatement in an attachment suit are not to be considered as *res adjudicata* where the case is afterwards tried on its merits; overruling *Stewart v. Nelson*, 79 Mo. 522.—*Garrett v. Greenwell*, (Mo.) 441.
 6. A judgment against an administrator does not conclude the widow of the intestate in a suit to subject land conveyed by him to her in consideration of love and affection only. She may disprove the

fact of his indebtedness.—*Hobbs v. McMakin*, (Ky.) 798.

7. Where judgment is taken against one of several defendants, who was neither served with summons, nor brought into court in any other manner, the judgment, although properly rendered against the others, should be regarded as of no effect when sought to be taken advantage of in a collateral proceeding.—*County of Jasper v. Mickey*, (Mo.) 424.

Collateral attack.

8. The judgments and orders of probate courts in matters within their jurisdiction have the same import of verity as those of courts of general jurisdiction, and, like them, are not to be impeached in collateral proceedings.—*Camden v. Plain*, (Mo.) 86.

9. In ejectment, defendant claimed under an administrator's deed, which plaintiff attacked on the ground that the petition for the sale of decedent's realty failed to show that his personal estate was not sufficient to pay existing debts. *Held*, that the judgment of the probate court upon that question, after jurisdiction obtained by publication, could not be collaterally attacked.—*Id.*

10. Under the Missouri practice, a notice in an order of publication, bearing date February 10, 1877, and notifying the defendants to appear at the next term of the court to be holden "at Carthage, in the county and state aforesaid, on the first Monday, A. D. 1877, and on or before the third day thereof," etc., should not be construed, for the purposes of collateral attack of the decree rendered thereon, to mean that the defendants are to appear on the first Monday in January, 1877, where it is a matter of judicial notice that the court in which the suit is pending held its next term on the first Monday in May, 1877.—*County of Jasper v. Mickey*, (Mo.) 424.

11. In ejectment to recover the possession of certain real estate, defendant claimed title under a sheriff's deed, given at a sale under two special executions issued upon special judgments rendered by a justice of the peace upon special tax bills for the doing of certain grading in the city of Kansas. Section 4 of the Kansas City charter provides: "Where the amount due on any tax bill does not exceed three hundred dollars, suit may be brought thereon before the recorder of the city, or any justice of the peace of said city." etc. The executions only recite that the justice who rendered the judgments was a justice of the peace of Kaw township, and omits the words "in Kansas City." It was admitted that it appeared from the proceedings held before the justice that he was a justice of the peace in Kansas City. *Held*, that the judgments were not subject to collateral

attack, and that an exception to the deed on this ground was not well taken.—*Karnes v. Alexander*, (Mo.) 518.

Action to set aside.

12. A., B., and C., claiming title separately to several tracts of land, sued jointly to recover them from defendants. On appeal the supreme court remanded the case for misjoinder of plaintiffs. Pending the appeal, defendants compromised with A. and B., and received a deed to the tracts claimed by them. C. alone appeared when the case was again called in the trial court, dismissed the suit as to A. and B., and obtained judgment for the tract claimed by her. Afterwards A. and B. appeared, and, without notice to the defendant, obtained leave to amend their original petition, and took judgment for the tracts compromised pending appeal. In a suit to set aside this judgment, *held* that, as the original action had been dismissed as to A. and B., they were out of it for all purposes, and could only proceed by a new suit, and the service of process upon defendants.—*Sowell v. Jones*, (Tex.) 620.

13. Diligence can hardly be expected of a defendant in preventing judgment in a suit of the pendency of which he has had no legal notice, and lack of it is therefore no defense to an action to set aside such judgment.—*Id.*

14. In a suit to set aside a judgment obtained without notice, and for a new trial, the petition shows a meritorious defense where it alleges ownership of the land in controversy.—*Id.*

Original proceedings for new trial.

15. A party who institutes an original action for a new trial, on equitable grounds, occupies no better position than one who makes his motion during the term at which the judgment is rendered, and he should be held to the diligence of prosecuting his action to a final determination. If a demurrer to his petition is sustained, and he fails to either amend or appeal, he is debarred of a second action.—*Bomar v. Parker*, (Tex.) 599.

JUDICIAL SALES.

See *Attachment*; *Execution*; *Executors and Administrators*, 21-29; *Guardian and Ward*, 3-6; *Mortgages*, 7-12; *Partition*.

Fixtures.

1. A sale by a sheriff, by order of a court of equity, of a cotton-gin and condenser, together with the gin-house, made at the court-house door, is not void because the property was not present. The property, being a fixture, is in the nature of real estate, and may be sold as such.—*Morrow v. McGregor*, (Ark.) 49.

Realty subject to dower.

2. Two partners made an assignment of all their property for the benefit of their creditors, expressly reserving the dower right of the wife of one of them in the land assigned. The assignee brought suit to sell the realty, and the court, in directing the sale, recognized the dower right, and ordered that its value should be paid to the widow, (the husband being then dead.) This was not done, but the land was sold subject to dower. *Held*, that the right to dower was thus finally ascertained, and could not afterwards be contested by the purchasers who bought at the commissioner's sale.—*Pepper v. Thomas*, (Ky.) 297.

Judgment for purchase price.

3. A motion by the master for judgment against a purchaser at a sale by order of the chancellor on the ground that the price had been paid in confederate money, is a suit in the interest of the parties, and a decree granting process against such purchaser is a final decree.—*Hardin v. Watson*, (Tenn.) 87.

4. Where a decree is made on such motion in 1869, and subsequently, in 1870, a stay of execution to August term, 1870, is granted, the stay ceases with that term, and an appeal will not lie, "upon the whole case," from a final decree disposing of the cause, and settling all questions pronounced in 1879.—*Id.*

JURY.

Competency, see, also, *New Trial*, 4. Custody and conduct, see *Criminal Practice*, 40-42.

Province of, see *Boundaries*, 6; *Counties*, 6; *Criminal Practice*, 85, 86; *Negligence*, 8-8; *Negotiable Instruments*, 15; *Robbery*, 3. Verdict, see *Criminal Practice*, 43-45; *New Trial*, 5-8; *Trial*, 11-18.

Competency.

1. One who had lived in this country about 18 years, resided in the city of St. Louis 3 years, was over 21 years of age, had declared his intention of becoming a citizen according to law not less than 1 nor more than 5 years prior to the trial, is a citizen under Const. Mo. art. 8, § 2, and, under the Missouri statutes, a competent juror upon the trial of a criminal case.—*State v. Pagels*, (Mo.) 981.

2. On the *voir dire* of a juror he said that he heard a person in whom he had confidence make a statement of the case upon hearsay, and that thereupon he (the juror) formed an opinion, provided the statement was true, but had formed no conclusion as to whether or not it was true. *Held* not a disqualifying conclusion.—*Balding v. State*, (Tex.) 579.

8. After a panel of jurors had been qualified and duly cautioned, defendant was, on motion, allowed 48 hours to make his peremptory challenges. On the day of the trial, four days thereafter, defendant's counsel requested a re-examination of the panel to ascertain whether any of them had become disqualified by having in the mean time read certain newspapers prejudicial to defendant. *Held*, that in the absence of evidence that the jury had disregarded the court's admonition, and read the newspapers, the motion was properly denied, especially as it did not appear that said newspapers contained anything prejudicial to defendant.—*State v. Rose*, (Mo.) 738.

— Prejudice.

4. An aversion to a bogus plea of insanity does not disqualify a person from serving as a juror who is otherwise competent.—*State v. Pagels*, (Mo.) 981.

5. In an action to recover damages under the statute of Missouri for causing the death of a person, the competency of a juror who testified that he had no prejudice against this particular case, but that he was opposed to personal damage cases generally, but that, if the evidence showed that the plaintiffs were entitled to damages, then he would be in favor of awarding them, is a question for the court to try, and the findings of the court upon it will not be disturbed.—*McCarthy v. Cass Avenue & Fair Grounds Ry. Co.*, (Mo.) 516.

Challenges.

6. That the trial court erroneously overruled a good challenge for cause to an unqualified juror, and required the defense to exhaust a peremptory challenge on him, is not reversible error, when it does not appear that any objectionable juror was forced upon the defendant.—*Balding v. State*, (Tex.) 579.

7. Under the Criminal Code of Kentucky, each party to a criminal prosecution is entitled to a *full* panel of jurors, found, upon examination, qualified to try the case, before being required to exercise the right of peremptory challenge to the individual juror; and, whenever the number is lessened by challenge of either party, the panel must be again filled before being passed on, and so on until the jury is completed.—*Jenkins v. Commonwealth*, (Ky.) 816; *Wilson v. Commonwealth*, (Ky.) 818.

Right to trial by jury.

8. The refusal of the trial court to grant a jury in a civil case is not a sufficient ground for reversing the judgment, if, under the evidence, none other could have been rendered.—*County of Caldwell v. Crocket*, (Tex.) 607.

Justice of the Peace.

Jurisdiction, see *Judgment*, 11; *Set-Off and Counter-Claim*.

Mayor acting as, see *Municipal Corporations*, 15, 16.

Laches.

Plea of stale demand, see *Appeal*, 43; *Public Lands*, 13.

LANDLORD AND TENANT.

Illegal use of premises, see *Intoxicating Liquors*, 7.

Leasehold estate, see *Descent and Distribution*.

Mining leases, see *Mines and Mining*.

Landlord's lien for rent.

1. Where the assignee retains possession of the leased premises, he is liable for rent under the lease, and the landlord is entitled to be paid therefor out of the proceeds of sale in the assignee's hands.—*Loth v. Carty*, (Ky.) 314.

2. Where the tenant assigns his property for the benefit of creditors, and the assignor brings suit to settle the estate, the landlord need not sue out a distress warrant or attachment for his rent in order to preserve his lien.—*Id.*

3. And, although the Kentucky statute requires that the landlord shall assert his claim for rent within three months after it is due, yet, where the tenant's assignee for the benefit of creditors brings suit to settle the estate within the three months, and avers that the landlord has a lien, this is sufficient to preserve the lien. The assignee represents the landlord, and holds the estate in trust for him along with other creditors.—*Id.*

4. The statute provides that, if property be removed openly and without fraudulent intent from the leased premises, the landlord's lien shall be lost unless asserted within 15 days. *Held*, that this provision does not apply where the property is removed by the assignee for the benefit of creditors.—*Id.*

Landlord's attachment.

5. Rev. St. Mo. 1879, § 3091, gives two independent grounds for an attachment for rent, either of which is sufficient to sustain the writ; and, accordingly, if a tenant either removes his property from the demised premises within 30 days prior to the commencement of the suit for attachment, or if he has disposed, or attempted to dispose, of his property, so as to endanger, hinder, or delay the landlord from the collection of his rent, the proceeding for at-

tachment is well grounded.—*Garrouette v. White*, (Mo.) 881.

6. Under Rev. St. Mo. 1879, §§ 3083, 3091, 3093, 3095, a proceeding for attachment for rent is intended to be a provision for the enforcement of the landlord's lien on the crop grown on the demised premises for the rent of the year in which such crop was grown; and such proceeding can be maintained by the landlord, not only against his immediate lessee, but also against the tenant of such lessee, provided the rent accrued during the term of such lessee. Where, therefore, an under-tenant had removed certain wheat crops from his land within 30 days next before the commencement of a suit for an attachment, and while rent was owing by the lessee to the landlord, *held*, that the landlord was entitled to an attachment against the under-tenant's wheat for the rent due by the lessee to the landlord.—*Id.*

Notice to quit.

7. Where a tenant enters upon land and subsequently denies his landlord's title, *held*, that he is not entitled to notice to quit.—*Ramsey v. Henderson*, (Mo.) 408.

LARCENY.

See, also, *Burglary; False Pretenses; Robbery.*

Finding and appropriating.

1. Under Code Tenn. § 5451, providing that "if any person come, by finding, to the possession of any personal property of which he knows the owner, and unlawfully appropriates the same * * * to his own use, he is guilty of larceny," etc., one who finds a cuff button is not guilty of larceny because he refuses to give it up upon demand by the owner, if, at the time he found it, he did not know who the owner was.—*Mayes v. State*, (Tenn.) 659.

2. An instruction that if the property taken was so obtained by stealth or fraud, with intent to steal the same, the offense of larceny was made out, is erroneous. Where the owner parts with the property by consent, there is no trespass, and the offense is that of cheating at common law, or the statutory offense of false pretenses.—*Haley v. State*, (Ark.) 746.

Indictment—Two counts.

3. Indictment for larceny contains two counts; the first alleging the ownership in some person unknown, and the second that the owner was one S. The evidence showing that the name of the owner was known, operates to defeat a conviction under the first count, wherefore the trial court should have confined the charge to the second count.—*Boren v. State*, (Tex.) 463.

4. The first count being eliminated, the

legality of a conviction under the second count will depend, first, upon the sufficiency of the indictment in the second count to charge the offense.—*Id.*

5. It was not essential to the sufficiency of the second count, as an indictment, that it should show by conjunctive words the accused named in the two counts to be the same person, and the stolen property described in the two counts to be the same property.—*Id.*

6. Both counts in the indictment in this case being sufficient in themselves to charge the offense, that which is supported by the evidence will support a general verdict of guilty.—*Id.*

— Robbery.

7. A statute (Mansf. Dig. § 2288) declared that "upon an indictment for an offense consisting of different degrees, the defendant may be found guilty of any degree not higher than that charged in the indictment, and may be found guilty of any offense included in that charged in the indictment." Section 2289 provided that all offenses of larceny should be deemed degrees of the same offense in the meaning of that section. *Held* that, the crime of robbery being an aggravated or compound larceny, a conviction of grand larceny upon an indictment for robbery is proper if the jury is in doubt which offense defendant committed.—*Haley v. State*, (Ark.) 746.

Evidence—Competency.

8. Where part of the stolen goods are found in possession of a woman whom defendant claims to be his wife, shortly after the taking, evidence of the subsequent finding of the remainder 60 yards from the place where the first finding was made, *held* competent in connection with other facts tending to connect defendant with the larceny.—*State v. Phelps*, (Mo.) 119.

9. Where two joint defendants were together when a larceny took place, the possession of the stolen goods, shortly after the larceny, by one of them, is criminating evidence against both.—*Id.*

10. The brand of the party from whom the defendant claimed to have obtained the alleged stolen animal was proved to be a horizontal "11." The brand on the animal was proved to be a perpendicular "11." The defense offered evidence to the effect that mistakes in the manner of applying the brand were frequently made by stock-men. *Held*, that the exclusion of the proof was error.—*Boren v. State*, (Tex.) 463.

— Sufficiency.

11. Defendant killed a cow which he had claimed to own, and preserved the hide. The alleged owner, with others, went to his house, and examined the hide, which

was of a peculiar color, and branded. When told that the cow belonged to witness, defendant said he would pay for it. The evidence as to its ownership, and the intent of the defendant in killing it, were conflicting, defendant's own statements as to his claim of ownership being contradictory. *Held*, that the evidence warranted a conviction of larceny.—*Hunnicut v. State*, (Tex.) 882.

Instructions.

12. The trial court having admitted proof of the larceny of other animals in the same neighborhood, and at the same time the animal described in the indictment was stolen, omitted to instruct the jury for what purpose such evidence was alone admissible,—to prove the *intent* with which the animal alleged was taken. *Held* error, notwithstanding the omission was not expected to, nor sought to be supplied by special charge.—*Davis v. State*, (Tex.) 590.

13. Where, in a trial for larceny, the sum of the testimony presented two theories,—either that the defendant was not authorized to take the property; or that he was authorized, but took it knowing that his authorizer had no title, since in this case the latter would be an accomplice, *held* that his evidence should not go to the jury without a charge on the law governing accomplice testimony.—*Boren v. State*, (Tex.) 463.

14. It is an invariable rule of practice in Texas that the charge of the court must respond to every issue raised by the evidence. Purchase is a valid defense to larceny, and, if such defense is supported by evidence, it is the right of the accused to have that question of fact submitted to the jury.—*Bond v. State*, (Tex.) 580.

15. Upon a trial for robbery resulting in a conviction of grand larceny there was evidence showing that the property obtained was voluntarily given by the prosecuting witness to shield himself from a threatened exposure of crime by defendants. *Held*, that defendants were entitled to an unqualified instruction that, if the jury should find that the prosecuting witness had parted with the property to shield himself from prosecution, or to avoid a public charge of crime, the offense of larceny was not committed, and that it was error for the court to modify a requested instruction to that effect by adding the idea of fraud.—*Haley v. State*, (Ark.) 746.

License.

From county, see *Bridges*, 2.

Insurance agents, see *Statutes*, 8.

Marriage license, application for, see *Perjury*.

LIENS.

See, also, *Attachment*, 11; *Equity*, 8, 4; *Execution*, 5, 6; *Judgment*, 2; *Landlord and Tenant*; *Mechanics' Lien*; *Mortgages*, 5, 8-10; *Taxation*, 15-18; *Vendor and Vendee*, 3.

For improvements, see *Tenancy in Common*, 8.

Pledge, see *Garnishment*, 1-4.

Stable keeper's lien.

If one who is allowed by the owner of a horse to have possession of it, and keep it in the town of A., but who is forbidden to take it to the town of B., nevertheless takes it to B., and boards it at a livery-stable there, the stable keeper will not acquire a lien thereon under Rev. St. Tex. art. 3183, giving stable keepers a lien "upon all animals placed with them for feed, care, and attention."—*Stott v. Scott*, (Tex.) 494.

LIMITATION OF ACTIONS.

Adverse possession, see, also, *Boundaries*, 9, 10.

Enforcement of equity, see *Deed*, 1.

Exceptions, see, also, *Constitutional Law*, 1. Plea of stale demand, see *Appeal*, 43; *Public Lands*, 18.

Running of the statute, see, also, *Counties*, 6; *Taxation*, 18.

When applicable, see, also, *Quieting Title*, 6.

To what cases applicable.

1. Where the relations of a principal and agent are continuous, and no accounting has ever been had between them, there is nothing to set the statute of limitations in operation as to their mutual claims.—*McHarry v. Irvin's Ex'rs*, (Ky.) 800.

2. Gen. St. Ky. c. 71, art. 3, § 2, which provides that an action for relief on the ground of fraud shall be commenced within five years next after the cause of action accrued, applies to an action by a creditor against his debtor to set aside as fraudulent a conveyance made by the latter.—*Cotton v. Brown*, (Ky.) 294.

3. A testator devised land which belonged to his wife, but directed that the devisee should pay her a certain sum in consideration thereof. In an action by the wife to recover the amount of the devisee upon his implied promise to pay it, *held*, that the statute of limitations was no bar to recovery. The title to the land was still in the wife, and the devisee could not acquire title, or be allowed to retain possession, without paying for the land.—*Peck's Ex'r, etc., v. Price*, (Ky.) 806.

—Suspension of statute.

4. That clause of the new constitution of Texas which provides that the period from twenty-eighth January, 1861, when the ordinance of secession was passed, to the

date of the acceptance of the new constitution by congress, shall not be included in reckoning time under the statute of limitations, took effect on December 3, 1869, when the constitution was ratified by the people, and its taking effect was not postponed to March 30, 1870, the date of its acceptance by congress. The clause, therefore, applies to all cases in which the bar had not become complete before December 3, 1869.—*Peak v. Swindle*, (Tex.) 478.

Adverse possession.

5. The mere placing of rails for a fence upon land is not sufficient evidence of possession to establish an adverse claim. The possession necessary in such cases must be adverse to the claim of all others, and accompanied by an actual possession exclusive in its character.—*Richards v. Smith*, (Tex.) 571.

6. When a husband is in possession of property belonging to his wife as her trustee, nothing short of an open and explicit disavowal and disclaimer of a holding under that title, and assertion of title in himself, brought home to the wife's knowledge, will satisfy the law, or lay a foundation for the operation of the statute of limitations.—*Gordon v. Eans*, (Mo.) 112.

7. If one enters upon land by the owner's mere permission, expecting merely that he will give it to him, such permission, and entry under it, will not constitute a hostile holding; but where there is an *unconditional parol gift* of the land, accompanied by an actual possession of 15 years or more, with claim of ownership, the donor cannot recover the land, although the donee may have entered expecting that the donor would *in futuro* convey or devise the land to him.—*Commonwealth v. Gibson*, (Ky.) 458.

8. In Arkansas, where a person claims title by limitation, in order to recover, he must show actual and notorious possession in himself continuing peaceably and uninterrupted for a period of seven years. Merely going upon the land, and girdling a part of the trees, then leaving it, and exercising no other acts of ownership, except to pay taxes thereon, is not sufficient evidence of itself to establish such possession.—*Scott v. Woodruff*, (Ark.) 908.*

Running of statute.

9. A fire-engine, for the payment of which certain invalid bonds and coupons were issued by a city, was obtained in 1877. The right of action on an implied contract to pay for it was barred by the statute of limitations of Texas at the expiration of two years. Consequently an action to enforce such contract could not be main-

tained in 1888.—*Gould v. City of Paris*, (Tex.) 850.

10. Under Rev. St. Tex. art. 677, providing that "no county shall be sued unless the claim upon which such suit is founded shall have first been presented to the county commissioners' court for allowance, and such court shall have neglected or refused to audit and allow the same," the statute of limitations begins to run as to such claims, duly presented, only from the date of the rejection of the claim.—*County of Caldwell v. Crockett*, (Tex.) 607.

11. Where money is deposited as a wager on the future rise or fall in the value of a certain commodity or thing, the statutory period of 90 days, during which suit must be brought to recover the same, (New Code Tenn. § 2440,) does not begin to run at the time of the deposit of the money, but from the time of the close of the "deal" to await the result of which the deposit was made.—*McGrew v. City Produce Exchange*, (Tenn.) 38.

12. A creditor levied on the interest of his debtor in a tract of land held in trust for him and others. At the sale the creditor bought in the debtor's interest for \$200, and afterwards sold it to plaintiff, who brought a suit for partition. It was decided in that case that the debtor's share, being in trust, could not be sold, and the sale was accordingly set aside. Plaintiff thereupon brought this action against the debtor to recover upon an implied promise to repay the \$200 which had been paid for the land. *Held*, that the right of action did not accrue until the judgment was rendered in the former action setting aside the sale.—*Johnson v. Barnes*, (Ky.) 176.

13. A deed of land in Missouri, belonging to a married woman in her own right, conveyed by her husband by a deed in which he was sole grantor, executed in 1853, prior to the passage of the act (Gen. St. 464, § 14) now known as Rev. St. 1879, § 3295, providing that "no conveyance made during coverture by the husband, of * * * any interest in such real estate, shall be valid, unless the same be by deed executed by the wife jointly with the husband," etc., though void as to the estate of the wife, is competent to pass the interest of the husband as tenant by the curtesy initiate; and, the right of action to recover the land being suspended during his life, the statute of limitations begins to run, as against the wife and her heirs, from his death, and not from the date of possession taken under the deed.—*Bradley v. Missouri Pac. Ry. Co.*, (Mo.) 427.

—Set-off.

14. The right to set-off accrues when an action is commenced, and is not barred by the statute of limitations, even though not

pleaded within the statutory time, where the right of action is not barred, and the claim sued on and the set-off both arise out of the same transaction.—*Dunn v. Bell*, (Tenn.) 41.

— Amendment.

15. In an action against a railroad company to recover for personal injury to the plaintiff, caused by the alleged negligence of the defendant, plaintiff averred her injury to be the fracture of a bone in the left arm; and, afterwards, in an amended petition, filed more than a year after the injury, set forth additional injuries to her head, shoulders, and spine. *Held*, that the additional injuries stated in the amended petition were not to be considered as a new cause of action for the purpose of computing the running of the statute of limitations.—*Texas P. Ry. Co. v. Davidson*, (Tex.) 686.

16. In an action brought to recover for the death of a railroad employe, the papers named as defendant the A. Co., which at one time owned the road, but had sold out to the B. Co. previous to the killing. The individual upon whom process was served, was named in the return as "vice-president" of defendant company, but was in fact vice-president of the B. Co. He claimed also to have been, at the time of such service, president of the A. Co. An answer, filed by attorneys, was verified by one who was an officer of the B. Co., and it did not set up that defendant did not, at the time of the accident, own the road. *Held*, that the answer was an appearance by the B. Co., and stopped the running of the statute of limitations against it; and that, upon an amendment substituting the B. Co. as defendant being afterwards made, it was no defense that, prior to such amendment, though after the bringing of the action, the period of limitation applicable to such actions had expired.—*Hackman's Adm'r v. Louisville & N. R. Co.*, (Ky.) 842.*

Disabilities and exceptions.

17. A suit by the wife of one who deposits money or property in pursuance of a gaming or wagering contract, to recover the same of the other party to such illegal contract, is not barred by the 90-days statute of limitation, (Code Tenn. 2440,) but may be brought within 12 months after the expiration of the 90 days. *Id.* 2441.—*Dunn v. Bell*, (Tenn.) 41.

— Infancy.

18. Where an infant dies, leaving a cause of action, which passes, not to his heirs, but to his personal representative, the statute of limitations, which had not begun to run in his life-time, owing to his minority, does not begin to run after his death until

the qualification of the personal representative.—*Sorrells v. Trantham*, (Ark.) 281.

19. Gen. St. Ky. c. 71, art. 1, § 3, provides that the time within which an action for the recovery of real property may be brought shall not be extended by reason of any disability which did not exist when the right to bring the action first accrued, nor by reason of any disability of the heirs of the person to whom the right first accrued. *Held* that, the cause of action in this case having accrued to the ancestor of the plaintiffs before his death, limitation continued to run after that event, and the fact that he left infant heirs did not have the effect to suspend it.—*Shuffitt v. Shuffitt*, (Ky.) 848.

— Reversal of judgment on appeal.

20. Plaintiff sued a railroad in a justice's court for \$125, for injury to his horse. He recovered the whole amount. On appeal to the supreme court the judgment of the justice, and that of the circuit court affirming it, were vacated, and the case dismissed, on the ground that the justice's jurisdiction of such actions was limited to the amount of \$100. Plaintiff brought a new action in the circuit court, for the same cause, less than a year after the dismissal, but more than a year after the cause of action accrued. Such actions are barred, unless brought within one year after the injury is inflicted. *Mansf. Dig. Ark. § 5540. Held* that, in view of *Mansf. Dig. Ark. § 4497*, which provides that where suit is brought in due time, and plaintiff suffers a nonsuit, or judgment is arrested on a verdict in his favor, or reversed on appeal, he may sue again within one year from the time of such nonsuit, arrest of judgment, or reversal, the dismissal of his first action in the supreme court saved the limitation.—*Little Rock, M. R. & T. Ry. Co. v. Manees*, (Ark.) 778.

— Absence from state.

21. In 1857, W. brought suit in Texas against B. & R., for cutting timber off his lands. The attorneys whom W. had retained abandoned the suit. Two years later he employed other attorneys, who, upon leaving the state, dropped the case. In May, 1867, judgment by default went against W., who then lived in Louisiana, for costs, and the land in controversy was sold and bought in by H. W. came to Texas in 1877, and went into possession, but was ejected by H. in 1881. In the mean time he had paid taxes on the land, through an agent, and had corresponded with the clerk and sheriff of the county to no effect, to get information about the suit. He had no communication with his agent about the case. He then, in 1881, brought trespass to try title against the widow and

sole heir of H. *Held*, that the suit was barred, and that there was nothing in the circumstances set out to excuse the delay. — *Walt v. Haskins*, (Tex.) 595.

New promise.

23. A letter written by the debtor in which he speaks of "the debt I owe you," and regrets his inability to pay any part of it, is a sufficient acknowledgment to remove the bar of the statute. — *Chidsey v. Powell*, (Mo.) 448.

Pleading the statute.

23. In an action at law, under the Code of Arkansas, the defense of the statute of limitations must be interposed by answer. It cannot be raised by demurrer. — *St. Louis, I. M. & S. Ry. Co. v. Brown*, (Ark.) 781.

24. Under Gen. St. Ky. c. 71, art. 8, § 6, which provides that, in an action for relief on the ground of fraud, the cause of action shall not be deemed to have accrued until the discovery of the fraud, but no such action shall be brought ten years after the time of making the contract or the perpetration of the fraud, where the action to set aside a deed as fraudulent is brought more than five years after the deed was lodged for record, and the debtor pleads limitation, the plaintiff must plead and prove, not only that he has brought the action within five years after the discovery of the fraud, but that he could not by ordinary diligence have discovered the fraud until within five years before the bringing of the suit. — *Cotton v. Brown*, (Ky.) 294.

25. And it is not a compliance with this rule for plaintiff to plead that he had not notice or knowledge of the deed until within the last five years. — *Id.*

Foreign statute.

26. In Tennessee, a plaintiff seeking to avoid the bar of the statute of limitations of a sister state must show what that statute is, or the court will presume that it is the same as the home statute; and, if the claim would be barred by the home statute, the defense will prevail. — *Bagwell v. McTigue*, (Tenn.) 46.*

Particular statutes.

27. Rev. St. Mo. § 8235 (act February 27, 1874, § 1) provides that any person claiming any real estate in the lawful possession of another, and which has not been in possession of such claimant, or any one under whom he claims, for 30 consecutive years, and on which he has paid no taxes, and the equitable title to which has emanated from the government more than 10 years, shall within one year from the approval of the act bring his action to recover the same, or be forever barred. *Held*, that where this section was pleaded as a bar to an action of ejectment, although by its in-

structions the court erroneously made the bar of the statute complete against plaintiff upon proof of the two facts only,—that defendants were in possession of the premises at the time of the commencement of the action, and that neither plaintiff, nor those claiming under him, had been in possession of the premises for 30 years last past,—yet as it appeared upon all the evidence that plaintiff could not recover, the erroneous instruction was not ground for reversal. — *Fairbanks v. Long*, (Mo.) 499.

28. *Mansfield v. Pollock*, 74 Mo. 186, and *Rollins v. McIntire*, 87 Mo. 497, holding that the statute applies to cases where the legal as well as the equitable title has emanated from the government, reconsidered and affirmed. — *Id.*

29. The statute is absolute, and makes no exceptions in favor of those laboring under disability. *Held* that, where such is the case, the court cannot introduce any exceptions into the statute on the ground of inherent equity, or because it may appear reasonable that the statute should not run against a party in a given case. — *Id.*

Lis Pendens.

Purchase of land, see *Quieting Title*, 1.
Settlement, see *Executors and Administrators*, 12.

Marriage.

See *Husband and Wife*.

Application for license, see *Perjury*.

Marshaling Assets.

See *Equity*, 8, 4.

MASTER AND SERVANT.

Torts of servant—Master's liability.

1. A passenger on a street car who is willfully and wantonly assaulted by the driver, thrown off the car, and run over, may maintain an action against the company for his injuries. — *Winnegar's Adm'r v. Central Passenger Ry. Co.*, (Ky.) 287.

2. The defendant, owner of property adjoining which a cellar was being dug, engaged A., who was digging the cellar under contract with B., to under-pin the wall of his house adjoining such cellar. Defendant ordered A. not to commence undermining until the wall was properly underpinned. A. disobeyed, by commencing before the shores were up, in consequence of which the wall fell, doing damage to plaintiff's property. *Held* that, as the evidence showed A. to be under the control of defendant, defendant was liable for his acts, though caused by disobedience of or-

ders, and that instructions which hinged defendant's liability upon the question whether A. was at the time a servant of defendant or B., were misleading and erroneous.—*Mound City Paint & Color Co. v. Conlon*, (Mo.) 922; *Mullen v. Conlon*, (Mo.) 925.

Negligence of vice-principal.

8. A train dispatcher, having control of the movements of trains upon a railroad, is, in the performance of his duties as such, a representative of the company, and for an accident occurring through his negligence to another employe subordinate to him, and subject to his orders, the company will be liable. *Sherwood, J., dissenting*.—*Smith v. Wabash, St. L. & P. Ry. Co.*, (Mo.) 129.

4. If, in obedience to the order of the conductor in charge of a freight train about to start, the foreman of the car-repairers goes under it to fix a defective brake, and is run over by the backing of the train while he is known by the conductor to be there, the railroad company, the common employer of both, is liable under the rule of *respondet superior*.—*Ritt's Adm'x v. Louisville & N. R. Co.*, (Ky.) 796.

Defective appliances.

5. When it is clear from the testimony that the blocking of guard-rails adds to the security of the employes, and it is in proof that the company has made use of them on some parts of its road, a verdict against the company for damages resulting from the death of one of its yard-masters, who got his foot caught in an unblocked guard-rail, and was run down, will not be set aside on the ground that there is no evidence in the case to show negligence on the part of the company.—*Huhn v. Missouri Pac. Ry. Co.*, (Mo.) 987.

— Risks of employment.

6. An unblocked guard-rail is not an appliance so dangerous as to threaten immediate injury to those who work about it, and the fact that a yard-master knew that the rail was not blocked, and continued to pursue his employment of cutting out cars on that track, will not defeat a recovery on the part of his representatives, when, at the time he got his foot caught and was run down, he was in the exercise of all due care and proper caution.—*Id.*

MECHANIC'S LIEN.

For what obtained.

1. Under the mechanic's lien law of Texas a contractor who agrees to prepare stone for and erect the walls of a building for the owner, who is to pay him in installments

therefor, is entitled to a lien on the building and land for stone prepared for the building, but never delivered on the premises, nor actually used in its construction, when the owner has notified him that he could not comply with his contract, and he is compelled to cease work.—*Trammell v. Mount*, (Tex.) 877.

Proceedings to perfect.

2. Under the Texas lien law, the lien of a mechanic, though not fixed before record of the contract or bill of particulars, when it is fixed, relates back to the time when the work was performed or the material furnished, and hence takes precedence of all claims to the property improved which have been fastened upon it since that time.—*Id.*

8. Rev. St. Tex. art. 4804, requiring the county clerk to record deeds of trust, mortgages, judgments, or other instruments of writing intended to create a lien, in a book or books separate from those in which deeds or other conveyances are recorded, does not contemplate that liens shall be recorded separately from each other. The registration, therefore, of a mechanic's lien in a book in which mortgages are recorded, is proper.—*Quinn v. Logan*, (Tex.) 247.

Foreclosure.

4. Where property that is foreclosed for the payment of a mechanic's lien has been previously sold under attachment proceedings, the purchaser at the attachment sale will be entitled to the surplus of the proceeds arising from the lien sale, in preference to the owner of the premises.—*Trammell v. Mount*, (Tex.) 877.

MINES AND MINING.

Mining leases.

1. Where, by a mining lease, it is optional with the lessee whether he will take the land or not at the end of a year, the contract is unilateral, and time will be regarded as of the essence of the performance of the obligations incumbent upon the lessee; especially when the injuries to the land increase the longer the use for mining continues, and the lessors were kept out of the use of the land during the mining.—*Presidio Min. Co. v. Bullis*, (Tex.) 860.

2. But if such property were community property, and the lessor's husband represented to defendants that he would extend the time, and, on the faith of such representation, defendants went on to expend moneys, and carry out their part of the contract, the lessor was bound by such waiver.—*Id.*

MORTGAGES.

See, also, *Chattel Mortgage*.

Effect, see *Assignment for Benefit of Creditors*, 3, 4.

Firm property, see *Partnership*, 2.

Foreclosure, see, also, *Vendor and Vendee*, 6.

Lien, see, also, *Equity*, 3, 4.

Transfer of property mortgaged, see *Vendor and Vendee*, 5.

Validity, see *Husband and Wife*, 7.

Deed absolute on its face.

1. An instruction that a deed absolute on its face should be regarded as an absolute deed "unless the preponderance of evidence clearly shows" it to have been intended as a mortgage, and directing the jury to find so "unless you are so satisfied from the evidence that it was intended" as a mortgage, is erroneous, the use of the word "clearly" being calculated to lead the jury to believe that more than a preponderance of evidence is requisite.—*Prather v. Wilkins*, (Tex.) 252.

2. An instruction that, if the jury find that a certain deed was intended to secure a debt, it is a mortgage, and the grantors have the right to pay the debt within one year, and have the property reconveyed to them, *held* misleading, as tending to convey the idea that a failure to pay within the year worked a forfeiture.—*Id.*

Validity.

3. A deed of trust, regular in form, and acknowledged by the grantor before a proper officer as his act and deed, but lacking the grantor's signature, which was omitted by mistake, will be regarded in equity as a mortgage, and enforced against the lien of a judgment creditor of the mortgagor, subsequently acquired. *Rax, J.*, dissenting.—*Martin v. Nixon*, (Mo.) 508.

Consideration.

4. Extension of time by a creditor for the payment of a debt due him by the debtor, as security, is a valid consideration, and is sufficient to support a deed of trust given by the debtor to secure a new note for the debt.—*Id.*

Lien.

5. Where land intended to be included in a mortgage is omitted by mistake, and a judgment is subsequently rendered against the mortgagor, the lien of the judgment creditor is subject to the equity of the mortgage. *Rax, J.*, dissenting.—*Id.*

Assignment of debt.

6. In Missouri the transfer of a note secured by mortgage transfers the mortgage; and, after the transfer, the mortgagee has no power to release any part of the prop-

erty mortgaged, and such a release by him is void.—*Hagerman v. Sutton*, (Mo.) 73.

Foreclosure.

7. The mortgage of land, in which the wife had no separate estate, executed by both husband and wife, was foreclosed, the wife being made a party defendant. The judgment contained the usual deficiency clause, giving a personal judgment against her. *Held*, that this did not invalidate the sale under the foreclosure, since only the property mortgaged was sold.—*Id.*

— Rights of lienholders.

8. A mortgagee, having instituted a foreclosure suit, and obtained judgment for the sale of the mortgaged land, assigned the judgment to another, and the assignee set up his claim to the property by cross-petition in a separate action between other parties to which he was a defendant, and undertook to litigate it with them, they claiming liens on it adverse to him. *Held*, that he could not, while the latter suit was pending, proceed in the foreclosure suit, have the order of sale executed, buy in the property, take the commissioner's deed, and thereby perfect his title; his act in voluntarily introducing his claim into the latter suit, and litigating it with the lienholders, who were not parties to the foreclosure suit, being an abandonment of his right to pursue further the foreclosure suit.—*Seeley v. Mitchell's Assignee*, (Ky.) 190.

9. A mortgagee, having instituted a foreclosure suit, obtained an order for the sale of the land, which he bought in himself, and took the commissioner's deed therefor. Four years afterwards the mortgagee filed an amended petition setting out that one L. was in possession of the land, claiming under a deed from the mortgagor made before the commissioner's sale, and that other parties were claiming liens on the land under the mortgagor. The mortgagee asked that the case be reinstated on the docket. *Held*, that the case ought to be reinstated, although it would have been more regular to have brought a new action.—*Loftin v. Strow*, (Ky.) 180.

10. *Held, also*, that the amendment was not to be taken as being in effect an action of ejectment to recover the possession of the land, which would have been cognizable at law only, but as a proceeding to settle the rights under the conflicting liens, which was cognizable in equity.—*Id.*

Setting sale aside.

11. A county, being by law the trustee of the school funds for the benefit of the common schools and the education of minors, loaned a portion of those funds on a bond and mortgage. It became necessary to enforce the mortgage, and an order for the sale of the land was obtained. The

county authorities instructed a person to attend the sale, and represent the county's interest by bidding on the land up to the amount of the debt. This the person so instructed failed, through inadvertence or mistake, to do, whereby the land was bought in at a grossly inadequate price. *Held*, that the sale should be set aside upon the application of the county.—County of Cole v. Madden, (Mo.) 897.

12. The fact that the county court failed to make any record of its appointment of an agent to attend the sale, and to represent it, is immaterial in a proceeding to set aside the sale; defendant, the successful bidder, alleging in his answer that the county court had an agent present who bid on the property.—*Id*.

MUNICIPAL CORPORATIONS.

See, also, *Counties; Schools and School-Districts*.

City ordinance, see *Costs*, 4; *Disorderly House; Horse and Street Railroads*, 1-8.

Contracts, monopolies, see *Constitutional Law*, 6.

Obligations, see *Constitutional Law*, 1.

Streets, use by railroads, see *Constitutional Law*, 7.

Contracts.

1. Power given to a municipal corporation to contract in relation to a given subject-matter does not carry, by implication, the power to contract, even with reference to that, so as to embarrass and interfere with its future control over the matter, as the public interests may require.—City of Brenham v. Brenham Water Co., (Tex.) 148.

— Exclusive privileges.

2. A city ordinance granted to a water company "the right and privilege, for the term of 25 years from the adoption of this ordinance, of supplying the city of B., and the inhabitants thereof, with water for domestic and other purposes, and for the extinguishment of fires." By the ordinance the city also agreed to pay the company a large sum per annum, during the term of 25 years, for the supply of hydrants. *Held*, this is a grant of an *exclusive* privilege to the water company for the period named.—*Id*.*

8. The charter of the city provided that it "shall be capable of contracting and being contracted with," and gave it power to provide the city with water for the convenience of the inhabitants, and the extinguishment of fires; while the law under which the water company was organized provided that it should have full power to

furnish water to any city where it was located, for public or private buildings, or for other purposes, and to lay pipes through the streets with the consent of the city. A general law also authorized any city in which a water company was organized to contract with it for supplying the city with water. *Held* that, while these several laws authorized the city to make some contract for supplying itself with water, yet they did not confer *express* power to make a contract granting the water company the exclusive right to supply the city and inhabitants with water for the period of 25 years, at a fixed rate *per annum*; and this contract must be considered as unauthorized by the legislature, and invalid.—*Id*.*

Bonds.

4. Rev. St. Tex. art. 8788, authorizes the council or board of aldermen of any city or town to pass such ordinances, not inconsistent with the constitution and laws, as may be necessary to establish and maintain free schools, purchase building sites, and construct school-houses. *Held*, that this article does not confer on a town, which has taken charge of its free schools, power to purchase school buildings, and issue bonds in payment thereof.—City of Waxahachie v. Brown, (Tex.) 207.

5. Rev. St. Tex. arts. 419, 420, authorize cities to issue bonds to pay off their existing or future debts incurred in improving public markets, streets, erecting city halls, hospitals, water-works, etc., but provide that the amount of bonds issued shall not exceed 6 per cent. of the value of the city's taxable property. *Held*, that in ascertaining the amount of bonds outstanding, those issued in aid of a railroad are to be included, and a sum of money in the city treasury applicable to the bonds could not properly be deducted.—*Id*.

6. Ordinance No. 45 of the city council of Paris authorized the issue of certain bonds and coupons in payment of a balance due on the purchase of a steam fire-engine, provided that payment of principal and interest on said bonds should be made by an annual tax, and that no part of the current expense fund should be used for such payment, and an acceptance of the bonds by the company, to whom they were issued, was to be construed as a consent to these provisions. In an action against the city to enforce payment of certain of said coupons, brought by an assignee of the company, *held* that, as the bonds state upon their face that they were issued under said ordinance, holders are bound by the provisions thereof.—Gould v. City of Paris, (Tex.) 650.

7. The holder of bonds issued under an invalid ordinance is not entitled to the bal-

ance of the tax already collected, because the money was paid to the city, to be paid to the plaintiff only on condition that he had a valid claim against the city.—*Id.*

8. Rev. St. Tex. art. 420, (re-enacting the act of March 15, 1875, § 76,) which allows cities to borrow money to discharge their indebtedness, and for certain public improvements, and which was the law at the time the contract was made, is limited by section 9 of article 8 of the constitution, which provides that "the state tax on property * * * shall never exceed 50 cents on the 100 dollars valuation, and no county, city, or town shall levy more than one-half of said state tax." The only exception to this limitation is as to cities of over 10,000 inhabitants; but as plaintiff, who is seeking to coerce the city into the exercise of its taxing power, which it can possess only through the law of the state, and on whom, consequently, the burden rests of showing this power, has failed to show that Paris contained more than 10,000 inhabitants, he cannot claim for it powers specially granted to cities of that size. The legislature, at the time said contract was made, having already levied a tax of one-fourth of 1 per cent. for current expenses, the city council had no power to levy the tax for the payment of said bonds and coupons, the contract itself was void, and the city is not liable for the payment of said bonds and coupons.—*Id.*

Control of streets.

9. The Arkansas statute of March 21, 1885, § 3, conferring on cities of 5,000 inhabitants power to require owners of lots abutting on streets to build and maintain sidewalks, when necessary to the safety or convenience of travel, and to enforce obedience by fine, etc., is not unconstitutional, as an unwarranted delegation of the taxing power, but is a proper exercise of the police power of the state; and a city ordinance passed pursuant to, and in accord with, the statute, is valid.—*James v. City of Pine Bluff*, (Ark.) 760.

10. Such an ordinance, however, must be general, covering the whole street or locality where the necessity exists; and it must be reasonable, and not oppressive, in respect to the dimensions and materials of the proposed sidewalk.—*Id.*

11. Where a city ordinance requires a footway to be constructed of brick, 10 feet wide, with a curb, in the absence of proof to the contrary, it will be presumed, on appeal from a conviction of a lot-owner for disobeying the ordinance, that a pavement of that width was necessary at that point to accommodate pedestrians, and that brick was ordered to be used because the street was within the fire limits of the town.—*Id.*

Public improvements—Assessments.

12. Under section 5, art. 6, of the charter of the city of St. Louis, a separate assessment of the benefits to each lot from the opening of a street must be made, and, when several contiguous lots are assessed together as one lot, no recovery can be had; following *City of St. Louis v. Provenchere*, *ante*, 410.—*City of St. Louis v. Johansen*, (Mo.) 417.

13. The charter of the city of St. Louis (article 6, § 5) provides the method by which property shall be assessed for benefits conferred by the opening of a street, and directs commissioners to assess contiguous property benefited thereby, which assessment shall be a lien on the property so charged. *Held*, under these provisions, that, where one person owns several lots, a separate assessment of the amount of benefits to each lot is necessary, and commissioners have no authority to group the several lots and assess them in gross.—*City of St. Louis v. Provenchere*, (Mo.) 410.

Defective streets.

14. Although it is the duty of incorporated towns and cities in Arkansas to keep their streets in repair, yet no statute, expressly or by implication, makes them liable to a private action by an injured party for damages sustained by reason of a failure to discharge the duty. In the absence of such a statute, they are not liable.—*City of Arkadelphia v. Windham*, (Ark.) 450.*

Judicial power of mayor.

15. The power to take general affidavits vested in justices of the peace by the Arkansas statutes (Mansf. Dig. § 2918) may be exercised by the mayors of incorporated towns within the limits of their corporations, by virtue of the statute (Id. § 797) which confers upon such mayors "all the powers and jurisdiction of a justice of the peace in all matters, civil and criminal, arising under the laws of the state, to all intents and purposes." Such mayor may consequently take an affidavit, to be used in prosecuting an appeal from a judgment of the county court to the circuit court.—*Robinson v. County of Benton*, (Ark.) 195.

16. The said statute (Mansf. Dig. § 797) does not merely confer upon such mayors judicial power, and carry into effect section 43 of article 7 of the constitution of 1874, which declares that "corporation courts for towns and cities may be invested with jurisdiction concurrent with justices of the peace in civil and criminal matters," but goes further, and grants the general as well as the judicial power of a justice.—*Id.*

Taxation—City property.

17. Land adapted to municipal uses, deriving an increased value from its prox-

mity to the city, and having a city population on or near it, creating a necessity for municipal government, or at least rendering the extension of such government over it reasonable, is liable to city taxation. The fact that the owner of such land chooses to use it for agricultural purposes does not exempt it from city taxation.—*Torbitt v. City of Louisville*, (Ky.) 845.

NEGLIGENCE.

See, also, *Carriers*, 2-5, 8-11, 14; *Damages*, 1, 2, 4, 7, 8, 11; *Master and Servant*, 3-6; *Municipal Corporations*, 14; *Railroad Companies*, 9-21.

Death by wrongful act, see *Conflict of Laws*; *Damages*, 8; *Venue in Civil Cases*, 4.

Who liable.

1. G. leased ground from a railroad company adjoining its depot, and erected and maintained thereon an eating-house, to which the company's employes and passengers frequently resorted for refreshments. In an action against G. and the company for injuries caused by a defective platform erected by G. in front of the eating-house, and on the leased premises, *held* that, in the absence of evidence that the eating-house was managed or controlled by the company, the mere fact that it owned the ground upon which it was erected, and that the company's interests were subserved by having such eating-house near its depot, imposed no duty upon the company to keep in repair or well lighted the platform upon which the injury occurred, or a passage-way leading to it from the depot.—*Texas & P. Ry. Co. v. Mangum*, (Tex.) 617.

Dangerous premises.

2. It appearing that the railroad was required by statute to post at the nearest station-house a notice of the killing of stock by their trains, and that one who was missing a cow went upon the platform of the station to read a notice posted there, taking plaintiff with him to do the reading, as he himself was unable to read, and that plaintiff, in climbing up to get at the notice, fell through a defective plank in the platform, and was injured, *held*, that the railroad was liable to plaintiff.—*St. Louis, I. M. & S. Ry. v. Fairbairn*, (Ark.) 50.*

Province of jury.

3. In an action against a railroad company to recover for the death of a fireman, caused by the track giving way under the train during a heavy rain, *held*, that the sudden giving way of the track was *prima facie* evidence of negligence in its construction, and that, the evidence as to whether the rain was an extraordinary one

being conflicting, the case was properly sent to the jury.—*Stoher v. St. Louis, I. M. & S. Ry. Co.*, (Mo.) 339.

4. In such action the fact that the fireman and engineer were warned against danger from water in the neighborhood of the place where the accident occurred, it appearing, however, that a long train passed safely over the track shortly before their train, *held* to be, at most, only evidence of contributory negligence for the consideration of the jury.—*Id.*

5. In an action for personal injuries caused by alighting from a train in motion, at the direction of the conductor, a refusal to instruct the jury to find for the defendant if they believed, from the evidence, that, after the train had stopped at the station for a reasonable length of time to enable plaintiff to alight, he, failing to so alight, leaped from the train while in motion, and in so doing was injured, is not error, since such charge seeks to make circumstances, of which the negligence is to be determined by the jury, negligence *per se*.—*St. Louis, I. M. & S. Ry. Co. v. Person*, (Ark.) 755.*

6. It being, on the evidence, a doubtful question whether, at the time a car-repairer while under a freight train about to start was run over by the backing of the train, the train was in charge of its conductor, who ordered the car-repairer under the train, or of the yard-master, (in the former case the railroad company being liable, and in the latter not,) *held*, in an action against the company, that the question was for the jury; that for the court to order a verdict for defendant on the ground that the train was in charge of the yard-master was error.—*Ritt's Adm'x v. Louisville & N. R. Co.*, (Ky.) 796.

7. In an action to recover from a railroad for damages received by plaintiff while alighting from a passenger train, *held*, although the length of the stop was sufficient to enable him to leave the train in safety under ordinary circumstances, and he was young, presumably active, unincumbered with baggage, and the failure of the company adequately to light its station and platform was not shown to have contributed directly to the injury, yet, the injury having been found by the jury to have been caused by the railroad's negligence in this respect, the verdict should not be set aside, it appearing that the instructions given were correct.—*St. Louis, I. M. & S. Ry. Co. v. White*, (Ark.) 52.*

8. The plaintiff was injured by falling over an embankment, while alighting from a train at a station where he lived, and with the railroad approaches to which he was familiar. The train on which he was riding had not, however, stopped at the usual point, and the night was so dark that

he could not see just where he was. Before he got off the station had been called, the train stopped, and the conductor had gone off with his lantern. *Held*, that these were facts tending to show negligence on the part of the company, and that the case should go to the jury.—*McGee v. Missouri Pac. Ry. Co.*, (Mo.) 789.

Evidence.

9. In an action against a railroad company to recover damages for its negligence which resulted in the death of plaintiff's father, evidence of the condition of the track at the place of the accident more than three years after it happened, is inadmissible.—*Stoher v. St. Louis, I. M. & S. Ry. Co.*, (Mo.) 889.

10. Upon an action against a railroad company for damages for personal injuries sustained in an accident, evidence was given for plaintiff as to the condition of the track a mile and a half from the place of the accident. *Held* that, while such evidence was incompetent and inadmissible, yet the error was cured by an instruction limiting the consideration of the jury to the defects specifically charged in the petition.—*Sidekum v. Wabash, St. L. & P. Ry. Co.*, (Mo.) 701.

11. Several witnesses who were present when plaintiff's husband was struck by defendant's train testified that the bell was ringing, and the head-light of the engine burning, for some distance before reaching the point at which the deceased was first seen. In this state of the evidence, *held*, that the exclusion of the testimony of a witness living near by, (it did not appear how far from the place of the accident,) that the bell was not ringing, nor the head-light burning, when the train passed her house, was not prejudicial error.—*Hughes v. Galveston, H. & S. A. Ry. Co.*, (Tex.) 219.

Contributory negligence.

12. The act of plaintiff in going at dusk upon a defective station platform to read a notice which the company was required by law to post there when stock had been killed by its trains, *held* not *per se* negligent, as a conclusion of law.—*St. Louis, I. M. & S. Ry. v. Fairbairn*, (Ark.) 50.

13. In an action by an employee against a railroad company for injuries, *held*, that it was not negligence upon the part of the employee to act, in an emergency, upon the verbal order of the train dispatcher, although a rule of the road required that the specific order should be in writing. *SHERWOOD, J.*, dissenting.—*Smith v. Wabash, St. L. & P. Ry. Co.*, (Mo.) 129.

14. A recovery cannot be had against a railroad company for the death of a person who, being capable of taking care of himself, enters upon the company's track,

and remains there until struck by a train, whose approach he might see, even if the train might have been stopped in time to avoid striking him.—*Hughes v. Galveston, H. & S. A. Ry. Co.*, (Tex.) 219.*

15. In an action by a woman in good health, 65 years old, and weighing 170 pounds, to recover damages for personal injuries occasioned by the starting of a train while she was in the act of alighting, the jury may take into consideration the "age, sex, and physical condition" of the plaintiff in determining whether she exercised ordinary care and diligence at the time of the accident.—*Hickman v. Missouri Pac. Ry. Co.*, (Mo.) 127.

16. Where plaintiff sued a railroad company for injuries caused by the negligence of the defendant in allowing a train to start while she was trying to get on, the burden of proof as to contributory negligence on the part of the plaintiff is on the defendant, and does not shift to the plaintiff, when it is shown that she had gone close to the train, to be ready to board it, and, when notified by a brakeman to get on, and that she would have plenty of time, attempted to do so.—*Texas P. Ry. Co. v. Davidson*, (Tex.) 686.*

Instructions.

17. In an action against a railroad company by a passenger, to recover damages for personal injuries, instructions to the effect that if the plaintiff purchased a ticket to a regular station on defendant's road, and entered its train for the purpose of being carried there, and that, by reason of the failure of the conductor of said train to keep the cars at a stand-still a reasonable length of time to enable plaintiff to leave the cars in safety, the plaintiff was injured, without negligence on his part, the defendant is liable therefor; that if said train, after stopping at said station, started before the plaintiff could alight, and plaintiff, obeying the conductor's orders, attempted to get off while the train was going slowly, and the danger was not apparent, he was not guilty of such contributory negligence as would bar a recovery; that, if the plaintiff was directed by the conductor or agent of the defendant to get off while the train was moving, he had a right to rely upon said direction, provided he took no more risk than a prudent man would have taken under the same circumstances, and in so doing he would not be guilty of contributory negligence; and that where the danger of alighting from a moving train is not apparent to a passenger, and he is urged to take the risk by the company's employee, whose duty it is to know the danger, his conduct is not negligent,—correctly state the law as to carriers of passengers and contributory negli-

gence.—*St. Louis, I. M. & S. Ry. Co. v. Person*, (Ark.) 765.*

— Infants.

18. In an action for damages based upon alleged negligence in violating an ordinance of St. Louis by which drivers and conductors of street cars are required to keep watch for children, either on the track or approaching the same, and to stop in the shortest time possible, where the evidence disclosed that a boy between eight and nine years old was knocked down by the horses of defendant's street car while attempting to jump on another car going in the opposite direction, and that the driver of the car did all in his power to stop it the instant he saw or could have seen the boy, *held*, that an instruction to the jury "that the law requires of a boy eight years and eight months old that he shall exercise such care and foresight, in avoiding danger and accident, as he is capable of exercising, and if he failed to exercise such degree of care, and thereby contributed directly to his death, that his parents could not recover," is not error, when the court otherwise instructed the jury that it was proper for them to consider the facts and circumstances of the case, his age, experience, and knowledge of the risk attending the act of running in the street to catch onto street cars, and the warnings which he may have received from his parents and others, and when the court also told the jury that all the instructions were to be taken and read together.—*McCarthy v. Cass Avenue & Fair Grounds Ry. Co.*, (Mo.) 516.*

Actions for wrongful death.

19. Under Gen. St. Ky. c. 57, giving to an administrator a right of action for the death of his intestate, when caused by "neglect" of servants or agents of a corporation, an action cannot be maintained against a street-railroad company for the death of a passenger, caused by the driver willfully assaulting him, and throwing him off the car.—*Winnegar's Adm'r v. Central Passenger Ry. Co.*, (Ky.) 287.*

20. The fact that an action does not lie for causing the death of a person in a certain case is no objection to the maintenance of an action by the administrator for damages up to the time of death.—*Id.*

21. In an action for death by wrongful act, it is error to introduce into the charge the question of malice on the part of the crew that was running the train at the time of the accident, when there is no evidence in the case tending to show such malice.—*Nashville, C. & St. L. R. Co. v. Seaborn*, (Tenn.) 661.

22. Where an experienced freight conductor was knocked off his train while passing through an overhead bridge, it ap-

pearing that one could stand up on the ordinary cars used by the company, and pass the bridge safely, but that the train in question happened to contain one car which was too high for this, *held*, that an action to recover damages for the death of the conductor, in which it is necessary to show "willful neglect" of the corporation, was not maintainable; although, when willful neglect is shown, in such an action contributory negligence of the deceased is not a defense. *Lewis, J., dissents.*—*Derby's Adm'r v. Kentucky Cent. R. Co.*, (Ky.) 808.*

— Damages.

23. In an action brought by a child against a railroad company to recover damages for its father's death, which was alleged to have been caused by the negligence of the company, the jury are not confined, in settling their verdict, to nominal damages, although plaintiff's evidence does not show what the earnings of the father were at the time of his death. The loss of a parent's care in the education, maintenance, and pecuniary support of the child have, in addition to their moral value, an appreciable pecuniary value, which the jury may consider.—*Stoher v. St. Louis, I. M. & S. Ry. Co.*, (Mo.) 839.

NEGOTIABLE INSTRUMENTS.

Actions on, see, also, *Evidence*, 16-19; *Trial*, 10; *Witness*, 1, 4.

Transfers.

1. A., holding two notes executed by the vendee of land for the purchase money, sold one of them to B., representing to B. that there was an outstanding equity in favor of the vendee, but that it should be charged against the other note. A. afterwards sold the other note to a third party. *Held*, that the latter took the note subject to the equity.—*Wallace v. Arnold*, (Ky.) 840.

2. R. agreed to take of an agent \$3,000 of certain stock the agent had for sale, a certificate for \$7,000, the title to which was in his principal, but only for life. This certificate, which R. had never seen, and about which he knew nothing, the agent had canceled, and two new certificates issued,—one for \$3,000, in the name of R.; and one for \$4,000, in his own name. The \$3,000 was delivered to R., who paid full value. *Held*, in a suit by the remainderman, upon the death of the life-tenant insolvent, that R. was a *bona fide* purchaser, and was not liable.—*Caulkins v. Memphis Gas-Light Co.*, (Tenn.) 287.

3. A wife mortgaged her property for \$10,000, and gave the note and mortgage to

her husband, C., for the purpose of enabling him to obtain credit for the firm to which he belonged. He so used them by obtaining from the duly authorized agent of the mortgagee the acceptance of a draft of \$10,000, payable to C.'s order, in three months, which was deposited to the credit of C.'s firm in a bank. At the request of the agent, the president of the bank promised not to negotiate the draft; but the cashier did negotiate it, and the bank failed. The mortgagee was sued on the draft, and judgment was rendered against it. *Held*, that the wife's property was chargeable with the amount of the draft and interest, since, where one of two innocent parties must suffer for the wrongful act of a third, the loss must fall on the party whose acts brought about the loss.—*Cocke v. Hatcher*, (Tenn.) 170.

4. The arrangement having been made between the bank and the parties that \$2,900 of the \$10,000 were to be retained for the mortgagee to pay taxes on the property, and be paid on the premium notes it took from the mortgagor, *held*, that to that extent the bank became trustee of the mortgagee, and the mortgagor was relieved of liability to the mortgagee for the wrongful negotiation by the bank of the note.—*Id.*

Transfers without indorsement.

5. A negotiable promissory note, payable to M. or order, transferred to a third party without indorsement by M., is in his hands, to all intents and purposes, a non-negotiable instrument, and subject to all the equities to which it would have been subject had it been a non-negotiable instrument in form, or had remained in the hands of the original payee; and such party has constructive notice of a defeasance, though not recorded, providing that, if the patent for the purchase price for which the note was given should prove a failure, the note and deed of trust securing it should be surrendered, in so far as to preclude him from pleading ignorance thereof.—*Weber v. Orton*, (Mo.) 271.

Gambling notes.

6. The statutes (Rev. St. Mo. 1879, §§ 5721-5723,) making all notes, where the consideration is money or property, won at any game or gambling device, void, and providing that assignment of such a note should not affect the defense, are designed to aid the criminal law, and do not affect the validity of such a note in the hands of a *bona fide* holder without notice.—*Crawford v. Spencer*, (Mo.) 718.

7. C. gave to a firm of speculating brokers his note, secured by a deed of trust covering certain real estate, to save the brokers harmless in certain wagering transactions in futures, then pending and there-

after to be made between the parties. The brokers assigned the said note to F. before maturity, who took same without notice of the infirmity, and in payment of an existing valid debt between said brokers and F. In a suit by C. to restrain F. from selling the real estate under said deed of trust, *held*, that F. took the note free from the equities existing, as against C. and the brokers, and that F. was entitled to enforce the security to the extent of the amount due from the brokers to him.—*Id.*

Indorsers.

8. In the absence of testimony as to the order of indorsement, those that follow or are below that of the payee are presumed to be subsequent.—*Williams v. Merchants' Nat. Bank of Kansas City*, (Tex.) 163.

9. On a promissory note, with the following clause: "In case of non-payment of the above note at maturity I hereby authorize any licensed attorney at law to appear for me in court, and to accept service, waive process, and confess judgment in favor of the legal holder of said note, against me, for the amount of said note, and interest, with ten per cent. attorney's fees additional,"—judgment according to the terms of the note was taken against, not only the maker, but four subsequent indorsers. *Held*, that the indorsers by their indorsement simply guaranteed the performance of the obligations of the maker as set forth in the note, and did not authorize the taking of the same summary judgment against themselves.—*Id.*

Actions on.

10. Where suit was brought on a note not due, and an attachment obtained, but the attachment was afterwards quashed, *held*, that this does not require the dismissal of the suit upon the ground that the attachment was the only ground of jurisdiction in such a case; and the note having meantime fallen due, and that fact being set up in an amended petition, the cause might properly proceed to judgment.—*Arnold v. Willis*, (Tex.) 485.

Pleading.

11. Rev. St. Mo. § 547, defines a negotiable promissory note to be one "for the payment of money to the payee therein named, or order or bearer, and expressed to be for value received." *Held*, under this section, that the allegation, "was expressed to be for value received," is an essential averment in a petition which seeks to set up a cause of action against the indorsers of a negotiable promissory note.—*Hart v. Harrison Wire Co.*, (Mo.) 123.

Inspection of signature.

12. Where suit has been brought upon a promissory note, it is not error for the court to grant a motion requiring the

plaintiff to file the note in court for the inspection of the defendant, who has denied in his answer the signature of the note.—*Smith v. Caswell*, (Tex.) 848.

— Instructions.

13. It is not error for the court, at the trial of an action upon a promissory note, in charging the jury, to say that "no witness has been called by plaintiff to testify directly to the execution of the note;" such statement being undeniably true as shown by the record, it being proper for the court to direct the jury to the very issue to be determined, and to instruct them as to what evidence they might look to in coming to a decision upon it.—*Id.*

14. The plaintiff in an action upon a promissory note excepted to the verdict on the ground that the court erred in its general charge to the jury in not giving full and complete instructions as to the manner of proving a signature. *Held* that, if the instructions were incomplete, the plaintiff's proper course was to ask special instructions, and, not having done this, he could not complain of the instructions as given.—*Id.*

15. In an action upon a promissory note, the court, at the request of the defendant's counsel, instructed the jury, in effect, that the language of the plea of *non est factum* to the note in issue was for the construction of the court, and not a matter for them to consider. *Held*, that the court did not err.—*Id.*

— Verdict.

16. Where the question in an action on a promissory note is whether the signature of the maker is genuine or a forgery, and the instructions as given by the court present that question fairly to the jury, the verdict will not be disturbed where there is evidence tending to support it.—*Griffith v. Hanks*, (Mo.) 508.

NEW TRIAL.

See, also, *Appeal*.

Absent witness, see *Criminal Practice*, 4.
Application for, see, also, *Appeal*, 38, 39;
Judgment, 15.

Ruling on evidence, see *Witness*, 2, 3.

Inadequate damages, see *Railroad Companies*, 8.

Application for.

1. When an attorney fails to promptly present a statement for a new trial to the judge before whom the case was tried, and it is not signed and filed in time by reason of a delay in the mail to which he has intrusted it, he cannot obtain a new trial by original suit for that purpose, as ordinary prudence demanded, in such a case, that he should have presented the statement in

person, or by attorney or messenger, and not trust to the uncertainties of the mail.—*Proctor v. Wilcox*, (Tex.) 375.

2. In ejectment, the jury found for plaintiff, and on the same day defendant filed a motion for a new trial, but withdrew it in consideration of a waiver by plaintiff of the damages assessed, and a judgment for mesne profits was entered. About 45 days later, defendant refiled his motion for a new trial. *Held* that, under Mansf. Dig. Ark. § 5153, requiring application for a new trial, except for newly-discovered evidence, to be filed within three days after verdict or decision, unless unavoidably prevented, the motion was not made in time, and that defendant was estopped by the record, and his own agreement.—*Nichols v. Shearon*, (Ark.) 167.

Misleading instructions.

3. In an action for damages resulting from a collision of plaintiff's horses and wagon with defendant's train, when there is evidence claiming the death of one horse only, and injury to the other, the charge of the court was such as to induce the jury to believe that, in the opinion of the court, there was evidence from which they could find that both horses were killed. *Held*, erroneous, and that a new trial should be granted.—*Texas Cent. Ry. Co. v. Asunc.* (Tex.) 13.

Disqualified juror.

4. One of the qualifications for jury service in Texas is that the proposed juror is a freeholder in the state, and a householder in the county of the forum. In this case a juror qualified himself on his *voir dire*, but, after the trial and conviction, it was discovered that he was neither a freeholder in the state, nor a householder in the county, and this disqualification was set up as a ground for new trial. *Held* that, in refusing the new trial, the trial court erred.—*Boren v. State*, (Tex.) 463.

Inadequate or excessive damages.

5. In personal actions founded upon tort, and sounding merely in damages, a new trial will not be granted on the sole ground of smallness of damages, unless, under all the circumstances, the verdict appears to have been the result of either passion, prejudice, or partiality.—*Pritchard v. Hewitt*, (Mo.) 487.

6. In an action of assault and battery, the jury awarded plaintiff one dollar as damages. *Held* that, while the evidence showed that defendant was not justified in making the assault, yet, as it also showed that plaintiff was not without fault, the verdict would not be disturbed.—*Id.*

7. A verdict fixing the value of plaintiff's grass, burned by negligence of defendant,

at \$750, held not to be set aside. It appearing that, although plaintiff's witnesses did not give very satisfactory reasons for their opinions as to its value, yet the railroad did not call any witnesses to fix the value at any less.—*Gulf, C. & S. F. Ry. Co. v. Witte*, (Tex.) 490.

8. In an action to recover damages resulting from a collision of plaintiff's horses and wagon with defendant's train, when there is evidence showing the death of one horse only, and injury to the other, without specifying its extent, a verdict for such sum as would cover the highest value placed on both horses, and damages for the injury to the wagon and harness, is erroneous, since it is not sustained by the evidence.—*Texas Cent. Ry. Co. v. Ascue*, (Tex.) 18.

Newly-discovered evidence.

9. A motion for a new trial on the ground of newly-discovered evidence will not be granted where it appears that the evidence relied on is that of the wife of the party making the motion, who came to the place of trial for the purpose of testifying, but was unable to take the stand on account of illness, it appearing that no postponement on account of her illness was asked for, and no effort made to take her testimony in any of the modes provided by law.—*Richards v. Smith*, (Tex.) 571.

10. A motion for a new trial on the ground of newly-discovered evidence will not be granted where it appears that the evidence relied on is to be given by the party making the motion, who was present at the trial, and heard the witnesses in the case, but did not offer to testify in rebuttal or explanation of their statements.—*Id.*

Discretion of court.

11. A motion for a new trial on the ground of newly-discovered evidence being addressed to the discretion of the lower court, its decision thereon is not subject to revision.—*Smith v. Commonwealth*, (Ky.) 798.

12. The matter of granting new trials lies peculiarly within the discretion of the trial court. Hence, where it appears that the facts relied on, and upon which a verdict is based, are not pleaded, but appear in an instruction requested by plaintiff, and given by the court, and that the instructions given at the trial are inconsistent with each other, the ruling of the court in granting a new trial will not be reversed.—*Iron Mountain Bank v. Armstrong*, (Mo.) 720.

NONSUIT.

Conflicting evidence.

Where an issue of fact is to be determined by a jury, and the evidence is conflicting, or conduces to make out plaintiff's

cause of action, it is improper to direct a nonsuit.—*Lingenfelter v. Louisville & N. R. Co.*, (Ky.) 185.

NOTARY PUBLIC.

Authority.

The authority of a notary, who is lawfully such by virtue of his holding some other office, is quite as ample to authenticate conveyances for the purpose of registration as if he were notary by direct appointment.—*Wilson v. Simpson*, (Tex.) 839.

OATH.

Chinese.

Under Rev. St. Mo. 1879, §§ 8324, 8325, providing that the oath shall be administered to a person about to be sworn in the mode most binding on his conscience, and that every person believing in any religion other than the Christian religion shall be sworn according to the peculiar ceremonies of his religion, when a Chinese interpreter states that "the joss-stick burning is the true oath among the Chinese," it is error to compel him to be sworn in the usual way. *Norton, C. J.*, dissenting.—*State v. Chyo Chiagk*, (Mo.) 704.

PARDON.

Revocation.

1. The delivery and acceptance of a pardon are complete when the grantor has parted with his entire control or dominion over the instrument, with the intention that it shall pass to the grantee, and the latter assents to it either by himself or agent. In this case, the agent having accepted the pardon on behalf of the grantee, the pardon took effect immediately upon its delivery.—*Rosson v. Stehr*, (Tex.) 897.

2. The pardoning power cannot revoke a pardon once delivered, and accepted by the grantee or agent.—*Id.*

Obtained by fraud.

3. A pardon was issued and delivered to the grantee's agent on August 25, 1886. On August 30th, it was filed with the superintendent at the penitentiary in which grantee was confined. On the same day, but before the pardon was entered on the books of the penitentiary, or delivered to the grantee, the superintendent received a telegram from the governor to hold said pardon for further orders. By subsequent telegram the governor notified the superintendent that the pardon had been revoked, and ordered its return. It was returned to the governor, who indorsed upon it instructions to the secretary of state to issue an order revoking it, as granted upon

misinformation. Thereafter proceedings by *habeas corpus* were instituted in the district court, and appellant produced in evidence the charter of pardon bearing the said indorsement. *Held*, that a pardon procured by fraud upon the pardoning power, by any imposition, is absolutely void; and that the appellant, having relied upon the pardon with its indorsement, established against himself *prima facie* fraud, and assumed the *onus* of proving no fraud; failing to do which the trial court did not err in remanding him.—*Id.*

Parties.

See, also, *Equity*, 7; *Infancy*; *Quieting Title*, 4, 5; *Trespass*, 4.

Defect of, see *Executors and Administrators*, 6.

Joinder and misjoinder, see *Husband and Wife*, 12; *Mortgages*, 7; *Venue in Civil Cases*, 2, 3.

Necessary, see *Abatement and Revival*, 2; *Corporations*, 5; *Ejectment*, 3.

Next friend, see *Guardian and Ward*, 1.

Intervention and substitution, see *Guardian and Ward*, 2; *Mortgages*, 8; *Replevin*.

PARTITION.

Commissioners' report.

1. Where, in a suit for the partition of land, the commissioners report that the land is incapable of being divided without great prejudice to both parties, they should state the facts upon which their opinion is based.—*McGee v. Russell*, (Ark.) 284.

Premature sale.

2. A sale for partition was made within one year from the time of the appointment of the administrator, and at that time Pasch. Dig. Tex. art. 1848 provided that partition should not be made till after the first term after the expiration of 12 months from the original grant of letters of administration. *Held*, that this limitation was for the protection of creditors; and, if the order was prematurely made, none but creditors could complain, and that, though the sale might have been set aside for the irregularity within a proper time, after the lapse of 25 years the presumption *omnia recte acta* applies.—*White v. Jones*, (Tex.) 161.

Repartition.

3. Where a man dies leaving community property in which his surviving wife owns one-half interest, but the entire property is partitioned *equally* among his nine children, including seven by a former wife and two by the surviving wife, *held*, that the two children of the surviving wife may afterwards have a repartition, by which

the one-half belonging to their father is divided equally between the nine children, but the one-half belonging to their mother, the surviving wife, is divided between them to the exclusion of the other seven children. The rule that upon partition each parcener impliedly warrants the title of his coparceners does not apply in such a case.—*Grigaby v. Peak*, (Tex.) 474.

4. If any one of the parceners shall have in the mean time sold the land allotted to him upon the original partition, the same land may be allotted to the purchaser upon the repartition, if this can be done without detriment to the other parties in interest.—*Id.*

PARTNERSHIP.

See, also, *Assignment for Benefit of Creditors*, 1.

Dissolution, see, also, *Executors and Administrators*, 10, 16.

Real estate, see, also, *Dower*, 1.

Firm and individual creditors, see *Execution*, 6; *Fraudulent Conveyances*, 10.

Real estate as firm property.

1. If real property be purchased with partnership means, and used for partnership purposes, it is treated in equity as held by the partners in trust for the firm, subject to the same rules as apply to partnership personal property, and liable to the debts of the firm and the claims of the partners *inter se*; and this is so whether the title be vested in one or all of the members of the firm.—*Pepper v. Thomas*, (Ky.) 297.*

2. A partner cannot maintain an action to set aside a mortgage executed by his co-partner on the latter's interest in the partnership real estate, and subject that interest to the payment of the partnership debts, unless he alleges and proves that the mortgagees had notice that the real estate was partnership property.—*Seeley v. Mitchell's Assignee*, (Ky.) 190.

Power of partner.

3. Though one partner cannot, without the authority of his copartners, make a general assignment, he can, in their absence, assign a part of the firm's assets in payment of a particular debt, and direct the distribution of the surplus among its other creditors.—*Johnson v. Robinson*, (Tex.) 625.

Dissolution and settlement.

4. In a suit to settle the affairs of a partnership, it is the duty of the trial court, upon approval of the report of the referee, to so dispose of the assets of the firm, by order of sale or partition in kind or otherwise, as to make a complete and final settlement between the parties.—*Filbrun v. Ivers*, (Mo.) 674.

5. After the dissolution of a partnership, but before the final settlement of accounts, the continuing partner bought in, for \$210, an outstanding promissory note of the firm of the face value of \$4,000, and claimed credit for the full amount in the final adjustment. *Held*, that the trust relation which exists between partners is not terminated with the dissolution, but continues until a final adjustment and settlement of the partnership affairs, and that only the amount actually paid in purchasing the claim should be credited.—*Id.*

PAYMENT.

See, also, *Schools and School Districts*, 2-7.

By surety, see *Principal and Surety*, 5-7.
Claims against estate, see *Executors and Administrators*, 10.

Taxes, labor on roads, see *Taxation*, 8.
— recovery, see *Taxation*, 15-18.

Voluntary payment.

A. purchased a lot of corn, giving his note secured by chattel mortgage, with a power of sale, in payment. Only a part of the corn was delivered, but the vendor insisted upon payment of the note in full. A. objected and the vendor agreed to make a small deduction, but threatened to take the property mortgaged from A.'s possession, and sell it to satisfy his claim, if A. did not pay the amount claimed. After some negotiation A. paid the full amount, under protest. *Held*, in a suit to recover the amount overpaid, that the payment was voluntary.—*Vick v. Shinn*, (Ark.) 60.

PERJURY.

Corroborating circumstances, see *Seduction*, 1.

False swearing.

1. County clerks have authority to take affidavits of the consent of parents to the marriage of their daughter, and such an affidavit, if false, may be assigned as "false swearing," though not as perjury. *Rev. St. art. 149.*—*Stecher v. State*, (Tex.) 880.

Evidence.

2. It was in proof that, when the marriage license was obtained upon appellant's affidavit that the bride's mother consented to the marriage, the said mother had been dead two years, and thereupon one G., who stood in *loco parentis* to the bride, was permitted to testify that he did not consent to the marriage. *Held*, that the testimony of G. was wholly irrelevant, and should have been excluded.—*Id.*

Instructions.

3. Article 196 of the Texas Penal Code, in defining the offense of "false swearing,"

requires that it be done "deliberately," and "willfully." Though the court properly defined "deliberately," it omitted to define "willfully," which omission, in view of the facts, was reversible error.—*Id.*

PLEADING.

See, also, *Equity*, 8, 9; *Limitation of Actions*, 23-25.

Amendment, see *Appeal*, 46; *Judgment*, 4; *Limitation of Actions*, 15, 16; *Qui Tam and Penal Actions*, 2.

Declaration or petition, see *Appeal*, 47; *Bonds*, 5; *Carriers*, 8, 8; *Damages*, 10; *Taxation*, 10.

Plea in abatement, see *Attachment*, 7, 8.

Specially pleading defense, see *Effectment*, 5.

Sufficiency after judgment, see *Tender*.

Verification, see *Attachment*, 7, 8; *Equity*, 10.

Answer.

1. *Rev. St. Mo. § 3653*, provides that, in an action on an instrument purporting to have been executed by the other party, the execution of such instrument will be adjudged to be confessed, unless the denial thereof be verified by affidavit. *Held*, that this section will not authorize a judgment for plaintiff upon the pleadings if the complaint is otherwise fatally defective.—*Hart v. Harrison Wire Co.*, (Mo.) 123.

2. At the time an action was brought by the vendor against the vendee on the purchase-money notes, another suit was pending, to which the vendee was a party, involving the right to recover on the purchase-money notes of another tract, and in his answer in this action he attempted, by a general allegation, to make his answer in that suit a part of his answer in this, with a view to consolidating the two cases. *Held* that, as the two cases are independent of each other, his defense in this action must be complete in itself, and a mere general reference to what had been pleaded in the other case could not make such matter part of the defense in this.—*Russell v. Greenwade*, (Ky.) 295.

Demurrer.

3. Under rule 17 of the Texas supreme court, upon general demurrer, "any reasonable intendment arising upon the pleading excepted to must be indulged in favor of its sufficiency."—*County of Caldwell v. Crockett*, (Tex.) 607.

Motion to strike out.

4. An amendment to an answer admitting everything of importance to plaintiff's recovery contained in the petition, without seeking to avoid their effect, presents no defense to the action, and is properly stricken out.—*Wilson v. County of Wichita*, (Tex.) 87.

Variance—Time.

5. In proving the time at which a cause of action arose, plaintiff is never confined to that laid in his declaration or petition.—*Gulf, C. & S. F. Ry. Co. v. Witte*, (Tex.) 490.

Waiver of defects.

6. Where a complaint in a civil action is filed on a legal holiday contrary to statute, and the defendant puts in a general demurrer and general denial, he waives any objection to the irregularity in the filing of the complaint.—*Ullman v. Verne*, (Tex.) 548.

PLEDGE.

Rights of creditors in, see *Garnishment*, 1, 2.

Application of security.

Where A. indorses a note for the accommodation of B., A. cannot use as indemnity against his liability for such indorsement a security previously transferred to him by B. as indemnity against an entirely different liability; nor can A. confer on the holder of the accommodation note any right to apply such security on that note.—*Anderson v. Sims*, (Tex.) 471.

POOR AND POOR LAWS.**Liability of county.**

There is no distinction in regard to a county's liability for funeral expenses and its liability for services rendered to the indigent person in his life-time. In both cases a previous adjudication of poverty is necessary to fix that liability.—*Clark Co. v. Huie*, (Ark.) 452.

POWERS.

Of attorney, see *Acknowledgment*.

Testamentary, see *Trusts*, 3.

To confess judgment, see, also, *Negotiable Instruments*, 9.

• **To confess judgment.**

A power of attorney to confess judgment, contained in a promissory note signed by several persons, did not designate against whom judgment by confession might be entered; a blank space after the word "against" being left unfilled. *Held*, that the power was incomplete, and no judgment by confession could be rendered.—*Morris v. Bank of Commerce*, (Tex.) 246.

PRACTICE IN CIVIL CASES.

See, also, *Appeal*; *Courts*; *Equity*; *Judgment*; *Jury*; *New Trial*; *Trial*; *Venue in Civil Cases*.

Transfer of causes.

1. An action of ejectment is purely legal in its nature; and the mere fact that the mode of holding or the evidences of title are set out in the pleadings by either the one side or the other does not convert the action into an equitable proceeding so as to authorize its transfer to the equity docket.—*York v. Steele*, (Ky.) 818.

Stipulations.

2. Agreements of counsel in regard to the trial of a cause are not absolute, and are not to be treated as contracts to be enforced under all circumstances. They may be set aside by the court in the exercise of a sound discretion, when their enforcement would result in serious injury to one of the parties, and the other would not be prejudiced by such setting aside.—*McClure v. Heirs of Sheek*, (Tex.) 552.

PRINCIPAL AND AGENT.

See, also, *Master and Servant*.

Agreement as between principals, consideration, see *Contracts*, 2.

Confederates in illegal transactions, see *Gaming*, 5.

Insurance agents, license, see *Statutes*, 8.

Liability of agent to principal, see *Limitation of Actions*, 1.

Liability of principal to third parties, see *Gaming*, 9.

Notice, authority of agent, see *Negotiable Instruments*, 2.

Ratification.

1. An instruction that the acquiescence of the principal for a long period of time in the unauthorized acts of an agent creates a presumption of ratification, *held* correct.—*Shinn v. Hicks*, (Tex.) 486.

2. A party held entitled to an instruction that, if a principal ratified the act of his agent in part, this would be a ratification of the whole transaction, there being evidence to which the instruction was applicable, and it not having been embraced in the general charge.—*Prather v. Wilkins*, (Tex.) 252.

PRINCIPAL AND SURETY.

See, also, *Bonds*; *Executors and Administrators*, 19, 20; *Guardian and Ward*, 1, 4-6.

Signature of sureties, see *Appeal*, 4.

Subsequent surety.

1. Under the Missouri statute a bond to secure a loan of the school fund by a county court must contain an agreement for such additional security as may from time to time be ordered by the court; and, where

a bond is signed by a surety as such additional security, it relates back to the date of the original execution of the bond, and no new consideration is required.—*County of Montgomery v. Auchley*, (Mo.) 426.

Release of surety.

2. Gen. St. Ky. c. 104, § 11, provides that a surety may by notice in writing to the creditor require him to sue, and, if he fails to do so, such failure shall release the surety from all liability on the obligation. *Held*, that where a woman is surety, and afterwards marries, the notice to the creditor required by the statute is sufficient, if given by her husband.—*Medley v. Tandy*, (Ky.) 808.*

3. A creditor may release one who is bound to him as surety without releasing the principal debtor.—*McIlhenny Co. v. Blum*, (Tex.) 867.

4. Where the surety pays the creditor a certain sum in consideration of his release, leaving the obligation in full force against the principal debtor, *held*, that the creditor may recover the full amount of the debt from the principal, and is not obliged to credit the amount paid by the surety.—*Id.*

Remedy of surety against principal.

5. Mansf. Dig. Ark. § 6401, providing that when any bond, bill, or note for the payment of money shall not be paid by the principal debtor, but shall be paid by the surety, the principal debtor shall refund to the surety the amount, with 10 per cent. interest per annum, does not apply to a case where two purchase land jointly, and give their joint notes, and one makes default in paying his share of the purchase money, and the other pays the entire amount.—*McGee v. Russell*, (Ark.) 284.

Contribution between sureties.

6. It is no defense to the liability to contribution of sureties on a sheriff's bond, in an action against them by their co-surety, who paid the damages in full, that the breach of the condition in the bond was caused by the misconduct of the co-surety himself, while he was deputy-sheriff, when the alleged misconduct was directed, or at least approved and ratified, by the sheriff.—*Block v. Estes*, (Mo.) 781.

7. Plaintiff, one of four sureties on a note, being compelled to pay it, brought suit for contribution against his three co-sureties, and recovered a joint judgment against them for three-fourths of the amount paid by him, interest thereon, and an attorney's fee provided for in the note, but which plaintiff had not been compelled to pay. *Held*, (1) that judgment should have been rendered against each surety separately for his proportionate share; (2) plaintiff, not having paid the attorney's fee provided for in the note, was not en-

titled to recover it as against his co-sureties.—*Acers v. Curtis*, (Tex.) 551.

PUBLIC LANDS.

See, also, *Boundaries; Surveys and Surveyors.*

Contracts relating to, see *Evidence*, 22; *Trespass*, 8, 9.

Titles under state law, see, also, *Schools and School-Districts*, 11-18.

Reservation.

1. An action to try title to land claimed to be reserved public domain can be maintained notwithstanding that the lands sued for have not been surveyed, if the petition sufficiently identifies the boundary of the reservation, and shows that the land to which the suit relates is comprised within it.—*Day Land & Cattle Co. v. State*, (Tex.) 865.

Surveys.

2. In 1874, plaintiff appropriated certain tracts of land in Texas, by virtue of certificates which he delivered to the deputy-surveyor for location. The deputy prepared field-notes based upon information obtained by surveys made before the certificates issued. These field-notes were approved and certified by the county surveyor, and returned, together with the certificates, to the general land-office, but were not properly recorded in the office of the county surveyor. A copy of them, with a statement for whom surveyed, and by virtue of what certificate, was retained in his office. The records of the general land-office showed that the survey was made before the certificates were issued. *Held* that, under the Texas law in force in 1874, the fact that the surveys were made prior to the issuance of the certificates did not invalidate the claim, and that plaintiff's equitable title was good as against the state and one who had subsequently located the same tracts with notice of plaintiff's claim.—*Thomson v. Houston & T. C. Ry. Co.*, (Tex.) 629.

3. Case reversed and remanded on the ground that no survey was shown to have been made and returned to the general land-office by virtue of one of the certificates upon which plaintiff recovered judgment.—*Id.*

Pre-emptions.

4. A defendant in ejectment duly entered the land in controversy at the land-office in Little Rock, paid the purchase money, and received a certificate of his application to the United States land-office at Washington. *Held*, that he was unaffected by the subsequent breaking out of the war, and interruption of intercourse between the land-office at Little Rock and

the authorities of Washington, owing to which the register at Little Rock failed to report his application to Washington, and to enter it on the tract books and plats.—*Chowning v. Stanfield*, (Ark.) 276.

Swamp lands.

5. Where swamp land in Missouri is confirmed to the state by the report of the United States secretary of interior, and a patent for the same is issued from the state to a county in it, the county is invested with a complete title, behind which the defendant, in ejectment by the county for the land, cannot go, and show, by parol or otherwise, that the land in fact was not swamp land, and that the secretary of the interior made a mistake in confirming the selection of the same as swamp land.—*County of Jasper v. Mickey*, (Mo.) 424.

6. Such evidence is inadmissible also under Rev. St. Mo. 1879, § 6204, art. 3, c. 123, relating to "swamp lands," and providing that all patents issued, as required by that act, shall be received and read as evidence in all courts in the state as *prima facie* evidence of title in the counties where overflowed or swamp land lies.—*Id.*

7. A judgment foreclosing the vendor's lien retained by a county upon swamp lands sold by it, filed before the rendition of a judgment in favor of the state, in a suit by it to enforce its lien for taxes upon the same lands, passes to the county whatever equitable interest the purchaser from the county had in the lands, and gives it a better title—the county not being a party to the suit by the state—than the purchaser at the tax sale took therefrom.—*Id.*

Titles under state law.

8. Section 2, art. 14, Const. Tex., providing for notice of appropriation of the public domain, does not apply to lands owned by the state, which, but for their appropriation for specific purposes, would be a part of its public domain, subject to appropriation by private individuals.—*Day Land & Cattle Co. v. State*, (Tex.) 865.

9. When the original location of certificates is contrary to law, the subsequent issuance of patents will not legalize the locations, and both locations and patents are void.—*Id.*

10. The statements of land commissioners, as contained in a land certificate issued by them, are conclusive of the right of the person named to the quantity of land to which he is certified to be entitled, but are not conclusive proof that he is not entitled to greater rights.—*Baker v. Maloney*, (Tex.) 466.

11. A Texas bounty certificate, issued by the secretary of war in 1838, contained the words: "The said Geo. W. Lemoyne, by his attorney, T. D. Tomkins, is entitled to said land, or to sell, alienate, convey, and do-

nate the same." An instruction that if the jury believed the words, "by his attorney, T. D. Tomkins," were inserted by the secretary of war when the certificate was issued, they should presume, in the absence of evidence to the contrary, that those words were inserted by proper authority from Lemoyne, *held* correct.—*Shinn v. Hicks*, (Tex.) 486.

Transfers before location.

12. A land certificate, before location, is merely an evidence of personal property, and its possession is not evidence of title in the possessor.—*Shifflet v. Morelle*, (Tex.) 848.

13. A title bond executed in 1837, relating to lands to which at the time no patent had been issued, conveys no legal estate, but is a mere executory contract, conferring an equitable interest; and in any proceeding upon it, if not instituted within proper time, the plea of "stale demand" will be applicable.—*Wilson v. Simpson*, (Tex.) 889.

Head-right certificates.

14. The Texas special act of April 30, 1873, which granted a head-right certificate to one Lancaster, was unconstitutional and void. The act of March 31, 1883, enacts that such head-right grants, "to which there is no valid legal objection other than that they are supposed to be in conflict with the then existing constitution, are hereby validated and confirmed, and declared to be binding upon the state: * * * provided, that this act shall only apply to soldiers and heirs and actual settlers of Texas, and their vendees, to whom lands have been granted." *Held* that, there being nothing in the constitution in 1883 prohibiting the legislature from passing such an act as that by which a special grant was made to Lancaster, such act might be made valid.—*Blum v. Looney*, (Tex.) 857.

15. *Held*, also, that it was incumbent upon those claiming through Lancaster to show that he was an actual settler within the meaning of the proviso aforesaid, and that this was not shown by the proof that he was an actual settler in 1833, because, as the act of 1873 gave the land as a head-right, it was as such that he must receive it under the law of 1883, and first-class head-right certificates were not granted to settlers of a date later than 1836; and the act of 1873, being void, does not prove that Lancaster fulfilled the requirements which entitled him to the grant in question.—*Id.*

Veteran certificates.

16. The Act of April 9, 1891, (Gen. Laws Tex.,) known as the "Confederate" act, granting certificates, but requiring the locator to set aside an equal amount of land for the benefit of the public school fund,

and expressing in terms that said location "shall be made on any of the public domain of Texas not reserved by law from location," did not enlarge the privileges to veteran certificates, nor evidence any intent on the part of the legislature to open the reservations to the veteran certificate holders.—*Day Land & Cattle Co. v. State*, (Tex.) 865.

17. The act of March 15, 1881, (Gen. Laws Tex.) granting the veteran certificates for 1,280 acres, which may be located, as "head-right" certificates, "upon any of the public domain," must be construed to mean "upon any of the *unappropriated* public domain."—*Id.*

Titles under state law—Setting aside patent.

18. The fact that executive officers of the state had issued patents in excess of their authority, or that they took no steps to advise or warn the patentees of the invalidity of the patents, or that the legislature had not at an earlier day passed a law requiring suits to be brought to vacate the patents, cannot estop the state from maintaining a suit to recover the lands patented.—*Id.*

19. The legislature of Texas alone has power to determine what part of the public domain shall be applied to specific purposes, and, if either the governor or the commissioner of the general land-office disregard the will of the legislature, their action will be reviewed by the courts and the patents issued by them canceled.—*Id.*

Conflicting titles.

20. Lands within Greer county, Texas, were claimed both by the state and by the United States, and it was contended by the defendant, in a suit brought by the state to quiet title, that the state must fail, not having shown an undisputed paramount legal title. *Held*, that the fact of the legislature having extended its laws over Greer county precluded the defendant from setting up the claim of the United States to that territory, either as holding the outstanding title, or as unsettling the title of the state of Texas as plaintiff, or as lacking the title paramount.—*Id.*

QUIETING TITLE.

See *Public Lands*, 1.

Trespass to try title, see *Trespass*, 3-9.

When action lies.

1. A., concealing from the court the fact that he was the owner of a life-estate in certain land, and therefore liable for taxes and paying assessments, instituted a proceeding to enforce a pretended lien on the land, based, as he alleged, on payments of

such taxes, etc., made at the request of the owner of the life-estate, and in behalf of herself and her children, the remaindermen. In this proceeding a sale of the entire estate was ordered, and A. became the purchaser. Within the time limited by law the remaindermen duly instituted the statutory proceeding to retry the case, and obtained a judgment setting aside the judgment obtained by A., and the sale made thereunder. After the inception, and before the termination, of this proceeding of the remaindermen, A. conveyed the land to B., and B. conveyed it to C. *Held*, that the remaindermen could maintain a suit against C. to quiet their title.—*Keller v. Stanley*, (Ky.) 807.

— Possession of plaintiff.

2. In Texas, a suit to remove cloud on title may be brought when the plaintiff is in possession, as well as when he is out.—*Walt v. Haskins*, (Tex.) 596.

3. In Texas, in a suit to remove cloud from title, it is not necessary, as it would be in states having separate legal and equitable jurisdictions, to aver that plaintiff is in actual possession of the lands; the courts of this state being not only authorized, but required to give such relief, either legal or equitable, or both, as the facts presented may authorize or require.—*Day Land & Cattle Co. v. State*, (Tex.) 865.

Parties.

4. Under the act of Kentucky, March 9, 1854, any person having the legal title and possession of land may bring an action in equity, in the circuit court of the county where the land or some part of it may lie, against any person setting up claim thereto, for the purpose of establishing and quieting his title to said land.—*Kincaid v. McGowan*, (Ky.) 802.

5. In an action to quiet title under the Kentucky statute, all persons setting up claim to the land may be joined in the suit as defendants, although each claims a separate parcel of the land, under a distinct right.—*Id.*

Defenses.

6. The statute of limitations has no application to a suit brought by remaindermen to quiet their title as against one who, owning the life-estate only, claims the fee.—*Keller v. Stanley*, (Ky.) 807.

7. Where, in an action to quiet title, it appears that the ultimate source of defendant's title, as of plaintiff's, is a certain will, defendant is in no position to question its validity, or that it was, in due form of law, probated and admitted to record in the state where the land lies.—*Id.*

8. A defendant who asserts a claim, even under an instrument void upon the face of

it, cannot be heard to say that it has not such a semblance of validity as to create a cloud upon the title to property which it professes to convey, which will prejudice the right of the real owner if it be not removed, and in such a case the court has power, which it must exercise, not only to declare the instrument void, but to cancel it.—*Day Land & Cattle Co. v. State*, (Tex.) 865.

QUI TAM AND PENAL ACTIONS.

Mitigation of penalty, see *Statutes*, 8.

Jurisdiction.

1. Where a statute provides that the penalty imposed for its violation may be "sued for" in the name of the state, suit is properly brought in a court having jurisdiction of civil causes only.—*Commonwealth v. Sherman*, (Ky.) 790.

Pleading—Amendment.

2. Where a penal action is erroneously brought in the name of the "state" of Kentucky, an amendment styling the plaintiff the "commonwealth" of Kentucky is permissible; and process on the amendment is not necessary.—*Id.*

Imprisonment for non-payment.

3. In a *qui tam* action brought in the name of the state to recover a penalty, the appellate court will not consider the question of whether the statute imposing the penalty, and authorizing the action, may not be open to the constitutional objection that it gives the court unlimited discretion as to the term of imprisonment which may be imposed in case of non-payment of the fine, the clause of the statute relating to imprisonment being severable from the rest of the statute.—*Id.*

Quo Warranto.

See *States and State Officers*, 2.

RAILROAD COMPANIES.

See, also, *Carriers; Horse and Street Railroads; Master and Servant*, 1, 8-6; *Negligence; Taxation*, 17.

Actions for assault, see *Abatement and Relief*, 3.

Land damages, see, also, *Surface Water*.

Municipal aid, see *Municipal Corporations*, 5.

Charters and franchises.

1. A company chartered to build a "railroad" merely has the right to elevate it above the surface wherever the character of the country makes it either essential or

convenient, although the word "elevated" may not occur in the charter, or the right to elevate it may not be expressly granted.—*Bulton v. Short-Route Ry. Transfer Co.*, (Ky.) 832.

2. Even if the power under the charter to construct the road above the surface were questionable, yet, a subsequent amendment to the charter having recognized a prior city ordinance by which the road was authorized to be elevated in passing through the city of Louisville, this legislation placed the right beyond doubt.—*Id.*

3. Where the charter of a railroad corporation provides, in substance, that the company shall have full power and authority to build their road along or across any state or county road, or the streets and wharves of any city, town, or village, whether corporate or otherwise, an order for the same being first had from the county court of the proper county, *held*, the granting of such order is an exercise of the administrative discretion of the court, from which an appeal does not lie to the circuit court.—*St. Louis, I. M. & S. R. Co. v. City of St. Louis*, (Mo.) 664.

Purchase and sale.

4. Under Rev. St. Tex. art. 4113, regulating the general right to amend railroad charters, and providing that any railroad corporation may, by amendment to its charter, project and provide for the locating, constructing, owning, maintaining, and operating of a branch line to its original main line, while the right to construct, operate, and maintain is conferred, it does not confer the right to buy another railroad.—*Gulf, C. & S. F. Ry. Co. v. Morris*, (Tex.) 156.

5. Under the general incorporation law of Texas, one railroad company has no power to buy another railroad, nor does that law authorize a railroad company to sell its road to another company, or to another person.—*Id.*

6. Corporations organized for public purposes cannot, by contract of sale or otherwise, render themselves incapable of performing their duties to the public, or in any way absolve themselves from the obligation which forms the main consideration for giving them a corporate existence, unless this be done by consent of the state, given through the charter, or in some other manner.—*Id.*

Land damages.

7. In an action against a railroad company for damages alleged to have been caused by the erection of an embankment, it is not error to instruct the jury that the defendant was not bound to construct sluices and water-ways in places where the water did not naturally flow out, an instruction having previously been given

that, if the work of the defendant caused the overflow, the plaintiff was entitled to recover; and such instruction would not prevent the jury from considering the question of the obstruction of the outlets of the pond which covered the land in question.—*Owens v. Missouri Pac. Ry. Co.*, (Tex.) 593.

8. In an action against a railroad company to recover damages alleged to have been caused by the erection of an embankment by the defendant, where a verdict has been rendered for the plaintiff for a small amount, it will not be set aside because the evidence would have sustained a verdict for a much larger sum; and it cannot be said that the jury found against the evidence upon the question of damages, where certain witnesses certified that the standing of the water on the land in question was wholly caused by the embankment of defendant, while other witnesses testified that the embankment did not affect the flow of the waters from it.—*Id.*

Liability for negligence.

9. Code (M. & V.) Tenn. § 1298, pars. 1, 2, provides that when a train is approaching a crossing of a public road, distinguished by a sign, "Look out for the cars when you hear the whistle or bell," it shall give signals in a certain manner. *Held*, that the section had no application to a *turnpike* crossing at which no such sign had been put up, and that it was error for the trial justice to charge it to the jury in a suit for damages for a death caused by a collision at such a crossing.—*Nashville, C. & St. L. R. Co. v. Seaborn*, (Tenn.) 661.

10. Code (M. & V.) Tenn. § 1298, par. 4, requires that "when any person, animal, etc., appears upon the road, the alarm whistle shall be sounded, the brakes put down," etc. *Held*, that the requirement was not applicable to a collision which was caused by the tongue of the wagon in which the plaintiff's intestate was riding catching in the locomotive, and drawing the wagon along-side, and thus causing the death; neither the wagon, nor the mules that were pulling it, having got upon the track before the accident occurred.—*Id.*

11. Plaintiff was injured by a train of freight cars while they were backing into a coal-yard, without having a man stationed on top of the car at the end of the train furthest from the engine, to give danger signals, as required by an ordinance of the city of St. Louis. *Held*, that, though the plaintiff may have been guilty of contributory negligence, the railroad company was still liable for the injury if it could have been prevented by the exercise of reasonable care on the part of the company, after discovery of the danger, or if

the company failed to discover the danger, when the exercise of ordinary care would have discovered it, and averted the calamity. *SHERWOOD, J.*, dissents.—*Dunkman v. Wabash, St. L. & P. Ry. Co.*, (Mo.) 670.

— Trespasser on tracks.

12. The liability of a railroad company to a trespasser on its track must be measured by the conduct of its employes after they become aware of his presence there, and not by their negligence in failing to discover him; for, as to such negligence, the contributory negligence of the trespasser will defeat a recovery.—*St. Louis, I. M. & S. Ry. Co. v. Monday*, (Ark.) 783.*

13. A railway company having a legal right to a clear track, except at crossings, owes no duty to a trespasser walking on the track from one station to another until his presence is discovered, and even then those in charge of an approaching train may assume that he will get off the track to avoid a collision, unless they can see from his condition, or the circumstances surrounding him, that he cannot get out of danger.—*Id.**

Stock-killing cases.

14. Rev. St. Tex. act. 4245, provides that every railroad company shall be liable to the owner for any stock killed or injured by the locomotives and cars of the company in running over their respective railways, unless the track is fenced. *Held*, that a railroad company is not liable, under the statute, for an injury to an animal caused by the animal running on the track through fright at the train, and being injured on a trestle, and not by contact with the locomotive or cars.—*International & G. N. R. Co. v. Hughes*, (Tex.) 492.

15. Where the railroad on which the killing occurred was owned by one company, and leased to another, without special authority from the state, both companies are liable to the owner of the stock, the one because of its actual operation of the road, and the other because it could not, without permission of the legislature, transfer its franchise even temporarily so as to release itself from liability for the acts and defaults of its lessee.—*Missouri Pac. Ry. Co. v. Dunham*, (Tex.) 472.

— Pleading.

16. In an action in a justice's court to recover double damages under Rev. St. Mo. 1879, § 899, for a mare killed on a railroad, it is not necessary that the statement should contain an express averment that the point at which the animal got upon the track was not within the corporate limits of an incorporated city or town; and averments that "said killing took place at a point on said railroad where the same passes

through, along, and adjoining cultivated and inclosed farm land, and not in the crossing of a public highway, or at any crossing whatever," and that "at the point aforesaid the mare strayed and got upon the track and was killed," are sufficient, as they by necessary implication negative the presumption that the entry might have occurred within the corporate limits of an incorporated city or town.—*Ringo v. St. Louis, I. M. & S. Ry. Co., (Mo.) 896.*

17. An averment in a complaint against a railroad company for injury to live-stock, that the animals were injured by the defendant's trains, is a sufficient averment of negligence on the part of the company.—*St. Louis, I. M. & S. Ry. Co. v. Brown, (Ark.) 781.*

— Evidence.

18. In an action against a railroad to recover for killing plaintiff's stock while trespassing on the railroad track in a town, evidence is admissible to show that stock was not permitted, under the law, to run at large in the town where the killing occurred. Where there is such a law, the railroad company is liable only for gross negligence in killing stock.—*Missouri Pac. Ry. Co. v. Dunham, (Tex.) 472.*

19. The Texas statute imposing a liability on railroad companies for injuries done to animals, unless the railroad track is fenced, does not apply to such places as public necessity or convenience require should be left unfenced, such as the streets of a city or town, the depot or contiguous grounds. When, however, an injury occurs within the limits of a town or city, the burden of proof rests with the railway company to show that the place at which the animal entered was one which, under the law, it was not permitted to fence.—*Id.**

— Concealing killed stock.

20. The act of Arkansas of February 8, 1876, (Mansf. Dig. § 5545,) provides: "If any * * * person, employed by any railroad company * * * in this state, * * * shall be caught mutilating, disfiguring, burning, hauling off, or burying any dead carcass that shall be killed on any railroad in this state, without first notifying at least two citizens of the neighborhood, * * * shall be deemed guilty of a misdemeanor, and be fined," etc. *Held*, that the power to enact such a statute is found in the general control which the state has reserved over all agencies for the public safety and protection, and to guard properly the rights of other persons, and that it is not class legislation, nor repugnant to sections 8 and 21 art. 2, Const. 1874, guarantying the equality of all persons before the law.—*Bannon v. State, (Ark.) 655.*

Railroad fires.

21. In an action against a railroad for its negligence in allowing sparks to escape from a locomotive, so as to set fire to and destroy plaintiff's pasture grass, the evidence showed that the railroad's right of way was covered with combustible grasses and weeds, that these were ignited by sparks emitted from a passing train, and the fire spread to and destroyed plaintiff's pasture. *Held*, that this was sufficient to establish negligence against the railroad, and was not overcome by evidence that the company's engines were provided with spark arresters, without showing the condition of the particular engine which caused the fire.—*Gulf, C. & S. F. Ry. Co. v. Witte, (Tex.) 490.*

Dissolution—Rights of creditors.

22. Where one railroad company sells out to another, a person having a claim against the former company for damages on account of personal injuries cannot maintain an action against the latter company; and the old company, against which his right of action existed, having been dissolved by the sale, his only right of action remaining is against the stockholders of the old company, who received the purchase money.—*Chesapeake, O. & S. W. R. Co. v. Griest, (Ky.) 323.*

23. Some of the stockholders of the G. C. & S. F. Ry. Co. bought up all of the stock and bonds of the C. & M. R. Co., and destroyed them. They did not, however, buy the road itself, but, taking themselves to be owners of the road from the purchase of the stock and bonds, they sold it to the G. C. & S. F. Ry. Co. A creditor of the C. & M. R. Co. obtained judgment against the road. *Held*, that he had the right to levy execution on the road and franchise; the purchase and destruction of the stock and bonds, and subsequent sale to the G. C. & S. F. R. Co., not constituting a dissolution of the C. & M. R. Co., so as to relieve it, as a corporation, from all its debts and obligations.—*Gulf, C. & S. F. Ry. Co. v. Morris, (Tex.) 4 S. W. 156.*

RAPE.

Attempt by fraud.

1. A conviction for assault with intent to rape is not supported by evidence showing an attempt to rape by fraud.—*Milton v. State, (Tex.) 574.*

2. Assault with intent to rape can only be established by proof of force, or attempted force, and not by proof of threats or fraud, as the means of accomplishing the offense. But an attempt to commit rape may be committed by means of threats or fraud, and the use of chloroform as the

means comes within the meaning of fraud, and cannot be construed to be force.—*Id.*

RECEIVER.

Powers.

Where a receiver is appointed to take charge of an insolvent estate upon the application of a secured creditor, pending litigation or threatened litigation concerning the property held as security, the court will not permit the receiver to retain a portion of the fund, as to which there is no contract or legal lien giving it protection from the remedies of creditors. Upon the application of unsecured judgment creditors, therefore, an order will be made directing such receiver to pay such portion of the fund to them in the order of their priority, without allowance for costs.—*Wormser v. Merchants' Nat. Bank*, (Ark.) 198.

REFPLEVIN.

Parties.

Under the Arkansas statute providing that where, in an action for the recovery of real or personal property, any person having an interest in the property applies to be made a party, the court may order it to be done, *held*, in an action by a trustee under a mortgage to obtain possession of the mortgaged property, that a trustee claiming under a prior mortgage, who was also surety for the mortgagor upon a forthcoming bond executed by the latter to retain possession of the mortgaged property, was entitled to be admitted as a party.—*Smith v. Moore*, (Ark.) 282.

ROBBERY.

Indictment.

1. At common law one indicted for robbery could not be convicted of larceny. The statutory system of Arkansas has changed this rule.—*Haley v. State*, (Ark.) 746.

Instructions.

2. Upon the trial of an indictment for robbery alleged to have been committed by putting the person robbed in fear of immediate injury to his person by tying him up with a rope, and threatening to hang him, an instruction to the jury that, before they could convict, they must believe, "beyond a reasonable doubt that the robbery was committed by putting the man robbed in fear," without specifically describing how they must believe he was put in fear, is sufficient.—*McIntire v. Commonwealth*, (Ky.) 1.

3. Upon a trial for robbery, defendants requested an instruction to the effect that the long silence of the prosecuting witness in announcing the crime was a cir-

cumstance from which the jury might, in connection with the evidence, infer that no putting in fear or violence had been used. *Held* properly refused. It is not the judge's duty to point out what inferences may or should be drawn from particular facts in evidence.—*Haley v. State*, (Ark.) 746.

4. An instruction on the subject of fraud or stealth on a robbery trial, there being no evidence that the property taken had been obtained by these means, is error.—*Id.*

SALE.

See, also, *Attachment*, 10; *Execution*, 7-14; *Executors and Administrators*, 21-29; *Guardian and Ward*, 3-6; *Judicial Sales*; *Mortgages*, 7-12; *Taxation*, 10-18; *Vendor and Vendee*.

Consideration, prior debt, see *Chattel Mortgage*, 8.

What constitutes.

1. An agreement by an agent with his principal, whose money he had invested in bonds, which afterwards depreciated, "for value received in" the bonds to pay the principal a price named, being the face value of the bonds, and interest annually "upon the bonds" until collected, "not to pay the principal until collected," *held* to show a sale of the bonds to the agent, although the principal afterwards, when weak in mind, directed the agent to use "one thousand dollars' worth of said bonds" for a certain purpose.—*Denny v. Campbell's Ex'r*, (Ky.) 801.

2. In an action against a railroad company to recover the value of wood appropriated by defendant, it appeared that the wood had been cut by one T., and piled up on plaintiff's land; that plaintiff claimed compensation from T. for other wood which T. had cut off of his (plaintiff's) land; that T. told plaintiff that he would turn over to him the wood then stacked on plaintiff's land, in settlement of the claim, but that if he (T.) should come with the money and settle the claim, plaintiff must let him have the wood. To this plaintiff assented. T. absconded without settling. *Held*, that title to the wood passed to plaintiff, and he might recover its value of the railroad company.—*Texas & P. Ry. Co. v. Beard*, (Tex.) 488.

Bona fide purchaser.

3. The owner who is induced by fraud to part with the possession, and not the title, of his goods, may recover them even from one who has paid value for them without notice of the owner's right; but if the owner be induced to sell the goods, parting with the title as well as possession, by the fraud of another, he cannot recover them

from a *bona fide* purchaser for value, into whose hands they passed from the fraudulent vendee.—*Rohrbough v. Leopold*, (Tex.) 460.

4. Plaintiffs sold and delivered a corn-mill, on condition that title should remain in plaintiffs until it was paid for. The purchaser, having possession, and before he had paid for it, sold the mill to the defendants, who bought in good faith and for value, without notice of plaintiff's rights. *Held*, that they acquired no title as against plaintiffs.—*Simpson v. Shackelford*, (Ark.) 165.*

Conditional sale—Fraud on creditors.

5. Where one sells a stock of goods to another, and puts the vendee in possession, but provides that title to the goods, as well as to any additions to the stock, shall remain in the vendor until the purchase money is paid in full, and that, upon failure to pay any installment of the purchase money, the vendor may retake possession of the goods, and no memorandum of the sale is put on record, *held*, that the sale is fraudulent so far as it reserves title to the vendor, and the creditors of the vendee may subject the goods to their debts.—*Loving Pub. Co. v. Johnson*, (Tex.) 532.

SCHOOLS AND SCHOOL-DISTRICTS.

Purchase of school buildings, *see Municipal Corporations*, 4.

Teachers and pupils.

1. Moderate restraint and correction of a pupil by his teacher is not an offense, but is authorized by law; and it seems that the authority of a teacher is not limited to the time the pupil is at the school-room, or under the actual control of the teacher.—*Balding v. State*, (Tex.) 579.

Compensation of teachers.

2. The Texas act of April 2, 1883, recognizes the validity of claims of teachers in the public schools, which have been audited and allowed by the boards under the acts of August 7, 1876, and April 23, 1879, each entitled "An act to ascertain the amount due teachers for services rendered in public schools from September 1, 1873, to January 1, 1876, and to provide for the payment of the same," and makes it absolutely the duty of the several counties to pay them.—*County of Caldwell v. Crockett*, (Tex.) 607.

3. Recovery can be had on such claims against the county by persons to whom the teachers assigned them, as well as by the

teachers themselves. The purpose of the several acts is not to provide bounties, but to secure rights growing out of services rendered, and it is a matter of indifference to the state in whose hands the claims may be.—*Id.*

4. It is not necessary in a suit by the assignees of such claims, so audited, to define in the petition, when the claims are due from different school-districts in the county, the several districts, and to allege how much is due from each of them.—*Id.*

5. The fact that the county had collected, and placed in the hands of its treasurer, a sum sufficient to pay the claims sued on, does not operate as a payment of them, or relieve the county from the obligation to raise more money to pay them, if that placed with the treasurer for that purpose was by him appropriated to some other purpose.—*Id.*

6. The fact that the county treasurer, who had defaulted, turned over special school funds to one of the sureties on his *general* bond, is not sufficient of itself to fix liability on that surety, and to defeat a suit against the county by that surety and others not sureties, as assignees of school claims audited under the acts of 1876 and 1879.—*Id.*

7. The Texas acts of 1876 and 1879, for the payment of school-teachers, are not unconstitutional as being retroactive in character, and creating a demand where none existed before. The constitution of 1876 expressly provides (article 16, § 36,) that "the legislature shall, at its first session, provide for the payment or funding, as they may deem best, of the amounts found to be justly due to the teachers in the public schools by the state, for services rendered prior to the first day of July, 1873, and for the payment by the school-districts in the state of amounts justly due teachers of public schools by such district to January, 1876."—*Id.*

Contracts ultra vires.

8. Where the law fixed a certain time and place for transacting the annual business of a school-district, and a meeting was held on a different day, and authority was voted to the school directors to make a contract for building a school-house, *held*, that a contract made in pursuance of this vote was void, and no action could be maintained against the contractor for breach thereof.—*Fluty v. School-District No. 11*, (Ark.) 278.

9. In an action by a school-district against a contractor for breach of contract for the building of a school-house, which contract was void because authorized at a meeting irregularly held, the plaintiff is not entitled to recover the money paid the contractor on the contract.—*Id.*

School lands.

10. In an action of trespass by the state of Arkansas against one who has cut timber on school lands, and converted the same to his own use, an authority to cut the timber derived from the school directors of the district is no defense, as no power with reference to the disposal of such lands is confided by law to the school board.—*Widner v. State*, (Ark.) 657.

— Purchase under Texas act.

11. Under the Texas act of April 12, 1888, which allowed actual settlers to purchase certain school lands upon payment of one-thirtieth of the purchase money, and one year's interest, at the time of purchase, such payment of interest is in full discharge of all interest claim, or claim for use of such land, for one year from the date of such payment.—*Barker v. Torrey*, (Tex.) 646.

12. A statute which extends the time limited for the payment of interest on the purchase price of school lands is not retroactive, within the meaning of the constitutional inhibition of statutes of that character.—*Id.*

13. A statute which extends for five months the time limited for the payment of interest on the purchase price of school lands does not relieve the purchasers from any liability, and is not in conflict with article 7, § 4, of the Texas constitution, which declares that the legislature "shall have no power to grant any relief" to purchasers of land set apart to the public school fund.—*Id.*

Taxation for higher studies.

14. The teaching of Latin and Greek in a common school established under the common-school law of Kentucky, is not in violation of that law. Nor does it justify an injunction to restrain the collection of a tax levied in aid of such school.—*Newman v. Thompson*, (Ky.) 841.

15. A system of education adopted in a particular district under an act of the legislature which authorizes a tax that the school may be taught the entire year, and the higher branches of education brought within the reach of all the children, is not in violation of the state or federal constitutions.—*Id.*

SEDUCTION.**Criminal prosecution—Evidence.**

1. Evidence of such circumstances as usually accompany a marriage engagement is sufficient to satisfy the provision of Rev. St. Mo. § 1912, which provides that the evidence of the woman in trials for seduction under promise of marriage must be corroborated to the same extent as that of the

principal witness in perjury.—*State v. Hill*, (Mo.) 121.

2. Said section applies only to the promise of marriage. The other facts constituting the offense may be proven by any competent testimony.—*Id.*

3. On a trial for seduction under promise of marriage, the state may prove at the outset the previous good repute of the prosecuting witness.—*Id.*

4. In such case, evidence is also admissible that defendant had boasted to his friends that he had had illicit intercourse with the prosecuting witness, as tending to show, not only an illicit connection, but also in view of the circumstances under which the admissions were made, the deceptive practices by which it was brought about.—*Id.*

SET-OFF AND COUNTER-CLAIM.

When right accrues, see *Limitation of Actions*, 14.

Jurisdictional amount.

Under Rev. St. Tex. art. 816, in an action in a justice's court, to which a counter-claim has been filed, and judgment rendered in the whole case, and an appeal taken to a district court, the party filing the counter-claim will not be allowed in the latter court to enlarge the counter-claim, by adding items of damages not embraced in the pleadings in the justice's court, which amounted to a sum greater than the justice's court would have jurisdiction of.—*Bowdon v. Gillett*, (Tex.) 573.

Sheriff.

See *Attachment*, 9-11; *Bond*, 8; *Execution*; *Judicial Sales*, 1; *Principal and Surety*, 6; *Writs*.

SPECIFIC PERFORMANCE.

Part performance, see *Adoption*, 1.

Requisites of contract.

1. It is not ground for refusing to compel the specific performance of an agreement to convey land that the vendee, one Lee, is described as "Mr. Lee" only; this being, at most, but a latent ambiguity which may be explained by parol. Nor does the ambiguity exist where it appears that the vendee forwarded a deed for execution in which his name was fully stated.—*Lee v. Cherry*, (Tenn.) 885.

Evidence.

2. A court of equity will not decree specific performance of a contract if not clearly established, and will let in the defendant to defend himself by a class of evi-

dence in resisting a decree, when the plaintiff would not be permitted to establish his case by the like evidence. The court refuses specific performance in this case because the contract was not established with the requisite degree of clearness; the evidence showing that the plaintiff understood that there was an absolute sale, while the defendant understood that he was taking the land upon condition only that it turned out as represented, with the right to return it, and recover the purchase money, if it did not turn out so.—*Veth v. Gierth*, (Mo.) 482.

8. Where, in an action brought to enforce specific performance of an alleged agreement to sell real property, it appeared that plaintiffs, upon paying defendant \$400 for a tract of land which defendant had a few days before bought for \$375, was permitted to enter upon the land, and continued in possession, under claim of title, for a number of years, making valuable and permanent improvements thereon, *held*, that these circumstances, in connection with plaintiff's supporting testimony, were sufficient to rebut the contradictory averments of defendant, and establish that the agreement had been to convey an estate in fee-simple to plaintiff.—*Overspeck v. Thiemann*, (Mo.) 927.*

Decrees.

4. A., holding certain notes of B., agreed to surrender them in consideration that B. would convey to her a tract of land which he owned. She surrendered the notes, and without waiting for the deed for the land, conveyed the land to C. *Held*, that B. might be compelled to execute the deed, and both he and his privies were estopped to deny the transaction, or set up any claim to the land.—*Johnson v. Hughtart*, (Ky.) 848.

5. A married woman owned land as her separate estate, which she and her husband conveyed upon a merely formal consideration of one dollar, as recited in the deed. Plaintiff, becoming the owner of the land, sold it to defendant, who refused to accept the title because the married woman had not received valuable consideration for her conveyance. In a suit for specific performance, the married woman and her husband filed their answer, disclaiming any interest in the land, and ratifying their former deed. *Held*, that defendant might properly be compelled to take the title.—*Robinson v. Henning*, (Ky.) 322.

STATES AND STATE OFFICERS.

Suits by state, see, also, *Public Lands*, 18-20.
State legislature, see *Constitutional Law*; *Statutes*.

Sale of railroad by state—Power of governor.

1. The legislature of Texas passed an act empowering the governor to sell the Houston T. & B. R. R., and directed him to require bonds of the purchaser to keep the railway in running order. At the sale the state bought in the road. The legislature afterwards passed a resolution, again directing the governor to sell the road "by public or private sale, upon such terms and to such parties as he may deem best for the security of the school fund." The governor sold the road and appellee became the purchaser, and the governor required of him the bond provided in the first act. *Held*, that as a sale had been made under the act, it had performed its functions, and, as the second sale was made under the resolution, the governor had no authority to require the bond; and that the resolution authorizing the governor to sell upon such terms as he saw best referred only to the price and times of payment, did not authorize him to demand the bond, and the condition of the bond could not be enforced in a suit at his instance.—*Ireland v. Taylor*, (Tex.) 65.

Suit by attorney general.

2. In an action to establish the right of the state of Texas to certain lands, and to cancel adverse patents thereto, brought by the state through the attorney general and the district attorney of the judicial district in which the lands were embraced, the district court held that the presence of the attorney general with the district attorney, both representing the state, afforded a guaranty of the presence of the state as a litigant, and the authority of those officers would not be disputed by the court. *Held*, on appeal, that, the legislature having subsequently recognized the power of its officers to institute such a suit, the proceedings were ratified and must stand, as though the attorney general and district attorney had express power to institute and maintain it.—*Day Land & Cattle Co. v. State*, (Tex.) 865.

STATUTES.

Construction, see *False Pretenses*, 8; *Limitation of Actions*, 27-29; *Public Lands*, 16, 17.

Foreign, proof of, see *Limitation of Actions*, 26.

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Operation and effect, see *Habeas Corpus*, 1.
Repeal, see *Taxation*, 16.

Validity, see *Constitutional Law*; *Qui Tam* and *Penal Actions*, 8.

Enactment.

1. Under art. 8, § 82, Const. Tex., providing for the immediate passing of an act

where an emergency or public necessity demands it, the legislature itself is the sole judge whether facts exist to authorize the immediate passage of a bill, and its decision is final, and cannot be questioned in any court.—*Day Land & Cattle Co. v. State*, (Tex.) 865.

2. Article 3, § 33, Const. Tex., providing that revenue bills shall originate in the house of representatives, only applies to bills to levy taxes, in the strict sense of the word, and not to bills for other purposes, which may incidentally raise revenue.—*Id.*

3. Article 3, § 37, Const. Tex., providing that a bill shall be referred to and reported on by a committee before being passed by the legislature, is sufficiently complied with if a bill is presented to and reported on by a committee of either house.—*Id.*

Validity.

4. Where an act indivisible in its nature is void in part, it is void as to all of its provisions.—*Ex parte Jones*, (Ark.) 639.

5. An act of a legislature (Arkansas act approved April 4, 1887,) which divides a county into two judicial districts,—an Eastern and Western,—and provides by reference to a prior act for the holding of the terms of the circuit court in said districts, is void where it appears that the days for holding the terms of the court in the Eastern district are the same as those fixed for the Western district.—*Id.*

Amendment—Constitutionality.

6. Missouri act of 1883, (Acts 1883, p. 90,) amending act of 1881, (Acts 1881, p. 130,) prohibiting the sale of intoxicating liquors by druggists and pharmacists in certain quantities without a prescription, by adding three new sections thereto, and amending section 8 thereof, section 8, as amended, being set out in full in the amendatory act, does not violate Const. Mo. art. 4, § 34, providing that "no act shall be amended by providing that designated words thereof be stricken out, or that designated words be inserted, or that designated words be stricken out and others inserted in lieu thereof; but the words to be stricken out, or the words to be inserted, or the words to be stricken out and those inserted in lieu thereof, together with the act or section amended, shall be set forth in full as amended."—*State v. Thruston*, (Mo.) 980.

7. The Arkansas act of February 27, 1875, providing for the calling in of their floating indebtedness by counties, cities, and towns, provides, in section 4, that the law governing in cases where counties are authorized to call in their floating indebtedness shall apply and govern in proceedings had by counties, cities, or towns. *Held*, in an action where the provision of the law as to counties, barring a recovery if the holder fails to present his claim, was

invoked as a defense, that the section violates the provision of the constitution that "no law shall be revived or amended, or the provisions thereof extended or conferred by reference to its title only; but so much thereof as is revived, amended, extended, or conferred, shall be re-enacted and published at length."—*Watkins v. City of Eureka Springs*, (Ark.) 884.

Amendment of penal statute.

8. In Kentucky the statute has abolished the common-law rule that if, pending a trial or an appeal, the law imposing the penalty or creating the offense is repealed, the repeal works a remission of the penalty, but has provided that, if the repealing act mitigates the penalty imposed by the act repealed, such mitigated penalty may be imposed. *Held*, that this rule of construction must be applied where, pending a *quasi* action for the penalty imposed by Kentucky act of March 12, 1870, in the case of one acting without a license as agent for an insurance company, the act of April 19, 1886, amending the earlier act and, *inter alia*, mitigating the penalty imposed thereby, was enacted.—*Commonwealth v. Sherman*, (Ky.) 790.

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SURFACE WATER.

See, also, *Damages*, 3; *Railroad Companies*, 7, 8.

Obstruction of drainage.

1. In an action against a railroad company under Rev. St. Tex. art. 4171, to recover damages for overflowing lands, a petition need not allege negligence or want of skill in the construction of its railway in those very words. It is sufficient to aver that the effect of the construction of the road was that its grade obstructed the drainage of the surface water over certain sections of land, (including plaintiff's,) so as to cause it to stand longer than it would otherwise have done under similar circumstances. —Sabine & E. T. Ry. Co. v. Hadnot, (Tex.) 188.*

2. In an action against a railroad company to recover for injuries to crops caused by the construction of insufficient culverts, whereby the natural drainage of a flood was impeded, *held*, that the company was not liable if the overflow was of such extraordinary character that ordinary prudence would not have provided against it in the construction of the culverts, but that if the flood, though extraordinary, might reasonably have been anticipated, the company was liable.—Id.

SURVEYS AND SURVEYORS.

See, also, *Boundaries; Counties*, 2-4; *Public Lands*, 2, 8.

Courses and distances.

1. The south-east corner of a survey was fixed with reasonable certainty, though not by the objects called for, which had

disappeared, and the north-west corner with absolute certainty, and lines run from these corners, on courses called for, would intersect at a point from which the true bearing of a tree referred to in the patent would be S., 80 W., 96 varas. The patent named the bearing of the tree from the corner as S., 80 E., 96 varas. *Held*, that the point of intersection, found by running lines as described, should be considered as the true corner rather than that ascertained by adopting the bearing from the tree given in the patent, and rejecting the courses from the south-east and north-west corners.—*Davidson v. Killen*, (Tex.) 561.

2. A subsequent locator is not entitled to rely upon a single call in a previous survey of an adjoining grant to determine the boundary line, when such call is in conflict with others.—*Id.*

TAXATION.

See, also, *Municipal Corporations*, 5-9, 12, 18, 17.

Collection by suit, see *Execution*, 9; *Judgment*, 11.

Sale, combination to buy at, see *Contracts*, 1. Tax titles, see, also, *Estoppel*, 1; *Public Lands*, 7.

Uniform taxation, see *Constitutional Law*, 8.

Race discrimination.

1. *White* persons will not be heard to object that an act under which a tax has been levied is unconstitutional because the property of *colored* persons is made subject to the tax, while they are neither allowed to vote upon the question of taxation, nor to participate in the benefits for which the tax is levied.—*Norman v. Boaz*, (Ky.) 816.*

Void election for.

2. The Kentucky act of March 17, 1884, authorized submitting to a popular vote the question of levying a tax to build a school-house in Fulton county, and provided that the clerk who was appointed to record the votes at the municipal election for officers should, at the same time and place, record the votes given upon the proposition to levy the tax, and that he should make out a poll-book with two columns, for the purpose of recording the votes given for and against the tax. The clerk did not prepare such a book, or record the votes in any book. But a third person, a private individual, on his own motion, kept a record of the votes in a book prepared by himself; and, although he was in the same room where the election for municipal officers was being held, neither the judge nor clerk of that election gave any attention to his proceedings. *Held*, that the election was not valid, and no tax

could be levied in pursuance of the vote cast at it.—*Id.*

8. Pending an action by a tax-payer to enjoin the collection of the tax voted at the election, the legislature passed a curative statute declaring the election as lawful as if held in strict compliance with the law. *Held*, that the irregularities were not mere informalities, but affected the substantial and vested rights of the tax-payers. The election was therefore void, and could not be vitalized by the curative act.—*Id.*

Taxable property.

4. A house and lot purchased as a place of residence for the bishops of the Methodist Episcopal Church who may from time to time reside in St. Louis, are exempt from taxation under Rev. St. Mo. § 6659, which provides that all property used for purely charitable purposes shall be exempt.—*Bishop's Residence Co. v. Hudson*, (Mo.) 435.

5. Under Rev. St. Tex. 1879, the real estate of national banks is not subject to taxation.—*Rosenburg v. Weekes*, (Tex.) 899.

6. Under Rev. St. Tex. art. 4683, exempting corporation stock from taxation against the owner when the capital and property of the corporation are required to be taxed, the owner of stock in a state bank is not taxable therewith while the property of the bank is, under the law, taxable, although the bank does not return its property for taxation as it should do.—*Gillespie v. Gaston*, (Tex.) 248.

7. A bill in equity cannot be maintained to enjoin the collection of a tax assessed, in accordance with the provisions of a state statute, upon national bank shares, on the ground that the tax is at a greater rate than upon other moneyed capital, contrary to the act of congress, where it appears that the statute provides that the shares shall be assessed according to their actual value; and in arriving at that value the liabilities of the bank are deducted from its credits, and the shareholders thus given the benefit of the reduction, the value of the shares being decreased to an extent proportionate to the liabilities of the bank; and, if the claim of the plaintiff shareholder in such bill is that his individual debts should be taken from the value of his shares he should show that he owes such debts; otherwise the tax is valid as to him.—*Rosenburg v. Weekes*, (Tex.) 899.

Collection.

8. The Missouri law, as it existed in 1876, provided for the levy and collection of road taxes as the state and county taxes, with the proviso that such tax could be paid in labor on public roads, receipts being given by the road overseer to those who

worked out their tax, and these receipts were turned over to the collector. Any money collected by the collector was receipted for by the overseer in the proper district. *Held*, that these receipts so obtained by the collector exonerated him from all liability on account of the road tax.—*State v. Alsap*, (Mo.) 81.

— Commissions.

9. Under the provisions of the Missouri law, (Acts Mo. 1877, pp. 253, 882, 889,) a collector of county taxes, who is not a defaulter, is entitled to commissions upon his collections, and such commissions may be retained by him, and need not be paid into the county treasury.—*Id*.

Sale for non-payment.

10. To make a chancery sale for taxes valid, the bill must describe the tracts to be sold, and the amount of taxes due on each tract. A statement of the gross amount due on several tracts is irregular.—*Polk v. Mitchell*, (Tenn.) 221.

Tax deed—Validity.

11. The deed of a tax collector conveying land purchased at a tax sale, which fails affirmatively to show that all the proceedings required by law to be taken before a sale could be made, have been taken, is void. The general statement that the proceedings have been taken "*according to law*," or "in manner and form as directed by law," is not sufficient. The facts themselves must be set forth.—*Moore v. Harris*, (Mo.) 489.

12. A tax deed executed under Laws Mo. 1877, p. 386, must be based upon a judgment in an action wherein the owner of the land conveyed, if known, and, if unknown, the party appearing of record to be the owner of such land, was a party to the proceedings; otherwise the deed is invalid.—*Evans v. Robberson*, (Mo.) 941.

13. By the Arkansas statute (Mansf. Dig. § 4246) a deed from the commissioner of state lands of lands forfeited to the state for non-payment of taxes, is made *prima facie* evidence of title in the purchaser to the lands conveyed, and that everything necessary to vest title in the state was done. Hence it is error for the court to find such deed void because of the certificate of the county clerk that he could not find in his office certain records, and that for that reason the assessment and forfeiture of the land was illegal.—*Scott v. Woodruff*, (Ark.) 908.

14. The deed of a tax collector, conveying only the right and interest of the state in land which had never been forfeited to the state by the owner, does not vest the grantee with the legal title.—*Ketchum v. Mullinix*, (Mo.) 447.

Recovery of penalty and costs.

15. Where a decree recites that a tax sale was held to be invalid "for irregularity in the same," it will not be presumed, on appeal from a judgment in favor of the tax purchaser against the proprietor of the land sold, for penalty, costs, etc., that the irregularity was at such a time, or of such a nature, as to invalidate the penalty and costs.—*St. Louis, I. M. & S. Ry. Co. v. Alexander*, (Ark.) 758.

16. The fact that a statute authorizing the recovery of taxes paid, penalty, interest, and costs, by a tax purchaser whose title fails, is repealed or modified by legislation subsequent to the tax sale, will not affect the purchaser's right to recover, which had vested before the repealing act was passed. All the provisions of the statute giving him the right of action entered into and became part of his contract of purchase, and so passed beyond the legislative control.—*Id*.

17. The fact that the proprietor of land sold for delinquent taxes is a railroad company, does not deprive the tax purchaser, on failure of his title, of the right to a "personal judgment," for the taxes, penalty, interest, and costs, against the railroad company as such defaulting proprietor.—*Id*.

18. The cause of action of a purchaser at tax sale whose deed is declared invalid, to foreclose the lien for taxes, penalty, and costs, begins to run from the time of such adjudication, not from the date of the sale, or from the time of the expiration of the period for redemption. The statute (Mansf. Dig. Ark. § 5789) confers no right of action upon the tax purchaser for reimbursement until the sale at which he has purchased shall prove invalid, i. e., until a court of competent jurisdiction shall pronounce the title bad.—*Id*.

Erroneous taxation—Recovery.

19. One who pays an illegal tax under the belief that it is valid, and in response to a demand, and threat of compulsory collection, may recover it back upon discovering his mistake.—*Torbitt v. City of Louisville*, (Ky.) 845.

— Injunction.

20. County judges will not be enjoined from levying a tax to pay the interest on township bonds, when no evidence appears that they ever threatened or intended to make such a levy, or that the plaintiff had reason to believe that they contemplated doing so; more especially since the Missouri act of March 23, 1868, under which the bonds were issued, has been held to be unconstitutional and void, and the Missouri act of 1879 would make them criminally liable for it.—*State v. Hager*, (Mo.) 925.

21. Where an officer assesses an illegal tax against a person, such person is not

freed from taxation upon other property; and, if he is entitled to a reduction upon other taxes by reason of such unlawful assessment, it is his duty to demand the reduction, and pay the tax legally due, before coming into a court of equity to enjoin the collection of an entire tax, part of which it is his duty to pay.—*Rosenburg v. Weekes*, (Tex.) 899.

TENANCY IN COMMON.

Rights inter sese.

1. The rule that where a person who occupies such a relation to another, by the act or consent of that other, or the act of a third person, or of the law, that he becomes interested for him, or with him, in any subject of property or business, he is prohibited from acquiring rights in that subject antagonistic to the person with whose interest he has become associated, and, if he does so, he holds as trustee for the benefit of that person to the extent of the prohibition, applies to tenants in common by descent with the same force and reason as to persons standing in a direct fiduciary relation to others.—*Clement v. Cates*, (Ark.) 778.

2. Where one of several tenants in common by descent purchases an outstanding title, the fact that the common ancestor of all the co-tenants had no title, or a defective title, will not shield him from liability to account to his co-tenants as trustee of the property purchased. The opposite rule would abrogate the doctrine forbidding the purchase by one tenant in common of an outstanding title adverse to his co-tenants.—*Id.*

3. The plaintiff and one L. leased land contiguous to certain tracts owned by them, and inclosed and used it in common. Plaintiff, at the request of L., paid all the rent of the leased lands and the expense of fencing. With the consent of the plaintiff, L. sold his interest to T., who contracted to pay to the plaintiff such sum as was due him from L. on account of the matters aforesaid, and gave his note for an amount which included said sum. T. subsequently conveyed his interest to his wife. *Held*, that plaintiff is entitled to a lien on said leased lands for the money expended in making improvements thereon at the request of his co-tenant, and that such lien binds the land in the hands of Mrs. T. because she had notice of the terms of the contract between her husband and L.—*Torrey v. Martin*, (Tex.) 642.*

TENDER.

Sufficiency.

A bill to redeem land sold for taxes, which avers that complainant is ready and

willing to pay the sums already tendered, "and hereby offers to pay them, and here brings the money into court," and will pay the same as directed, is sufficient, in the absence of demurrer, to support a decree, though the money be not actually brought into court.—*Polk v. Mitchell*, (Tenn.) 221.

THREATS AND THREATENING LETTERS.

Assignment obtained by threats, see *Fraudulent Conveyance*, 1.

Evidence of threats, see *Homicide*, 8-11.

Information.

The offense defined by Tex. Pen. Code, art. 818, is the "knowingly sending or delivering of a threatening letter," etc. *Held*, that an information, under this article, charging that appellant "knowingly did threaten to take the life of A. B., by sending her a threatening letter," etc., is insufficient. It is not knowingly threatening, but knowingly sending or delivering a threatening letter which constitutes the offense.—*Castle v. State*, (Tex.) 892.

TRESPASS.

Cutting timber, see *Schools and School-Districts*, 10.

To try title, see, also, *Limitation of Actions*, 21; *Public Lands*, 1; *Trial*, 12.

Trespasser on track, see *Railroad Companies*, 12, 13.

Ejection of trespasser.

1. One entering another's dwelling-house on an implied license to do so, cannot be ejected forcibly until first requested to leave, although he misbehaves himself.—*State v. Partlow*, (Mo.) 14.

Malicious trespass—Instruction.

2. Where a statute fixes the liability of one who maliciously and wantonly injures the property of another, an instruction in an action under the statute, directing the jury that the only question for their determination is whether defendant "willfully and maliciously" did the injury complained of, is erroneous in using the word "willfully."—*Garrett v. Greenwell*, (Mo.) 441.

Trespass to try title—Practice.

3. In an action of trespass to try title, the failure of the plaintiff to indorse his petition with notice that it is a suit in trespass to try title, under Rev. St. Tex. art. 4787, cannot be raised by a general demurrer, and, when presented before the supreme court for the first time, on appeal, cannot be considered.—*Day Land & Cattle Co. v. State*, (Tex.) 865.

4. Under Rev. St. Tex. art. 4790, an action of trespass to try title may be maintained

against a defendant who never has occupied the premises, if he claims title thereto; and it is not necessary to aver and prove that the owner ever was in actual possession, or that the defendant was in possession as a trespasser, unless some relief is sought based on these facts.—*Id.*

5. In an action of trespass to try title, in Texas, where defendant shows no equity in or title to the land, it is not error to strike out a part of his answer, alleging payment of taxes by him, and asking that he have judgment against plaintiff therefor, as he has no right to be reimbursed for such payment.—*Capt v. Stubbs, (Tex.) 467.*

Evidence.

6. In an action of trespass to try title, where a defendant has disclaimed any interest in the land, and set up that he is only a tenant, his replevin bond may be introduced to show that he replevied the land, and therefore claimed an interest therein.—*Id.*

7. When there is no controversy in an action as to the ownership of a certain survey, No. 56, but the real issue is whether such survey does not conflict with another survey, No. 86, under which the defendants claim, it is not error to exclude from evidence a deed of which the only effect is to show title in plaintiff to said survey No. 56.—*Mynders v. Ralston, (Tex.) 854.*

—Instruction.

8. An instruction asked, that if the owner of a land certificate sold it, before location, to a person under whom plaintiffs claimed, or to any one else, the verdict should be for plaintiffs, *held* properly refused; an instruction having been given as to a sale to the person mentioned, and a sale to any one else not vesting title in the plaintiffs, but only divesting it from the defendants.—*Shifflet v. Morelle, (Tex.) 848.*

9. An instruction asked, that a sale of a land certificate, before location, could be presumed by the jury, if they believed from the evidence that such sale had been made, the court having already charged that a legal sale of such certificate could have been made verbally, *held* properly refused.—*Id.*

TRIAL.

See *Appeal; Continuance; Criminal Practice; Equity; Evidence; Judgment; Jury; New Trial; Nonsuit; Practice in Civil Cases; Witness.*

Findings by court, see *Carriers, 1.*

Verdict, against evidence, see *Appeal 85.*

Admission of evidence.

1. A failure to object to incompetent evidence, when offered, cures the error of its admission. *SHERWOOD and BRACE, JJ., dissenting.—State v. Rose, (Mo.) 783.*

2. In a civil case, error in admitting testimony in behalf of the defendant is cured where an instruction is subsequently given at the plaintiff's request withdrawing in express terms the testimony so admitted from the consideration of the jury.—*Griffiths v. Hanks, (Mo.) 508.*

Arguments of counsel.

3. Where the attorney for one side is allowed to indulge in improper remarks in his argument to the jury, the error cannot be righted by allowing the attorney for the other side a similar latitude in his argument. But *held*, that the verdict should not be set aside in this case on account of improper arguments indulged in by counsel, where it does not appear that the jury were seriously influenced thereby in finding their verdict.—*Gulf. C. & S. F. Ry. Co. v. Witte, (Tex.) 490.*

Instructions.

4. A refusal to give an instruction requested does not prejudice where the whole law applicable to the case has been embodied in instructions already given.—*Smith v. Commonwealth, (Ky.) 798.*

5. It is improper for the court to charge the jury that they are authorized to consider the interest that witnesses have in a controversy in determining their credibility, and the weight to be given to their testimony.—*Willis v. Whitesitt, (Tex.) 253.*

6. While the trial court is not bound to instruct the jury of its own motion, yet, if it does so instruct them, it should not direct them unconditionally to find against a party upon a given hypothesis, when there may be another hypothesis equally supported by the evidence, but withheld from their consideration, upon which they might find in favor of such party.—*Swope v. Schafer, (Ky.) 300.*

7. It is error for the presiding judge to notify the jury that, if they agree by a certain hour, they will be discharged, and that otherwise they will be held until they so agree.—*State v. Hill, (Mo.) 121.*

8. Where certain instructions in the judge's charge to the jury, claimed by appellant to be erroneous, are so qualified by subsequent instructions that the charge, taken as a whole, lays down the true rule of law, objections to it will not be sustained.—*Fort Worth & D. C. Ry. Co. v. Hogsett, (Tex.) 865.*

—Issues.

9. In an action for wrongfully attaching the property of A. upon a claim against B., defendant pleaded that the goods were the property of B.; that no transfer had been made to A., or, if so, that it was fraudulent. A written transfer being shown in evidence, and its execution, and plaintiff's possession under it, not being disputed,

Held, that it was not error for the court to submit to the jury only or mainly the question of fraud.—*Willis v. Whitsett*, (Tex.) 353.

10. Where the issue made by the pleadings in an action against an indorser on a promissory note is whether the note sued on, as described in the petition and offered in evidence, was indorsed by the defendant, an instruction on the rights of the *bona fide* holder of an altered instrument cannot support a motion for a new trial by the defendant, on the ground that it submits to the jury an issue not made by the pleadings, since he requested a converse instruction on the same subject, which was given.—*Iron Mountain Bank v. Armstrong*, (Mo.) 720.

Verdict.

11. It is not error for the jury to return a verdict which is a result of a compromise between the members of the jury.—*Owens v. Missouri Pac. Ry. Co.*, (Tex.) 598.

12. Where, in an action of trespass to try title, the verdict was in favor of certain defendants, "the jury finding no transfers" of a certain land certificate, *held*, that such verdict was not an uncalled-for special verdict, but was a good general finding in favor of the parties, and also of the facts on which the conclusion was based.—*Shifflet v. Morelle*, (Tex.) 848.

13. In an action involving a married woman's separate title to land sold under execution against her husband, the verdict of the jury was as follows: "We, the jury, find from the evidence that the land in controversy was and remained Mrs. T. A. Cady's individual property until conveyed by her to the plaintiff. We find for plaintiff." *Held*, sufficiently definite and certain.—*Yoe v. Montgomery*, (Tex.) 622.

Trover and Conversion.

See *Executors and Administrators*, 6, 7

TRUSTS.

Construction, see *Estoppel*, 8.

Deeds of trust, see *Mortgages*.

Implied, see *Tenancy in Common*, 1, 2.

Resulting, see *Evidence*, 8; *Husband and Wife*, 8.

Rights of beneficiary, see *Will*, 10.

Creation of trusts—*Estoppel*.

1. Although, as a matter of fact, no consideration passed, it does not lie in the mouth of a father who conveyed his property to a friend, and took a conveyance back to himself, in which he joined in trust for the sole use and benefit of his wife and their children, to say that the first deed was without consideration, and therefore left the estate in himself divested of all trust.—*Bobb v. Bobb*, (Mo.) 511.

Implied trusts—*Evidence*.

2. In 1859 A. was sent by his parents to Arkansas, to buy a home for them, and accordingly bought a farm for the price of \$4,000. He paid \$2,000 cash, which had been borrowed on his mother's credit, and subsequently paid the residue of the purchase money out of his own funds, and took the title in his own name. A. lived on the farm with his parents, and worked it for them, and died in 1878. The evidence failed to show that the money which had been borrowed on the mother's credit had ever been repaid, but a reasonable presumption of payment existed, and the whole testimony indicated that it had been paid, if at all, out of the mother's money. *Held*, that the heirs of A. were chargeable with an implied trust in the land, to the extent of the first payment of the purchase money, but not as to the residue.—*Russell v. Marchbanks*, (Ark.) 200.

Appointment and powers of trustees.

3. A testator by his will empowered his executor and trustee to lay off certain lots and streets in land owned by the testator, and to sell and convey a part or the whole on such terms as might be beneficial to the estate, and use the proceeds in improving other property. The executor named in the will refused to qualify, and the chancellor appointed the appellee as trustee to execute the will. *Held*, the chancellor might confer on him all the powers given to the executor.—*Price v. Swager's Trustee*, (Ky.) 84.

Accounts of trustees.

4. A father who creates a trust in his own property in favor of his children and undertakes to administer the trust himself is liable to account at the suit of the beneficiaries when the proper time arrives.—*Bobb v. Bobb*, (Mo.) 511.

5. Where a husband and father establishes a trust in favor of the separate use of his wife and of their children, by conveyance to a friend, and a reconveyance to himself as trustee, he is not entitled to a credit in his account as trustee for the consideration expressed in the reconveyance when, as a matter of fact, both transfers were voluntary, and no consideration passed.—*Id.*

6. A claim by a trustee to a credit on an accounting, made for the first time on appeal, will not be considered.—*Id.*

Interest.

7. Upon a suit for accounting against a trustee, it appeared that he kept no account of the trust funds for a large portion of the time, and that he used the balances, from time to time, for his own profit, by loaning the same at a high rate of interest, and by otherwise employing the same for his in-

dividual benefit, without accounting for the profits so realized. *Held*, that he should be charged, in lieu of the profits, with interest at 6 per cent. on balances in his hands, compounded annually.—*Id.*

Equity—Reformation of trust.

8. Equity will not reform a deed establishing a family trust, so as to let in after-born children, where the testimony, as to the intention of the creator of the trust is conflicting, and about equally balanced, and where the settlor, who was also the trustee, has administered the trust for 24 years according to its express terms, and with no intimation of a mistake.—*Id.*

USURY.

What constitutes.

1. A member of a building and loan association who owned five shares of stock in the association worth \$500, in order to obtain a loan, agreed to take 48 per cent. on that amount, and execute her note for the full amount of \$500, and pay interest thereon at the rate of 6 per cent. per annum, and besides, to pay one dollar per month on each share of stock, and all fines. *Held*, that the rate of interest thus agreed to be paid exceeded 12 per centum, and the contract was a mere device to evade the usury law, and was therefore void.—*Jackson v. Cassidy*, (Tex.) 541.

2. The association retained a lien on the member's stock, with the right to sell it in case she made default in paying principal or interest. Claiming that default had been made, the association sold the stock, but afterwards credited the member on its books with an amount sufficient to reduce the interest to 12 per cent. per annum, the legal rate. *Held*, that the vice in the contract could not be cured in this way.—*Id.*

3. Where, upon the purchase of land, the vendee agrees to pay, as part of the purchase price, a rate of interest on the deferred payments exceeding the legal rate, the contract cannot be considered as usurious.—*Askin v. Lebus*, (Ky.) 805.

Effect on contract.

4. If stock of a member of a building and loan association is sold by the association for default in payment of interest which is due by the terms of a usurious contract, but not legally collectible, the sale will pass no title even to a *bona fide* purchaser.—*Jackson v. Cassidy*, (Tex.) 541.

VENDOR AND VENDEE.

See, also, *Attachment*, 10; *Covenant; Deed; Execution*, 7-14; *Executors and Administrators*, 21-29; *Guardian and Ward*, 3-6;

Judicial Sales; Mortgages, 7-12; *Sale; Schools and School-Districts*, 11-18; *Taxation*, 10-18.

Action on title bond, see *Evidence*, 2.

Vendor's lien, see, also, *Public Lands*, 7.

Construction of contract.

1. Where a sale was made and the deed delivered in October, and the vendor agreed to re-roof and paint the house, and deliver it by the following January, *held*, that this was merely an agreement to repair, and not an undertaking on the part of the vendor to assume the risk of fire; and, the house having been destroyed between October and January, the loss falls on the vendee.—*Marks v. Tichenor*, (Ky.) 225.

2. Upon the sale of land, it becomes the property of the vendee from the execution, delivery, and acceptance of the written contract; and, if a building thereon is destroyed by fire between the time of such contract of sale and the time fixed upon for the delivery of possession, the vendee must bear the loss, unless there is an agreement to deliver possession, with improvements in the same condition as at the time of sale, or unless the loss occurs by the culpable negligence of the vendor.—*Id.**

Vendor's lien.

3. Where husband and wife executed a mortgage upon several tracts of land, all of which were described as belonging to the wife when in fact two of them belonged to the husband, *held*, that the mortgage was valid as to all of the tracts as between the mortgagor and mortgagee, but the misdescription of the ownership of the two tracts rendered the mortgage inoperative as to third parties without notice of the true state of things. So where one holding a vendor's lien on the two tracts owned by the husband brought suit to enforce the lien and sell the land, but did not make the mortgagee a party to the suit, *held*, that the sale nevertheless passed good title.—*Johnson v. Hughart*, (Ky.) 848.

Bona fide purchaser.

4. Declarations and admissions of a trustee in a trust deed, affecting the title to the trust property, made before he became trustee, are not admissible in evidence to charge the beneficiary of the trust with notice of a defect in the title.—*Fargason v. Edrington*, (Ark.) 768.

5. A purchaser of real estate incumbered with a mortgage, but which purports to be released by an attorney in fact, is charged by the record with notice that the power of attorney describes a different tract of land from that released, and is not an innocent purchaser.—*Hagerman v. Sutton*, (Mo.) 73.

6. F. & Co., holders of a deed of trust executed by M., advanced to him \$5,000. He was also indebted to them at the time in the sum of \$7,000. On consideration that he would give them his note for \$16,000 at 10 per cent. interest from date, and his deed of trust to secure the same, they advanced to him about \$4,000 more to pay for the land to be included in the new deed of trust, and canceled and surrendered the original deed of trust. F. & Co. subsequently purchased the land at a sale under the second deed of trust. *Held* that, on these facts, F. & Co. were purchasers for a valuable consideration, without notice, and that the acceptance by them of a quit-claim deed did not charge them with notice of prior equities.—*Fargason v. Edrington*, (Ark.) 768.

7. The grantor described the land by the true distances bounding the tract, but, by mistake, used a boundary line that made the grant convey a strip in excess of the land he intended and agreed to convey. The grantee moved his fence so as to include the extra strip, recorded his deed, and conveyed to C., a *bona fide* purchaser. In a suit for the strip, *held*, that the first grantor could not recover of C., since he could not be presumed to know that the distances would not reach the erroneous boundary line, and since he found his grantor in possession under a deed which, under the rule that boundaries govern distances, embraced the land so possessed.—*Garrison v. Crowell*, (Tex.) 69.

Rescission.

8. Proof of the rescission by parol of a contract for the sale of land should be clear and convincing in order to entitle a court to act on it.—*Davis v. Benedict*, (Ky.) 339.

9. A vendor cannot recover the possession of land from the vendee in possession under a bond for a deed, although there has been some talk about rescinding the contract on account of the vendor's inability to make a good title, if the vendee in his answer tenders the purchase price, and offers to accept a deed.—*Id.*

Action for price.

10. A vendee of land in possession under a general warranty deed sought to avoid the payment of the purchase money on the ground of failure of title, alleging that his vendor was a married man when he acquired the land, and that his wife had died, leaving children, before the sale. *Held* insufficient; that he should have alleged that the premises were community real estate, and stated the amount, character, and present condition of all the community property of the grantor and his wife, in order to show the children's interest.—*May v. Ivie*, (Tex.) 641.

11. A vendee who purchases under a general warranty of title, having knowledge, at the time of his purchase, of a defect in such title, cannot resist the payment of the purchase money on the ground of that defect, even though the vendor have contracted to furnish him a perfect title.—*Id.*

12. Where the vendee once owned the land bought, or a part of it, and was as familiar with the boundary as the vendor, and he has entered into possession, and resold the land at about the same price he paid for it, he cannot, in the absence of fraudulent representations on the part of the vendor, set up as a defense to the action on the purchase notes that he did not get as much land as he thought he was buying, and that a valuable spring which he thought was on the land turned out not to be there.—*Askin v. Lebus*, (Ky.) 305.

13. In an action by the vendor of land against the vendee, upon purchase money notes, the vendee defended on the ground that there was a deficiency in the number of acres conveyed. *Held*, that a judgment for the price of so much of the land as the vendee admits he is in possession of, and reserving the question of deficit to be afterwards determined, is not erroneous.—*Russell v. Greenwade*, (Ky.) 295.

VENUE IN CIVIL CASES.

Transitory action.

1. An action by a vendee of land, to recover from his vendor for a deficit in the contents of the tract sold, is transitory in its nature, and may be brought in any county in which the vendor is served with process.—*Stamper v. Central Kentucky Lumber, Min. & Manuf'g Co.*, (Ky.) 330.

2. Rev. St. Tex. art. 1198, subd. 4, providing that, "when there are two or more defendants residing in different counties, suit may be brought in any county where any one of the defendants resides," means, simply, that if one who is a *proper* or *necessary* party defendant resides in the county in which suit is brought, then other defendants who reside in other counties may be joined with him. Under this provision, a defendant residing in another county is entitled, under plea in abatement, to an instruction presenting the question of the liability of the defendant residing in the county where action is brought.—*Texas & P. Ry. Co. v. Mangum*, (Tex.) 617.

3. Civil Code Ky. § 78 provides that a transitory action may be brought in any county in which the defendant, or one of several defendants, resides or is summoned. An action by a vendee against his vendor was brought, and process served, in the county in which the vendor resided, but the vendor's vendor was also made a party.

He lived in another county, and was served with process there. *Held* that, as the immediate vendor could have sued his own or the remote vendor only in the county in which the latter resided, or in which process was served, he could not, by assignment, confer on his vendee the right to sue the remote vendor in any other county; and the judgment in this case against the remote vendor is therefore void.—*Stamper v. Central Kentucky Lumber, Min. & Manuf'g Co.*, (Ky.) 880.

4. Where the accident in which the plaintiff's husband lost his life occurred in Tennessee, where the road must be operated under its charter from that state, it is no defense to the action for damages that the deceased resided in Kentucky at and prior to his death; that plaintiff resided there, and the greater part of defendant's road lay in that state; that the contract of employment of deceased was made in that state; and that the engine which he was driving when killed was placed in his control there.—*Chesapeake, O. & S. W. R. Co. v. Higgins*, (Tenn.) 47.

VOTERS.

See, also, *Elections*.

Disfranchisement for crime.

Gen. St. Ky. c. 88, art. 12, § 15, which provides that any person convicted of robbery, forgery, counterfeiting, or perjury, or other like crimes, shall forfeit his right of suffrage and right to hold office, embraces in the words "other like crimes" all crimes besides those specifically mentioned which are inconsistent with the common principles of honesty or humanity, and convict the perpetrator of moral turpitude; such as grand larceny.—*Anderson v. Winfree*, (Ky.) 851.

WILL.

See, also, *Executors and Administrators; Trusts*, 8.

Devise in lieu of dower, see *Dower*, 8, 4.

Capacity of testator.

1. The fact that a testator believed in the exercise of unnatural powers by others does not justify an assumption that he was insane, and incompetent to make a will; and an instruction to the jury on the question of mental capacity, which makes that fact more prominent than the other facts relied upon, is erroneous.—*Schildnecht v. Rompf's Ex'x*, (Ky.) 235.

2. A testator devised his estate to his widow, with power to divide it at her death equally between their children, to

the exclusion of a son and daughter, to whom he gave only \$500 each. The daughter contested the will on the grounds of want of mental capacity, undue influence of the widow, and an insane delusion towards testant. The evidence showed that the testator had mental capacity, at the time of executing the will, sufficient to enable him to know his estate, and the objects of his bounty; that he acted in pursuance of a purpose of his own; that all of his children had been obedient, except the two discriminated against; that of these two the son was dissipated, and the contestant had been seduced; that he believed in witchcraft, and thought the contestant a witch, but this idea did not take possession of him until after the execution of the will. *Held*, that there was not sufficient evidence to set the will aside.—*Id.*

Nuncupative wills.

8. Under the Revised Statutes of Texas, in force in September, 1885, a nuncupative will made at that date is incompetent to pass real estate.—*Moffett v. Moffett*, (Tex.) 70.

Revocation.

4. The general rule is that if a will be traced to the hands of the testator, and cannot afterwards be found, it is to be presumed that it was destroyed by him *animo revocandi*.—*Minor v. Guthrie*, (Ky.) 179.

Evidence of.

5. In a will contest, where the destruction of the will last executed has not been proved, nor its absence explained, evidence relative to its character and contents is not primary, but secondary, and inadmissible for the purpose of showing a revocation of a writing previously executed, and set up as the last will.—*Id.*

Devise.

6. A devise to A., subject to a preceding life-estate, "to be held by her and her heirs to her sole and separate use; * * * at her death all the same to go to her bodily heirs, should she leave any, but, if she should leave none, then" to B.: *held*, in any view, not to vest in A. such an estate as to render a mortgage given by her in her lifetime valid as against her children after her death.—*Myar v. Snow*, (Ark.) 881.

7. A testator devised his land to his widow for life, remainder to his daughter for her support, and at her death to his heirs. The income from the land proving insufficient for the support of the widow, her trustee incurred debts for her support. The daughter being dead, suit was brought against the heirs to subject the land to the payment of these debts. *Held*, that the land could not be subjected to sale for the widow's debts.—*Hickman's Adm'r v. Hickman's Heirs*, (Ky.) 186.

Construction.

8. After certain specific legacies to and provisions for testator's widow and son, the residue of the estate was devised to the widow until her remarriage or the son's majority, when she was to take a specific part of the estate, and he the rest in fee. Subject to the widow's interest as above, the whole estate was given to the son; "but, should he die without lawful children or grandchildren living at the time of his death," the whole should go to the widow. *Held*, that, whether the estate of the son were absolute or defeasible, his children could claim no interest therein under their grandfather's will, and a joint deed from testator's widow and son conveyed an absolute title in property included in the will.—*Parriah v. Parriah's Trustees*, (Ky.) 819.

9. A testator directed that his widow should manage the estate until their youngest child should reach 21 years of age; that then they should divide the property, if they desired, the widow to take a child's share; that, if the widow should marry again, her share should be allotted to her, for her life, at her death to revert to the children, to be held together and managed as aforesaid, some one being appointed for the purpose by the proper court. *Held*, that any one of the devisees had a right to demand a division upon the youngest child arriving at 21; that, upon the remarriage of the widow, and the allotment to her of her share for life, the balance of the estate was to be kept together as before, her share after her death to be held as part of the whole estate, if no division has been made previously; and that the widow's remarriage would not supersede her power as trustee.—*Curd v. Curd*, (Ky.) 226.

10. A testator, who had been twice married, left his property to his widow, his children by her, and a daughter by his first wife, directing the property not to be divided until the youngest child should arrive at the age of 21 years, and meanwhile the widow to live on the farm, and manage the property for the benefit of all, and to "raise, provide for, and school" the children. *Held*, that the step-daughter, who did not live at home because she did not get along well with her step-mother, was entitled, notwithstanding that fact, to her share of the income of the property, making a deduction, however, in estimating the income, for any increase thereof caused by the labor of the other devisees.—*Id.*

11. A testator devised certain realty to a trustee to collect rents, keep up repairs, pay taxes, retain \$50 a month for services, and pay the remainder of said rents to devisor's four children, equal portions to each. The will provided that "at the death of either of my said children, the child or

children of such one dying shall receive the part or portion of said rents and profits that their father or mother was entitled to under this will." If any child died without child or children, his share was to be paid to the survivors in equal portions, and the children of such as might have died leaving issue. *Held*, that devisor's grandchildren received the remainder in fee, since a devise of the rents and profits or the income of land is equivalent to a devise of the land itself, and since no limitation was attached to the devise to the grandchildren, and the word "heirs" was not necessary to a fee.—*Davis v. Williams*, (Tenn.) 8.

WITNESS.

See, also, *Appeal*, 25-27; *Criminal Practice*, 18, 15-33; *Evidence*; *Trial*, 1, 2.

Right to process for, see *Criminal Practice*, 5-8.

Competency.

1. In an action upon a promissory note the executrix of the alleged maker of the note is not incompetent to testify against the plaintiff, as the other party to the execution of the note, as to the making of the affidavit of the plea of *non est factum*.—*Smith v. Caswell*, (Tex.) 848.

Examination.

2. Questions improperly asked a defendant on cross-examination, the answers to which could have in no way affected the verdict, are no ground for a new trial.—*State v. Beauchleigh*, (Mo.) 666.

3. Where a defendant allows a witness to testify without being sworn, he waives any objection to his evidence on that account, and cannot obtain a new trial because of its admission.—*Trammel v. Mount*, (Tex.) 377.

4. At the trial of an action upon a promissory note, where an expert has been called by the defendant to testify to the genuineness of the signature to the note, it is not error for the court to refuse to allow the plaintiff to ask the witness questions going to his credibility, and not to his competency as an expert, before the latter has answered the questions propounded by the defendant; the witness upon cross-examination being interrogated and answering fully as to the matters concerning which inquiry was made by the plaintiff.—*Smith v. Caswell*, (Tex.) 848.

Credibility.

5. An instruction on the doctrine of *falsus in uno*, etc., is in Missouri sufficient if it charge that the witness had willfully sworn falsely, the words "willfully" and "knowingly" being prescribed in the alternative in such cases.—*State v. Beauchleigh*, (Mo.) 666.

WRITS.

See, also, *Attachment; Execution; Garnishment; Habeas Corpus; Injunction; Replevin.*

Return.

Where a sheriff has sold real property under execution, and by mistake has returned that he sold only the interest therein

of one of the judgment defendants, L., who owned but a fraction thereof, in an action for partition of lands involving the title to this land, the parties claiming under the execution sale cannot contradict the return. Their remedy is to procure a reformation by the court of the return in the proceeding in which the return was made. —*Flanniken v. Neal*, (Tex.) 212.

